

FREEDOM OF INFORMATION ACT  
SOURCE BOOK: LEGISLATIVE MATERIALS,  
CASES, ARTICLES

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SUBCOMMITTEE ON  
ADMINISTRATIVE PRACTICE AND PROCEDURE  
OF THE  
COMMITTEE ON THE JUDICIARY,  
UNITED STATES SENATE.



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## LETTER OF TRANSMITTAL

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UNITED STATES SENATE,  
COMMITTEE ON THE JUDICIARY,  
Washington, D.C.

HON. JAMES O. EASTLAND,  
*Chairman, Senate Committee on the Judiciary,*  
*Washington, D.C.*

DEAR MR. CHAIRMAN: Last week the Freedom of Information Act celebrated its sixth year of operation. During that period of time the act has brought about numerous changes in policies, as well as in practices and procedures, of agencies with regard to the disclosure of information to the public. While these changes have been beneficial, the expectation of Congress that the doors of government would be opened to the public has not been fully realized. Thus around two hundred lawsuits have been instituted against the government to require disclosure of information, and this Subcommittee is faced with the task of fashioning legislation to clarify and strengthen the law.

The important role of the Freedom of Information Act in maintaining our system of government for and of the people, and the recent increase in interest in the problems raised by government secrecy have given rise to the presently heavy demand for background and materials on the history and operation of the act. The Subcommittee on Administrative Practice and Procedure has prepared, in response to this demand, the appended documents and materials which provide a basic source book for those members of Congress and the public wishing to learn about and to use the Freedom of Information Act. I request that the attached be printed as a committee print.

Sincerely,

EDWARD M. KENNEDY,  
*Chairman.*

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## INTRODUCTION

On July 4, 1966, the Freedom of Information Act was signed into law. The act, which became effective on July 4, 1967, was designed to reverse earlier law under which government agencies considered themselves free to withhold information from the public under whatever subjective standard could be articulated for the occasion. Most importantly, the Freedom of Information Act (FOIA)<sup>1</sup> set a standard of openness for government from which only deviations in well-defined areas would be allowed. The FOIA then went on to define those areas in a series of nine "exemptions." Finally, it provided a remedy for the wrongful withholding of information: the person requesting information from the government could take his case to court.

President Lyndon B. Johnson, in his bill-signing statement, articulated the spirit which the Freedom of Information Act was intended to instill in all areas of government:

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 the 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.

But, as recognized by Congress and the Executive, and as spelled out by Attorney General Ramsey Clark in a memorandum explaining the Act,<sup>2</sup> the 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."

Because the execution of this law by "those who direct and administer our agencies of government" has been substantially less than "faithful," testimony at recent hearings of the Subcommittee on Administrative Practice and Procedure on Freedom of Information<sup>3</sup> has suggested "that the act has become a 'freedom from information' law, and that the curtains of secrecy still remain tightly drawn around the business of our government." Judicial decisions and recent House subcommittee hearings and report substantiate this conclusion.<sup>4</sup>

In his 1953 book entitled "The People's Right to Know," Harold L. Cross, writing for the Committee on Freedom of Information of the

<sup>1</sup> 5 U.S.C. § 552 (printed below in full at p. 11).

<sup>2</sup> Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, U.S. Dept. Justice, June 1967 (printed below at page 194).

<sup>3</sup> *Executive Privilege, Government Secrecy and Freedom of Information*. Hearings before the Subcommittees on Administrative Practice and Procedure and Separation of Powers of the Committee on the Judiciary and the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, vol. I (April 10, 11, 12, May 8, 9, 10 and 16, 1973), vol. II (June 7, 8, 11 and 26, 1973), and vol. III (Appendices).

<sup>4</sup> *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act*, Hearings before the Subcommittee on Foreign Operations and Government Information, Committee on Government Operations, House of Representatives, 92d Cong., 2d Sess. (parts 4-6): *Administration of the Freedom of Information Act*, H. Rept. No. 92-1419, Committee on Government Operations, 92d Cong., 2d Sess., Sept. 20, 1972; see summaries of court decisions below in part II.

American Society of Newspaper Editors, observed "the dismayingly bewildering fact" that "in the absence of a general or specific act of Congress creating a clear right to inspect . . . there is no enforceable legal right in public or press to inspect any federal non-judicial record." The FOIA not only created this "clear right" in the public and press, but also made it enforceable. Thus the Act provided that whenever a person believed his request for information was wrongfully denied, he could take his case to the federal courts. The law specifically provides:

On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production on 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. . . .

In May 1968 this Subcommittee published a "Ten Months Review" of the Freedom of Information Act,<sup>5</sup> in which it observed that a pattern of court decisions under this act had not yet emerged although, of the eleven cases decided, "four have held in favor of disclosure and seven against." Now, some six years after the effective date of the FOIA, over two hundred suits have been filed under the act. Summary briefs of the substantive decisions handed down under this Act are contained in this volume in part II.

A House Subcommittee, analyzing the decisions under the FOIA, observed that the courts have generally been reluctant to order the disclosure of government information falling within the first exemption of the act, information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and within the seventh, "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." On the other side, courts have generally ruled against government withholding of information alleged to fall within the fourth and fifth exemptions relating to trade secrets and internal communications.<sup>6</sup> Nonetheless, in his general observations concerning the cases decided under the FOIA, Attorney General Elliot Richardson, appearing before the Senate Subcommittee on Administrative Practice and Procedure, observed that "the courts have resolved almost all legal doubts in favor of disclosure."<sup>7</sup>

It should be emphasized that the exemptions in the FOIA were not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they merely mark the outer limits of information that *may* be withheld where the agency makes an affirmative determination that the public interest and the specific circumstances presented dictate that the information *should* be withheld. Agencies have been slow to adopt this attitude, but enlightened judicial decisions reflect this approach to interpreting the force of the FOIA exemptions.

Most significantly, the courts appear to adopt and reinforce at each opportunity the congressional intent underlying passage of the Freedom of Information Act. For example, one Court of Appeals, after

<sup>5</sup> *The Freedom of Information Act (Ten Months Review)*, Comm. Print Submitted by the Subcommittee on Administrative Practice and Procedure to the Committee on the Judiciary of the U.S. Senate, 90th Cong., 2d Sess., May 1968.

<sup>6</sup> H. Rept. No. 92-1419, *supra* note 4 at 71.

<sup>7</sup> Hearings, *supra* note 3 at vol. II, p. 215.

ordering disclosure of documents requested by the plaintiff but withheld by the government in a recent case, observed:

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.<sup>8</sup>

Bills have been introduced in the 93rd Congress, in both the House and the Senate,<sup>9</sup> to strengthen and clarify the Freedom of Information Act. Even with such legislation, it is clear that the public will have to approach government agencies armed with a thorough knowledge of the Act and the interpretations thereunder, and will on occasion continue to have to resort to the courts for enforcement of congressional disclosure mandates. This Source Book is designed to provide the public with the arsenal necessary to obtain maximum disclosure from the departments and agencies of government. Part I contains legislative history materials: the text of the act, references to each stage of the legislative proceedings leading to enactment, the full text of the House and Senate reports, and a brief discussion of the legislative history. Part II contains comprehensive indices and cross-references to cases construing the act and summary briefs of the substantive decisions under the FOIA through February 1974. Part III contains a selected bibliography of articles discussing the Freedom of Information Act, the Attorney General's memorandum on the act, and reprints of three comprehensive discussions of the act. Part IV contains the FOIA Regulations of the Department of Justice, which were promulgated as models for agency regulations generally. The subcommittee intends to update this Sourcebook periodically; comments, suggestions, and references useful to this objective are invited.

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<sup>8</sup> *Soucie v. David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1971).

<sup>9</sup> H.R. 5425; H.R. 4960; S. 1142; H.R. 12471; S. 2543. On February 21, 1974, the House Committee on Government Operations reported favorably H.R. 12471 to the House of Representatives. On February 26, 1974, the Senate Subcommittee on Administrative Practice and Procedure reported favorably S. 2543 to the full Judiciary Committee.

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## DISCUSSION OF THE LEGISLATIVE HISTORY OF THE FREEDOM OF INFORMATION ACT

Recognition of the people's right to know what their government is doing by access to government information can be traced back to the early days of our nation. For example, in a letter written by James Madison in 1822 the following often-cited expression can be found:

A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance; And the people who mean to be their own Governors, must arm themselves with the power, which knowledge gives.<sup>1</sup>

A case has even been made that at the time our Constitution was written the people's "right to know" was such a fundamental right that it was taken for granted and not explicitly included therein, and that some express terms in the Constitution nevertheless can be pointed to as demonstrating an intent to keep secrecy in government at a minimum and implying a recognition of the people's right to information about their Government.<sup>2</sup>

The first Congressional attempt to formulate a general statutory plan to aid in free access occurred in 1946 with the enactment of section three of the Administrative Procedure Act.<sup>3</sup>

The Congressional intent seems apparent from the report of the House Judiciary Committee:

The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness assurance.<sup>4</sup>

The section was to become effective on September 11, 1946. On July 15, 1946, the Department of Justice distributed to all agencies a twelve-page memorandum interpreting this section. In 1947, this memorandum, together with similar memorandums interpreting other sections of the act, were issued in an Attorney General's Manual and declared in that aim of this section was "to assist the public in dealing with administrative agencies to make their administrative materials available in precise and current form."<sup>5</sup> Significantly, it noted that Congress had left up to each agency the decision on what information about the agency's actions was to be classified as "official records."<sup>6</sup>

Soon after the 1946 enactment, it became apparent that, in spite of the clear intent of the Congress to promote disclosure, some of its provisions were vague and that it contained disabling loopholes which

<sup>1</sup> Letter from James Madison to W. T. Barry, Aug. 4, 1822, in *The Complete Madison* (Padover ed. 1953) at 337.

<sup>2</sup> Hennings, Jr. *Constitutional Law: The People's Right to Know*, 45 A.B.A.J. 667 (1959).  
<sup>3</sup> June 11, 1946 ch. 324, Section 3, 60 Stat. 238, reprinted below at page 114.

<sup>4</sup> H. Rep. No. 752, 79th Cong. 1st Sess. 198 (1945). See also, S. Rep. No. 752, 79th Cong. 1st Sess. 12 (1945) and H.R. Rep. No. 1980, 79th Cong., 2d Sess. 17-18 (1946).

<sup>5</sup> Attorney General's Manual on the Administrative Procedure Act (1947) at 17.

<sup>6</sup> *Id.*, at 24.

made the statute, in effect, a basis for withholding information. Critics pointed to the broad standards of the section, such as, "[a]ny function . . . requiring secrecy in the public interest," "any matter relating solely to the internal management of an agency" "required for good cause to be held confidential," "matters of official record," "persons properly and directly concerned" and "except information held confidential for good cause found" as leaving the departments and agencies in a position to withhold information for any purpose.<sup>7</sup> One commentator has attributed the failure of the 1946 enactment to two reasons:

First, the former section three failed to provide a judicial remedy for wrongfully withholding information, thus allowing capricious administrative decisions forbidding disclosure to go unchecked. Second, and more importantly, section three of the APA imposed several major restrictions on free disclosure. Acting under "color of law," an administrator was empowered to withhold information "requiring secrecy in the public interest;" when the person seeking disclosure was not "properly and directly concerned," or where the information was "held confidential for good cause found;" and "when the information sought was related to the internal management" of a government agency or department. These four restrictive and nebulously drafted clauses provided agencies and departments with pervasive means of withholding information."<sup>8</sup>

The Administrative Procedure Act had been in operation less than ten years when a Hoover Commission task force recommended minor changes in the public information section. Two bills were introduced in the 84th Congress to carry out the minimal task force recommendations,<sup>9</sup> but the bills died without even a hearing. In the 85th Congress, the first major revision of the public information provisions was introduced,<sup>10</sup> based on a detailed study by Jacob Scher, Northwestern University expert on press law, who was serving as special counsel to the House Government Information Subcommittee. No action was taken on these bills, but in 1958 a statute was passed amending the Federal "housekeeping" statute, which provides that the head of each department may prescribe regulations not inconsistent with law for governing his department, so as to provide that the statute does not authorize withholding information or records from the public.<sup>11</sup> In the 86th and 87th Congresses, a number of versions of these bills were introduced,<sup>12</sup> and although interest was aroused and some hearings held, none appear to have received serious considerations in either house.

<sup>7</sup> Caron, Jr., *Federal Procurement and the Freedom of Information Act*, 20 Fed. B.J. 271 (1968). Also, see S. Rep. No. 1219, 88th Cong., 2d Sess. 10 (1964).

<sup>8</sup> Comment, *The Freedom of Information Act: A Critical Review*, 38 Geo. Wash. L. Rev. 150, 151-152 (1969).

<sup>9</sup> S. 2504, 84th Cong., 1st Sess. (1955) introduced by Senator Wiley, and S. 2541, 84th Cong., 1st Sess. (1955) introduced by Senator McCarthy.

<sup>10</sup> H.R. 7174, 85th Cong., 1st Sess. (1957) introduced by Representative Moss; S. 2148, 85th Cong., 1st Sess. (1957) introduced by Senator Hennings; and S. 4094, 85th Cong., 2d Sess. (1958) introduced by Senators Ervin and Butler.

<sup>11</sup> P.L. 85-619, 72 Stat. 547 (1958), now found at 5 U.S.C. section 301 (1970).

<sup>12</sup> For example, S. 186, 86th Cong., 1st Sess. (1959) introduced by Senator Hennings (this bill was the same as S. 4094, 85th Cong.), S. 1070, 86th Cong., 1st Sess. (1959) introduced by Senators Ervin and Butler; S. 2780, 86th Cong., 2d Sess. (1960) introduced by Senator Hennings (a revision of S. 186); S. 1887, 87th Cong., 1st Sess. (1961) introduced by Senator Ervin; S. 1567, 87th Cong., 1st Sess. (1961) introduced by Senators Hart, Long, and Proxmire; S. 1907, 87th Cong., 1st Sess. (1961) introduced by Senator Proxmire; S. 3410, 87th Cong., 2d Sess. (1962), introduced by Senators Dirksen and Carroll; and H.R. 9926, 87th Cong., 2d Sess. (1962) introduced by Representative Walter.

In the 88th Congress, the movement to amend section 3 can be said to have begun in earnest. On June 4, 1963, two bills were introduced in the Senate. The first of these was S. 1663<sup>13</sup> which, if it had passed, would have replaced the entire Administrative Procedure Act. The second bill S. 1666<sup>14</sup> was identical to section 3 of S. 1663, and aimed at amending only section 3 of the Act. The reason for introducing both bills was to focus attention on the need to make the revision and to expedite action in that regard.<sup>15</sup> Senate hearings were held on S. 1666 and section 3 of S. 1663 in October, 1963.<sup>16</sup> To remedy the weakness of existing law, the Senate Report stated the purpose of S. 1666 as: ". . . to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld."<sup>17</sup> Following the 1963 hearings, several revisions were made in S. 1666, and after additional hearings were conducted in July of 1964,<sup>18</sup> the bill underwent further modifications.<sup>19</sup> This revised version of S. 1666 was passed by the Senate on July 28, 1964,<sup>20</sup> but no action was taken by the House thereon before adjournment. In the 89th Congress, on February 17, 1965, a further modified form of S. 1666 was introduced in the Senate as S. 1160<sup>21</sup> and in the House of Representatives as H.R. 5012.<sup>22</sup> The House held hearings on March 30, 31, April 1, 2, and 5, 1965<sup>23</sup> and the Senate on May 12, 13, 14, and 15, 1965.<sup>24</sup> The Senate passed S. 1160, as amended, on October 13, 1965.<sup>25</sup> The House of Representatives then passed this bill on June 20, 1966.<sup>26</sup>

The House Report on S. 1160<sup>27</sup> stated what the House considered the purposes and intentions of the bill, but appears at places to be

<sup>13</sup> S. 1663, 88th Cong., 1st Sess. (1963) introduced by Senators Dirksen and Long.

<sup>14</sup> S. 1666, 88th Cong., 1st Sess. (1963) introduced by Senator Long and co-sponsored by Senators Bartlett, Bayh, Boggs, Case, Dirksen, Ervin, Fong, Gruening, Hart, Keating, Kefauver, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, Symington, and Walther.

<sup>15</sup> 109 Cong. Rec. 9958 (1963) (remarks of Senator Long).

<sup>16</sup> *Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963).

<sup>17</sup> S. Rep. No. 1219, 88th Cong., 2d Sess. (1964); 110 Cong. Rec. 17089 (1964) (remarks of Senator Mansfield).

<sup>18</sup> *Hearings on the Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (1964).

<sup>19</sup> *Note, Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame L. 417, 419 (1965).

<sup>20</sup> 110 Cong. Rec. 17089 (1964).

<sup>21</sup> S. 1160, 89th Cong., 1st Sess. (1965) introduced by Senators Long, Anderson, Bartlett, Bayh, Boggs, Burdick, Case, Dirksen, Ervin, Fong, Hart, Metcalf, Morse, Moss, Nelson, Neuberger, Proxmire, Ribicoff, Smathers, Symington, Tydings, and Yarborough.

<sup>22</sup> H.R. 5012, 89th Cong., 1st Sess. (1965) introduced by Representative Moss. The following identical bills were also introduced in the House on the same day or early in the session: H.R. 5013, introduced by Representative Fascell; H.R. 5014 by Representative Macdonald; H.R. 5015 by Representative Griffin; H.R. 5016 by Representative Reid; H.R. 5017 by Representative Rumsfeld; H.R. 5018 by Representative Edmondson; H.R. 5019 by Representative Ashley; H.R. 5020 by Representative McCarthy; H.R. 5021 by Representative Reid; H.R. 5237 by Representative Gibbons; H.R. 5406 by Representative Leggett; H.R. 5520 by Representative Scheuer; H.R. 5583 by Representative Patten; H.R. 6172 by Representative Mosher; H.R. 6739 by Representative Edwards; H.R. 7010 by Representative Widnall; and H.R. 7161 by Representative Erlenborn.

<sup>23</sup> *Hearings on Federal Public Records Law Before a Subcommittee of the House Committee on Government Operations*, 89th Cong., 1st Sess. parts 1 and 2 (1965).

<sup>24</sup> *Hearings on Administrative Procedure Act Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. (1965). See S. Rep. No. 813, 89th Cong., 1st Sess. (1965).

<sup>25</sup> 111 Cong. Rec. 26821 (1965).

<sup>26</sup> 112 Cong. Rec. 13661 (1966).

<sup>27</sup> H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), reprinted below at page 22.

inconsistent not only with the Senate Report but also with the explicit language of the statute. Professor Kenneth Culp Davis, a leading commentator on the Freedom of Information Act, observed that "In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of non-disclosure."<sup>28</sup> Professor Davis continues:

A fundamental question about legislative history, affecting almost all the use of legislative history of this Act, is whether the House report, written after the Senate had passed the bill and therefore not taken into account by the Senate, can be given the same weight as the Senate report, known to both the Senate and the House. The question takes on added importance because of the sharp differences between the two reports and because of the constant reliance by the Attorney General's Memorandum on the House report. Two courts so far have passed upon this question, both taking the same view. One said that the House report "represents the thinking of only one house, and to the extent that the two reports disagree, the surer indication of congressional intent is to be found in the Senate report, which was available for consideration in both houses."<sup>29</sup> The other said that it "accepts the Senate reading of the statute since its report was before both houses of the Congress."<sup>30</sup> P.L. 90-23, 81 Stat. 54, was enacted on June 5, 1967 in order to incorporate into title 5 of the United States Code, without substantive change, the provisions of P.L. 89-487.<sup>31</sup> Technical changes in language were made to conform therewith.

In June, 1967, the Attorney General issued a detailed and comprehensive memorandum for the executive departments and agencies to assist them in fulfilling their obligation under the new Act and to correlate the text thereof with its relevant legislative history.<sup>32</sup>

It has been observed that the Attorney General's Memorandum relies primarily on language of the more restrictive House report. One court observed:

The Attorney General's conclusions do not have the weight of a contemporaneous administrative interpretation since he is not charged with administering the Act. He recognized, moreover that definitive resolution of some ambiguities—perhaps those presented here—would have to await court rulings. The analysis of exemption (2) by the Attorney General fails to discuss the Senate Report. (Footnotes omitted.)<sup>33</sup>

Thus while the Attorney General's Memorandum is instructive on many points of interpretation of the Act, it should properly be considered *not* part of the legislative history but only an excellent secondary source.

<sup>28</sup> Davis, K. C., *Administrative Law Treatise* (Supplement) § 3A.2.

<sup>29</sup> *Benson v. General Services Administration*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), affirmed on other grounds, 415 F. 2d 878 (9th Cir. 1969).

<sup>30</sup> *Consumers Union of United States v. Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969).

<sup>31</sup> S. Rep. No. 248, 90th Cong., 1st Sess. (1967). The complete text of 5 U.S.C. section 552 (1970) is reproduced below at page 11.

<sup>32</sup> Attorney General, United States Department of Justice, *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June 1967), reprinted below at page 194.

<sup>33</sup> *Consumers Union of United States v. Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969); see *Benson v. General Services Administration*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), aff'd on other grounds, 415 F. 2d 878 (9th Cir. 1969); *Soucie v. David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). See also *Getman v. NLRB*, 450 F. 2d 670 (D.C. Cir. 1971).

## SUMMARY OF LEGISLATIVE HISTORY

- I. Freedom of Information Act, 5 U.S.C. 552 (P.L. 90-23, 90th Congress, H.R. 5357, June, 1967).\*
- II. Committee Reports on H.R. 5357 (90th Congress):
  - A. H. Rept. No. 125, 90th Cong., 1st Sess., Committee on the Judiciary, March 14, 1967.\*
  - B. S. Rept. No. 248, 90th Cong., 1st Sess., Committee on the Judiciary, May 17, 1967.
- III. Congressional Record References on H.R. 5357 (90th Congress):
  - A. Considered and passed House, April 3, 1967, 113 Cong. Rec. 8109.\*
  - B. Considered and passed Senate, amended, May 19, 1967, 113 Cong. Rec. 13253.
  - C. House agreed to Senate amendments, May 25, 1967, 113 Cong. Rec. 14056.
- IV. Freedom of Information Act (before codification), 80 Stat. 250 (P.L. 89-487, 89th Congress, S. 1160, July 4, 1966).
- V. Committee reports on S. 1160 (89th Congress):
  - A. S. Rept. No. 813, 89th Cong., 1st Sess., Committee on the Judiciary, October 4, 1965.\*
  - B. H. Rept. No. 1497, 89th Cong., 2nd Sess., Committee on Government Operations, May 9, 1966.\*
- VI. Congressional Record References on S. 1160 (89th Congress):
  - A. Considered and passed Senate, October 13, 1965, 111 Cong. Rec. 26820.
  - B. Considered and passed House, June 20, 1966, 112 Cong. Rec. 13007.\*
- VII. Senate Passage—88th Congress:
  - A. S. Rept. No. 1219, 88th Cong., and 2nd Session (S. 1666).\*
  - B. Considered and passed Senate, July 28, 1964, 110 Cong. Rec. 17086.\*
  - C. On motion to reconsider, July 31, 1964, 110 Cong. Rec. 17666.\*
- VIII. Hearings:
  - A. Senate Committee on the Judiciary, Hearings on S. 1160, May 12, 13, 14, and 21, 1965.
  - B. Senate Committee on the Judiciary, Hearings on S. 1663, July 21, 22 and 23, 1964.
  - C. House Committee on Government Operations, Hearings on H.R. 5012, March 30 and 31, April 1, 2 and 5, 1965 (and Appendix).
- IX. Prior law:
  - A. Revised Statutes, sec. 161.\*
  - B. Public Law 85-619, amending Revised Statutes sec. 161.\*
  - C. Administrative Procedure Act sec. 3, P.L. 404, ch. 324, 79th Cong., 2d Sess.\*

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\*Texts set out in full hereafter.

## TEXT OF THE FREEDOM OF INFORMATION ACT

(Section 552 of Title 5, United States Code, as amended by Public Law 90-23)

§ 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 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 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) 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. 6, 1966, 30 Stat. 383 ; Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54.)

H. Rept. No. 125, 90th Cong., 1st Sess. (March 14, 1967)\*

CODIFICATION OF PUBLIC LAW 89-487

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MARCH 14, 1967.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. WILLIS, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany H.R. 5357]

The Committee on the Judiciary, to whom was referred the bill (H.R. 5357) to amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of this bill is to incorporate into title 5 of the United States Code, without substantive change, the provisions of Public Law 89-487, which was enacted subsequent to the passage of title 5 by the House of Representatives.

Title 5, enacted by Public Law 89-554, contained the Administrative Procedure Act as amended through June 30, 1965. The amendment to that act by Public Law 89-487 becomes effective July 4, 1967, but was not drafted as an amendment to title 5.

SECTION ANALYSIS

SECTION 1

Section 1 amends section 552 of title 5, United States Code, to reflect Public Law 89-487.

The words "Every agency shall make available to the public the following information" are omitted as redundant as to subsections (a)-(d) in view of the provisions contained therein, and as inapplicable to subsections (e) and (f).

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\*The Senate Report (No. 248, May 17, 1967) is almost identical to this House Report.

In subsections (a)(1) and (c), the word "employees" is substituted for "officers" to conform with the definition of "employee" in 5 U.S.C. 2105.

In the last sentence of subsection (b), the words "A final order \* \* \* may be relied on \* \* \* only if" are substituted for "No final order \* \* \* may be relied upon \* \* \* unless"; and the words "a party other than an agency" and "the party" are substituted for "a private party" and "the private party", respectively, on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (d), the words "shall maintain and make available for public inspection a record" are substituted for "shall keep a record \* \* \* and that record shall be available for public inspection".

In subsection (e)(5) and (7), the words "a party other than an agency" are substituted for "a private party" on authority of the definition of "private party" in 5 App. U.S.C. 1002(g).

In subsection (f), the words "This section does not authorize" and "This section is not authority" are substituted for "Nothing in this section authorizes" and "nor shall this section be authority", respectively.

5 App. U.S.C. 1002(g), defining "private party" to mean a party other than a agency, is omitted since the words, "party other than an agency" are substituted for the words "private party" wherever they appear in revised 5 U.S.C. 552.

5 App. U.S.C. 1002(h), prescribing the effective date, is omitted as unnecessary. That effective date is prescribed by section 4 of this bill.

#### SECTION 2

Section 2 amends the analysis of chapter 5 of title 5, United States Code, to reflect the change in the catchline for section 552 of title 5.

#### SECTION 3

Section 3 repeals the act of July 4, 1966, Public Law 89-487 (80 Stat. 250)

#### SECTION 4

Section 4 prescribes the effective date of the bill as July 4, 1967, or the date of enactment of the bill, whichever is later. This conforms with the effective date of Public Law 89-487 which is repealed by this bill.

## COMPLIANCE WITH RAMSEYER RULE

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law are shown below:

### EXISTING LAW

(Sec. 3 of Administrative Procedure Act, as amended by Public Law 89-487)

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 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) 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

### NEW TEXT

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

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

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

(1) descriptions of its central and field organization and the established places at which, the employees from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(2) 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;

(3) 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;

EXISTING LAW

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 state-

NEW TEXT

(4) 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

(5) 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 subsection, 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.

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

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

ments 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.

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

(3) 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

EXISTING LAW

(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

NEW TEXT

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 subsection 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—

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

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

(c) Except with respect to the records made available under subsections (a) and (b) of this section, 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 the responsible employees for

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 geophysi-

contempt. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this subsection, 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) 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.

(e) 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;

EXISTING LAW

cal 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.

NEW TEXT

(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.

(f) 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.

H.R. 5357 Considered and Passed House April 3, 1967, 113 Cong. Rec. 8109

CODIFICATION OF PUBLIC LAW 89-487

The Clerk called the bill (H.R. 5357) to amend section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487.

The SPEAKER. Is there objection to the present consideration of the bill?

Mr. HALL. Mr. Speaker, reserving the right to object, it is my understanding, although it is not so stated in the report, that these changes were recommended by the Department of Justice. Will the gentleman from the Committee on the Judiciary confirm this?

Mr. KASTENMEIER. Mr. Speaker, will the gentleman from Missouri yield?

Mr. HALL. I yield to the gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Speaker, These are not actual changes, but this procedure, incorporating this entire title 5, was recommended by the Department of Justice.

Mr. HALL. Mr. Speaker, I would like to inquire further as to whether this would in any way aid or abet what has come about as a result of the Reorganization Act of 1949, which makes it possible to print in the Federal Register a reorganization of one of the executive branches, with the full effect and weight of law if not objected to by resolution on the part of one of the two Houses of Congress within a requisite number of days—Is there anything within these changes of the provisions of Public Law 89-487 which would make this power of the “veto in reverse”—as I have referred to in the provision—more applicable?

In other words, what I am getting at is, will it further relegate any of the powers of the Congress to the executive branch of the Government?

Mr. KASTENMEIER. Mr. Speaker, will the gentleman from Missouri yield?

Mr. HALL. I yield to the gentleman from Wisconsin.

Mr. KASTENMEIER. Mr. Speaker, I assure the gentleman this does not have that effect. This does not change in any respect the powers of Congress or the executive branch.

Mr. HALL. We do have the gentleman's full assurance that on this bill there is no substantive change, and that it is really a technical and conforming amendment which has nothing to do with the “veto in reverse”?

Mr. KASTENMEIER. Mr. Speaker, if the gentleman from Missouri will yield further, the bill simply incorporates into title 5, without any substantive change, an amendment of the Administrative Procedures Act. This bill incorporates into title 5 of the United States Code, without substantive change, the provisions of Public Law 89-487. That law was not amended by title 5, which was enacted by Public Law 89-554, but which codified the Administrative Procedures Act.

For this reason we have so recommended.

Mr. HALL. I appreciate the gentleman's explanation.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. HALL. I yield to the gentleman from Iowa.

Mr. GROSS. This would confer no greater power upon the 10th Judicial Conference or upon any other judicial conference in the country; is that correct?

Mr. KASTENMEIER. If the gentleman will yield further, I assure the gentleman it will not.

Mr. HALL. Mr. Speaker, I withdraw my reservation.

The SPEAKER. Is there objection to the present consideration of the bill? There being no objection, the Clerk read the bill, as follows:

[text omitted]

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

H. Rept. No. 1497, 89th Cong., 2d Sess.

89TH CONGRESS <i>2d Session</i>	}	HOUSE OF REPRESENTATIVES	{	REPORT No. 1497
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## CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION

MAY 9, 1966.—Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

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

### REPORT

[To accompany S. 1160]

The Committee on Government Operations, to whom was referred the bill (S. 1160) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

#### I. PURPOSE

Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) requires every executive agency to publish or make available to the public its methods of operation, public procedures, rules, policies, and precedents, and to make available other "matters of official record" to any person who is properly and directly concerned therewith. These requirements are subject to several broad exceptions discussed below. The present section 3 is not a general public records law in that it does not afford to the public at large access to official records generally.

S. 1160 would revise the section to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions. It makes the following major changes:

1. It eliminates the "properly and directly concerned" test of who shall have access to public records, stating that the great majority of records shall be available to "any person." So that there would be no undue burden on the operations of Government agencies, reason-

able access regulations may be established and fees for record searches charged as is required by present law.<sup>1</sup>

2. It sets up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "in the public interest," and "internal management" with specific definitions of information which may be withheld. Some of the specific categories cover information necessary to protect the national security; others cover material such as the Federal Bureau of Investigation files which are not now protected by law.<sup>2</sup>

3. It gives an aggrieved citizen a remedy by permitting an appeal to a U.S. district court. The court review procedure would be expected to persuade against the initial improper withholding and would not add substantially to crowded court dockets.<sup>3</sup>

## II. BACKGROUND

The broad outlines for legislative action to guarantee public access to Government information were laid out by Dr. Harold L. Cross in 1953. In that year he published, for the American Society of Newspaper Editors, the first comprehensive study of growing restrictions on the people's right to know the facts of government. Newspapermen, legislators, and other Government officials were concerned about the mushrooming growth of Government secrecy, but as James S. Pope, who was chairman of the Freedom of Information Committee of ASNE, explained in the foreword of the Cross book, "The People's Right To Know":

\* \* \* we had only the foggiest idea of whence sprang the blossoming Washington legend that agency and department heads enjoyed a sort of personal ownership of news about their units. We knew it was all wrong, but we didn't know how to start the battle for reformation.

Basic to the work of Dr. Cross was the—

conviction that inherent in the right to speak and the right to print was the right to know. The right to speak and the right to print, without the right to know, are pretty empty

\* \* \*

Dr. Cross outlined three areas where, through legislative inaction, the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know: the "housekeeping" statute which gives Government officials general authority to operate their agencies, the "executive privilege" concept which affects legislative access to executive branch information, and section 3 of the Administrative Procedure Act which affects public access to the rules and regulations of Government action.

In 1958 Congress corrected abuse of the Government's 180-year-old "housekeeping" statute by enacting a bill introduced in the House by Congressman John E. Moss and in the Senate by Senator Thomas E. Hennings. The Moss-Hennings bill stated that provisions of the

<sup>1</sup> Hearings, pp. 61 and 67; see also 5 U.S.C. 140.

<sup>2</sup> Hearings, pp. 13, 20, 27, and 39.

<sup>3</sup> Hearings, pp. 107 and 109.

<sup>4</sup> Hearings, Foreign Operations and Government Information Subcommittee, on a proposed Federal public records law, Mar. 30, 31, Apr. 1, 2, and 5, 1965, p. 26, cited hereafter as "hearings."

"housekeeping" statute (5 U.S.C. 22) which permitted department heads to regulate the storage and use of Government records did not permit them to withhold those records from the public.

The concept that Government officials far down the administrative line from the President could use a claim of "executive privilege" to withhold information from the Congress was narrowed in 1962 when President Kennedy informed Congress that he, and he alone, would invoke it. This limitation on the use of the "executive privilege" claim to withhold information from Congress was affirmed by President Johnson in a letter to Congressman Moss on April 2, 1965.<sup>5</sup>

While there have been substantial improvements in two of the areas of excessive Government secrecy, nothing has been done to correct abuses in the third area. In fact, section 3 of the Administrative Procedure Act has become the major statutory excuse for withholding Government records from public view.

#### THE "PUBLIC INFORMATION" SECTION OF THE ADMINISTRATIVE PROCEDURE ACT

The Administrative Procedure Act, which was adopted in 1946 to bring some order out of the growing chaos of Government regulation, set uniform standards for the thousands of Government administrative actions affecting the public; it restated the law of judicial review permitting the public to appeal to the courts about wrongful administrative actions; it provided for public participation in an agency's rulemaking activities. But most important it required "agencies to keep the public currently informed of their organization, procedures, and rules."<sup>6</sup> The intent of the public information section of the Administrative Procedure Act (sec. 3) was set forth clearly by the Judiciary Committee, in reporting the measure to the Senate. The report declares that the public information provisions—

are in many ways among the most important, far-reaching, and useful provisions \* \* \*. The section has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness and assurance.<sup>7</sup>

The act was signed in June 1946, and on July 15, 1946, the Department of Justice distributed to all agencies a 12-page memorandum interpreting section 3, which was to become effective on September 11, 1946. The memorandum, which together with similar memorandums interpreting the other sections of the act was later made available in the Attorney General's Manual, noted that Congress had left up to each agency the decision on what information about the agency's actions was to be classed as "official records."<sup>8</sup>

The Administrative Procedure Act had been in operation less than 10 years when a Hoover Commission task force recommended minor changes in the public information section. S. 2504 (Wiley) and S. 2541 (McCarthy) were introduced in the 84th Congress to carry out the minimal task force recommendations, but the bills died without even a hearing. In the 85th Congress, the first major revision of the public

<sup>5</sup> Hearings, p. 123.

<sup>6</sup> Attorney General's Manual on the Administrative Procedure Act, prepared by the Department of Justice, 1947, p. 9; cited hereafter as "Attorney General's Manual."

<sup>7</sup> H. Rept. 752, 79th Cong., 1st sess., p. 198.

<sup>8</sup> Attorney General's Manual, p. 24.

information provisions was introduced simultaneously in the House by Congressman Moss (H. R. 7174) and in the Senate by Senator Hennings (S. 2148). The legislation was based on a detailed study by Jacob Scher, Northwestern University expert on press law, who was serving as special counsel to the House Government Information Subcommittee. There was no action in either the House or Senate on the Moss and Hennings bills, and modified versions were introduced year after year with no final action. In the 88th Congress the Senate passed S. 1666 too late in the session for House action. In the 89th Congress the Senate passed S. 1160 sponsored by 22 Members of the Senate, and the Foreign Operations and Government Information Subcommittee held extensive hearings on similar legislation—H. R. 5012 and 23 comparable House bills.

### III. THE NEED FOR LEGISLATION

Section 3 of the Administrative Procedure Act (5 U.S.C. 1002), though titled "Public Information" and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information. Such a 180° turn was easy to accomplish given the broad language of 5 U.S.C. 1002. The law, in its entirety, states:

#### PUBLIC INFORMATION

**SEC. 3.** Except to the extent that there is involved (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—

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—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.

(c) **PUBLIC RECORDS.**—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.

In a sense, "public information" is a misnomer for 5 U.S.C. 1002, since the section permits withholding of Federal agency records if secrecy is required "in the public interest" or if the records relate "solely to the internal management of an agency." Government information also may be held confidential "for good cause found." Even if no good cause can be found for secrecy, the records will be made available only to "persons properly and directly concerned." Neither in the Administrative Procedure Act nor its legislative history are these broad phrases defined, nor is there a recognition of the basic right of any person—not just those special classes "properly and directly concerned"—to gain access to the records of official Government actions. Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records. The present statute, therefore, is not in any realistic sense a public information statute.

#### ABUSE OF THE "PUBLIC INFORMATION" SECTION

Improper denials occur again and again. For more than 10 years, through the administrations of both political parties, case after case of improper withholding based upon 5 U.S.C. 1002 has been documented. The Administrative Procedure Act provides no adequate remedy to members of the public to force disclosures in such cases.

Earlier this year the Foreign Operations and Government Information Subcommittee uncovered a serious violation of subsection (a) of 5 U.S.C. 1002 which requires every Government agency to publish its rules and a description of its organization and method of operation. In spite of repeated demands, this clear legal requirement has been ignored by the Board of Review on Loss of Nationality in the Department of State, which has authority over questions of citizenship.

In 1962 the National Science Foundation decided it would not be "in the public interest" to disclose cost estimates submitted by unsuccessful contractors in connection with a multimillion-dollar deep sea study. It appeared that the firm which had won the lucrative contract had not submitted the lowest bid. It took White House intervention to reverse the agency's decision that it had authority for this secrecy "in the public interest."<sup>9</sup>

Matters which relate solely to "internal management" and thus can be withheld under the provisions of 5 U.S.C. 1002 range from the important to the insignificant. They range from a proposed spending program, still being worked out in the agency for future presentation to the Congress, to a routine telephone book. In 1961, for example, the Secretary of the Navy ruled that "telephone directories fall in the category of information relating to the internal management of the Navy," and he cited 5 U.S.C. 1002 as his authority for this ruling.<sup>10</sup> On the other hand, in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for

<sup>9</sup> H. Rept. 918, 88th Cong., pp. 88-90.

<sup>10</sup> H. Rept. 1257, 87th Cong., pp. 77-82.

nondisclosure, and S. 1160 is designed to permit nondisclosure in such cases.

The statutory requirement that information about routine administrative actions need be given only to "persons properly and directly concerned" has been relied upon almost daily to withhold Government information from the public. A most striking example is the almost automatic refusal to disclose the names and salaries of Federal employees. Shortly after World War II the western office of a Federal regulatory agency refused to make available the names and salaries of its administrative and supervisory employees. In 1959 the Postmaster General ruled that the public was not "properly and directly concerned" in knowing the names and salaries of postal employees. This ruling has been reiterated by every Postmaster General in every administration since and was only overturned recently by a Civil Service Commission ruling that "the names, position titles, grades, salaries, and duty stations of Federal employees are public information."<sup>11</sup>

If none of the other restrictive phrases of 5 U.S.C. 1002 applies to the official Government record which an agency wishes to keep confidential, it can be hidden behind the "good cause found" shield. Historically, Government agencies whose mistakes cannot bear public scrutiny have found "good cause" for secrecy. A recurring example is the refusal by regulatory boards and commissions which are composed of more than one member to make public their votes on issues or to publicize the views of dissenting members. According to the latest subcommittee survey, six regulatory agencies do not publicize dissenting views. And the Board of Engineers for Rivers and Harbors, which rules on billions of dollars' worth of Federal construction projects, used the "good cause found" authority to close its meetings to the press and to refuse to divulge the votes of its members on controversial issues.<sup>12</sup>

Thus, even though 5 U.S.C. 1002 is titled a "public information" section, the requirements for publicity are so hedged with restrictions that it has been cited as the basic statutory authority for 24 separate terms—in addition to "Top Secret," "Secret," and "Confidential" used by Executive order only on national defense matters—which Federal agencies have devised to stamp on administrative information they want to keep from public view. The 24 restrictive phrases range from the often-used "Official Use Only" through the simple "Non-public" and more complicated "Individual Company Data" to the long and confusing "Limitation on Availability of Equipment Files for Public Reference."

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. 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. This bill strikes a balance considering all these interests.

<sup>11</sup> H. Rept. 2084, 86th Cong., pp. 128-133; H. Rept. 818, 87th Cong., pp. 106-108; Congressional Record, Mar. 21, 1966, pp. A1598-1599.

<sup>12</sup> H. Rept. 2578, 85th Cong., pp. 42-53; H. Rept. 1137, 86th Cong., pp. 71-74.

## IV. DETAILED DESCRIPTION

*Subsection (a).*—A number of the minor changes which subsection (a) of S. 1160 would make in the present law clarify the fact that the Federal Register is a publication in which the public can find the details of the administrative operations of Federal agencies. They would be able to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests. These administrative details are required to be published in the Federal Register by the present law, but it is unclear exactly what type of material must be published.

Subsection (a) also includes a provision to help reduce the bulk of the Federal Register by making it unnecessary to publish material "which is reasonably available" if that material has been incorporated in the Federal Register by reference. Presumably, the reference would indicate where and how the material may be obtained. Permission to incorporate material in the Federal Register by reference would have to be granted by the Director of the Federal Register, instead of permitting each agency head to decide what should be published.

An added incentive for agencies to publish the necessary details about their official activities in the Federal Register is the provision that no person shall be "adversely affected" by material required to be published—or incorporated by reference—in the Federal Register but not so published. This tightens the present law which states that no person shall be required to resort to "organization and procedure" not published in the Federal Register.

*Subsection (b).*—The present subsection (b) permits an agency's orders and opinions to be withheld from the public if the material is "required for good cause found to be held confidential." Subsection (b) of S. 1160 deletes this general, undefined authority for secrecy. Instead, the bill lists in a later subsection the specific categories of information which may be exempted from disclosure.

In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

As the Federal Government has extended its activities to solve the Nation's expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160. However, under S. 1160 an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases. Furthermore, an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in

the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases.

Subsection (b) solves the conflict between the requirement for public access to records of agency actions and the need to protect individual privacy. It permits an agency to delete personal identifications from its public records "to prevent a clearly unwarranted invasion of personal privacy." The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public. Subsection (b) of S. 1160 would prevent the privacy deletion from being used as a general excuse for secrecy by requiring that the justification for each deletion be explained in writing.

Subsection (b) would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance which would be made available or published under the law. The indexing requirement will prevent a citizen from losing a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way to discover it. However, considerations of time and expense caused this indexing requirement to be made prospective in application only.

Many agencies—including the Interstate Commerce Commission which is the oldest Federal regulatory agency—already have adequate indexing programs in operation. As an incentive to establish an effective indexing system, subsection (b) of S. 1160 includes a provision that no agency action may be relied upon, used, or cited as a precedent against a private party unless it is indexed or unless the private party has adequate notice of the terms of the agency order.

Subsection (b) requires that Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference. Presumably the copying process would be without expense to the Government since the law (5 U.S.C. 140) already directs Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents.

Subsection (b) also requires concurring and dissenting opinions to be made available for public inspection. The present law, requiring most final opinions and orders to be made public, implies that dissents and concurrences need not be disclosed. As a the result of a Government Information Subcommittee investigation a number of years ago, two major regulatory agencies agreed to make public the dissenting opinions of their members, but a recent survey indicated that five agencies—including the Federal Deposit Insurance Corporation and the Renegotiation Board—do not make public the minority views of their members.

*Subsection (c).*—In place of the negative approach of the present law (5 U.S.C. 1002) which permits only persons properly and directly concerned to have access to official records if the records are not held confidential for good cause found, subsection (c) of S. 1160 establishes the basic principle of a public records law by making the records available to any person.

The persons requesting records must provide a reasonable description enabling Government employees to locate the requested material, but the identification requirement must not be used as a method for withholding. Reasonable access rules can be adopted stating the time and place records shall be available—presumably during regular working hours in the location where the records are stored or used—and stating the records search or copying fees which may be charged pursuant to 5 U.S.C. 140.

Subsection (c) contains a specific remedy for any improper withholding of agency records by granting the U.S. district courts jurisdiction to order the production of agency records improperly withheld. If a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency. An aggrieved person is given the right to file an action in the district where he resides or has his principal place of business, or where the agency records are situated.

The proceedings are to be *de novo* so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.

The court is authorized to expedite actions under subsection (c) "in every way," and the court review procedure would be expected to serve as an influence against the initial wrongful withholding instead of adding substantially to crowded court dockets.

*Subsection (d).*—The subsection requires that a record be kept of all final votes of multiheaded agencies in any regulatory or adjudicative proceeding and such record shall be open to public inspection. Practices of the many agencies vary in this regard. The subsection would require public access to the records of official votes unless the information is withheld pursuant to the exemptions spelled out in the following subsection.

*Subsection (e).*—All of the preceding subsections of S. 1160—requirements for publication of procedural matters and for disclosure of operating procedures, provisions for court review, and for public access to votes—are subject to the exemptions from disclosure specified in subsection (e). They are:

1. Matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy: The language both limits the present vague phrase, "in the public interest," and gives the area of necessary secrecy a more precise definition. The permission to withhold Government records "in the public interest" is undefinable. In fact, the Department of Justice left it up to each agency to determine what would be withheld under the blanket term "public interest."<sup>13</sup> No Government employee at any level believes that the "public interest" would be served by disclosure of his failures or wrongdoings, but citizens both in and out of Government can agree to restrictions on categories of information which the

<sup>13</sup> Attorney General's Manual, p. 13.

President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501.

2. Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.<sup>14</sup>

3. Matters which are specifically exempted from disclosure by other statutes: There are nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160.

4. Trade secrets and commercial or financial information obtained from any person and privileged or confidential: This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies.<sup>15</sup> It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

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: Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

<sup>14</sup> Hearings, pp. 29 and 30.

<sup>15</sup> Hearings, pp. 45 and 46.

6. Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy: Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority.<sup>16</sup> A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a "clearly unwarranted invasion of personal privacy" provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or the compilation of unidentified statistical information from personal records.

7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings.

8. Matters 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: This exemption is designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm.

9. Geological and geophysical information and data (including maps) concerning wells: This category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the "trade secrets" provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure "would be prejudicial to the interests of the Government" (43 CFR, pt. 2). Witnesses contended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration.

*Subsection (f).*—The purpose of this subsection is to make clear beyond doubt that all the materials of Government are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information. Members of the Congress

<sup>16</sup> Hearings, pp. 15, 20, 27, and 39.

have all of the rights of access guaranteed to "any person" by S. 1160, and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions.<sup>17</sup>

*Subsection (g).*—This subsection defines "private party" as any party other than an agency. The term is not defined elsewhere in the Administrative Procedure Act to be amended by S. 1160.

*Subsection (h).*—A delay of 1 year in the effective date of the Federal public records law is designed to give agencies ample time to conform their practices to the new law.

## V. CONCLUSION

A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. And repeated it is, in textbooks and classrooms, in newspapers and broadcasts.

The repetition is necessary because the ideals of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in Government. In the time it takes for one generation to grow up and prepare to join the councils of Government—from 1946 to 1966—the law which was designed to provide public information about Government activities has become the Government's major shield of secrecy.

S. 1160 will correct this situation. It provides the necessary machinery to assure the availability of Government information necessary to an informed electorate.

## VI. 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 italic, existing law in which no change is proposed is shown in roman):

### SECTION 3 OF THE ADMINISTRATIVE PROCEDURE ACT

(60 STAT. 238)

#### PUBLIC INFORMATION

SEC. 3. [Except to the extent that there is involved (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—] *Every agency shall make available to the public the following information:*

(a) [RULES] *PUBLICATION IN THE FEDERAL REGISTER.*—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public [(1)] (A) descriptions of its central and field organization [including delegations by the Agency of final authority] and the established places at which, *the officers from whom, and the methods whereby, the public may secure information*

<sup>17</sup> Hearings, p. 23.

**[or]**, make submittals or requests, or obtain decisions; **[(2)]** (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal **[or]** and informal procedures available **[as well as forms and instructions as to the scope and contents of all papers, reports, or examinations]**; (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; **[and (3)]** (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 **[for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law]**; and (E) every amendment, revision, or repeal of the foregoing. **[No]** 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 **[organization or procedure]**, 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 **[publish or]**, in accordance with published **[rule]** rules, make available **[to]** for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all **[or]** orders made in the adjudication of cases **[(except those required for good cause to be held confidential and not cited as precedents) and all rules]**, (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) **[PUBLIC RECORDS.**—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.] **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.

## Calendar No. 798

89TH CONGRESS }  
1st Session }

SENATE

REPORT  
No. 813CLARIFYING AND PROTECTING THE RIGHT OF THE  
PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES

OCTOBER 4 (legislative day, OCTOBER 1), 1965.—Ordered to be printed

Mr. LONG of Missouri, from the Committee on the  
Judiciary, submitted the following

## REPORT

[To accompany S. 1160]

The Committee on the Judiciary, to which was referred the bill (S. 1160) to clarify and protect the right of the public to information, and for other purposes, having considered the same, reports favorably thereon, with amendments and recommends that the bill as amended do pass.

## AMENDMENTS

Amendment No. 1: On page 3, line 8, before "staff manuals" insert "administrative."

Amendment No. 2: On page 4, line 4, strike "Every" and insert in lieu thereof "Except with respect to the records made available pursuant to subsections (a) and (b), every."

Amendment No. 3: On page 4, line 4, after the comma insert "upon request for identifiable records made."

Amendment No. 4: On page 4, line 5, before "and" insert "fees to the extent authorized by statute."

Amendment No. 5: On page 4, line 6, strike "all its" and insert in lieu thereof "such."

Amendment No. 6: On page 4, lines 11 and 12, strike "and information"; and on line 13, strike "or information."

Amendment No. 7: On page 5, line 10, strike "the public" and insert in lieu thereof "any person."

Amendment No. 8: On page 5, lines 11 and 12, strike "dealing solely with matters of law or policy" and insert in lieu thereof "which would not be available by law to a private party in litigation with the agency."

Amendment No. 9: On page 5, line 17, strike the word "and"; and on page 5, line 20, strike the period and insert in lieu thereof "; and (9) geological and geophysical information and data (including maps) concerning wells."

#### PURPOSE OF AMENDMENTS

Amendment No. 1: The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.

Amendment No. 2: This is a technical amendment to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records.

Amendment No. 3: The purpose of this amendment is to require that requests of inspection of agency records identify the particular records requested. It is contemplated by the committee that the standards of identification applicable to the discovery of records in court proceedings would be appropriate guidelines with respect to the identification of agency records, especially as the courts would have jurisdiction to determine any allegations of improper withholding.

Amendment No. 4: It is contemplated that, where authorized by statute, an agency will require reasonable fees to be paid in appropriate cases.

Amendment No. 5: This is a technical amendment to require that the only records which must be made available are those for which a request has been made.

Amendment No. 6: This is a technical amendment to delete the term "information" which is included within the term "agency records" to the extent that it is in the form of a record.

Amendment No. 7: It was pointed out in statements to the committee that agencies may obtain information of a highly personal and individual nature. To better convey this idea the substitute language is provided.

Amendment No. 8: The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.

Amendment No. 9: The purpose of clause (9) is to protect from disclosure certain information which is highly valuable to several important industries and which should be kept confidential when it is contained in Government records.

#### PURPOSE OF BILL

In introducing S. 1666, the predecessor of the present bill, Senator Long quoted the words of Madison, who was chairman of the committee which drafted the first amendment to the Constitution:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves

with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that "popular information" of which Madison spoke. But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information. Many witnesses have testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," or "required for good cause to be held confidential."

It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

At the same time that a broad philosophy of "freedom" of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. 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.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

#### HISTORY OF LEGISLATION

After it became apparent that section 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.

The first of these proposals, S. 2504, 84th Congress, introduced by Senator Wiley and S. 2541, 84th Congress, by Senator McCarthy, arose out of recommendations by the Hoover Commission Task

Force. These were quickly followed in the 85th Congress by the Henning's bill, S. 2148, and by S. 4094, introduced by Senators Ervin and Butler, which was incorporated as a part of the proposed Code of Federal Administrative Procedure.

S. 4094 was reintroduced by Senator Hennings in the 86th Congress as S. 186. This was followed in the second session by a slightly revised version of the same bill, numbered S. 2780. Senators Ervin and Butler reintroduced S. 4094 which was designated S. 1070, 86th Congress.

More recently, Senator Carroll introduced S. 1567, cosponsored by Senators Hart, Long, and Proxmire. Also introduced in the 87th Congress were the Ervin bill, S. 1887, its companion bill in the House, H.R. 9926, S. 1907 by Senator Proxmire, and S. 3410 introduced by Senators Dirksen and Carroll.

Although hearings were held on the Hennings bills, and considerable interest was aroused by all of the bills, no legislation resulted.

In the last Congress, the Senate passed S. 1666, upon which this bill is based, on July 31, 1964, but sufficient time did not remain in that Congress for its full consideration by the House. The present bill is substantially S. 1666, as passed by the Senate, with amendments reflecting suggestions made to the committee in the course of the hearings.

#### INADEQUACY OF PRESENT LAW

The present section 3 of the Administrative Procedure Act, which would be replaced by S. 1160, is so brief that it can be profitably placed at this point in the report:

#### PUBLIC INFORMATION

*Section 3:* Except to the extent that there is involved (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—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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. No person shall in any manner be required to resort to organization or procedure not so published.

(b) *Opinions and orders.*—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.

(c) *Public records.*—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 serious deficiencies in this present statute are obvious. They fall into four categories:

(1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest \* \* \*." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to withhold information.

(2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it vitiates this command by adding the following limitation: "\* \* \* except those required for good cause to be held confidential \* \* \*."

(3) As to public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.

**PRESENT SECTION 3 OF ADMINISTRATIVE PROCEDURE ACT IS  
WITHHOLDING STATUTE, NOT DISCLOSURE STATUTE**

It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose.

Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the "public interest," or (2) "for good cause found," or (3) that the person making the request was not "properly and directly concerned." And, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available.

**WHAT S. 1160 WOULD DO**

S. 1160 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(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.

#### DETAILED DESCRIPTION OF BILL

##### *Description of subsection (a)*

Subsection (a) deals entirely with publication of material in the Federal Register. This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of too much publication rather than too little.

The principal change in subsection (a) has been to deal with the exceptions to its provisions in a single subsection, subsection (e).

There are a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.

There is also a provision, suggested by a number of agencies, for incorporation of other publications by reference in the Federal Register. This may be helpful in reducing the bulky present size of the Register.

The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added to expressly provide that a person shall not be adversely affected by matters required to be published and not so published. This gives added incentive to the agencies to publish the required material.

The following technical changes were also made with regard to subsection 3(a):

The phrase " \* \* \* but not rules addressed to and served upon named persons in accordance with law \* \* \*" was stricken because section 3(a) as amended only requires the publication of rules of general applicability.

"Rules of procedure" was added to remove an uncertainty. "Description of forms available" was added to eliminate the need of publishing lengthy forms.

The new clause (E) is an obvious change, added for the sake of completeness and clarity.

##### *Description of subsection (b)*

Subsection (b) of S. 1160 (as subsec. (b) of sec. 3 of the Administrative Procedure Act) deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available. The exceptions have again been moved to a single subsection, subsection (e), dealing with exceptions.

Apart from the exemptions, agencies must make available for public inspection and copying all final opinions (including concurring and dissenting opinions); all orders made in the adjudication of cases; and those statements of policy and interpretations which have been adopted by the agency and are not required to be published in the

Federal Register; and administrative staff manuals and instructions to staff that affect any member of the public.

There is a provision for the deletion of certain details in opinions, statements of policy, interpretations, staff manuals and instructions to prevent "a clearly unwarranted invasion of personal privacy." The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.

Written justification for deletion of identifying details is to be placed as preamble to " \* \* \* the opinion, statement of policy, interpretation or staff manual or instruction \* \* \*" that is made available.

Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it. However, considerations of time and expense cause this indexing requirement to be made prospective in application only.

Many agencies already have indexing programs, e.g., the Interstate Commerce Commission. Such indexes satisfy the requirements of this bill insofar as they achieve the purpose of the indexing requirement. No other special or new indexing will be necessary for such agencies.

Subsection (b) contains its own sanction that orders, opinions, etc., which are not properly indexed and made available to the public may not be relied upon or cited as precedent by an agency.

There are also a number of technical changes in section 3(b):

The phrase " \* \* \* and copying \* \* \*" was added because it is frequently of little use to be able to inspect orders or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

The addition of " \* \* \* concurring and dissenting opinions \* \* \*" is added to insure that, if one or more agency members dissent or concur, the public and the parties should have access to these views and ideas.

The enumeration of orders, etc., defines what materials are subject to section 3(b)'s requirements. The "unless" clause was added to provide the agencies with an alternative means of making these materials available through publication.

#### *Description of subsection (c)*

Subsection (c) deals with "agency records" and would have almost the reverse result of present subsection (c) which deals with "public records." Whereas the present subsection 3(c) of the Administrative Procedure Act has been construed to authorize wide-spread withholding of agency records, subsection 3(c) of S. 1160 requires their disclosure.

The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records. This requirement of identification is not to be used as a method of withholding records.

Subsection (c) contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel. The aggrieved person can bring an action in the district court where he resides, has his place of business, or in which the agency records are situated. The court may require the agency to pay costs and reasonable attorney's fees of the complainant as in other cases.

That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.

The court is authorized to give actions under this subsection precedence on the docket over other causes. Complaints of wrongful withholding shall be heard "at the earliest practicable date and expedited in every way."

#### *Description of subsection (d)*

This subsection provides that a record be kept of all final votes by agency members in every agency proceeding and that this record of votes be available to the public.

Agency practice in this area varies. This change makes the publication of final votes of agency members a uniform practice and provides the public with a very important part of the agency's decisional process.

#### *Description of subsection (e)*

Subsection (e) deals with the categories of matters which are exempt from disclosure under the bill. Exemption No. 1 is for matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. The change of standard from "in the public interest" is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase "public interest" in section 3(a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended—the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with Federal agencies.

Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

Exemption No. 3 deals with matters specifically exempt from disclosure by another statute.

Exemption No. 4 is for "trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

Exemption No. 6 contains an exemption for "personnel and medical files, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

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.

Exemption No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by on behalf of, or for the use of such agencies.

*Description of subsection (f)*

The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e). Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.

*Description of subsection (g)*

This subsection provides a definition of the term "private party" which is not presently defined in the act being amended by this bill.

*Description of subsection (h)*

The 1-year period before this act goes into effect is to allow ample time for the agencies to conform their practices to the requirements of this act.

#### CONCLUSION

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.

A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended.

#### CHANGES IN EXISTING LAW

Inasmuch as S. 1160 is new law, the provisions of subsection (4) of rule XXIX of the Standing Rules of the Senate are not applicable.

Considered and Passed House, June 20, 1966, 112 Cong. Rec. 13007\*

CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION

Mr. MOSS. Mr. Speaker, I move to suspend the rules and pass the bill (S. 1160) 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.

The Clerk read as follows:

The SPEAKER. Is a second demanded?

Mr. REID of New York. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

Mr. MOSS. I yield myself such time as I may consume.

Mr. Speaker, our system of government is based on the participation of the governed, and as our population grows in numbers it is essential that it also grow in knowledge and understanding. We must remove every barrier to information about—and understanding of—Government activities consistent with our security if the American public is to be adequately equipped to fulfill the ever more demanding role of responsible citizenship.

S. 1160 is a bill which will accomplish that objective by shoring up the public right of access to the facts of government and, inherently, providing easier access to the officials clothed with governmental responsibility. S. 1160 will grant any person the right of access to official records of the Federal Government, and, most important, by far the most important, is the fact this bill provides for judicial review of the refusal of access and the withholding of information. It is this device which expands the rights of the citizens and which protects them against arbitrary or capricious denials.

Mr. Speaker, let me reassure those few who may have doubts as to the wisdom of this legislation that the committee has, with the utmost sense of responsibility, attempted to achieve a balance between a public need to know and a necessary restraint upon access to information in specific instances. The bill lists nine categories of Federal documents which may be withheld to protect the national security or permit effective operation of the Government but the burden of proof to justify withholding is put upon the Federal agencies.

That is a reasonable burden for the Government to bear. It is my hope that this fact, in itself, will be a moderating influence on those officials who, on occasion, have an almost proprietary attitude toward their own niche in Government.

Mr. Speaker, I must confess to disquiet at efforts which have been made to point the Government information problems which we hope to correct here today in the gaudy colors of partisan politics. Let me now enter a firm and unequivocal denial that that is the case. Government information problems are political problems—bipartisan or nonpartisan, public problems, political problems but not partisan problems.

In assuming the chairmanship of the Special Government Information Subcommittee 11 years ago, I strongly emphasized the fact that the problems of concern to us did not start with the Eisenhower administration then in power nor would they end with that administration. At a convention of the American Society of Newspaper Editors some 10 years ago, I said:

"The problem I have dealt with is one which has been with us since the very first administration. It is not partisan, it is political only in the sense that any activity of government is, of necessity, political . . . No one party started the trend to secrecy in the Federal Government. This is a problem which will go with you and the American people as long as we have a representative government."

Let me emphasize today that the Government information problems did not start with President Lyndon Johnson. I hope, with his cooperation following

\*The bill (S. 1160) passed the Senate by voice vote without objection or debate on Oct. 13, 1965. (111 Cong. Rec. 26820).

our action here today, that they will be diminished. I am not so naive as to believe they will cease to exist.

I have read stories that President Johnson is opposed to this legislation. I have not been so informed, and I would be doing a great disservice to the President and his able assistants if I failed to acknowledge the excellent cooperation I have received from several of his associates in the White House.

I am pleased to report the fact of that cooperation to the House today. It is especially important when we recognize how very sensitive to the institution of the Presidency some of these information questions are. Despite this, I can say to you that no chairman could have received greater cooperation.

We do have pressing and important Government information problems, and I believe their solution is vital to the future of democracy in the United States. The individual instances of governmental withholding of information are not dramatic. Again, going back to statements made early in my chairmanship of the Special Subcommittee on Government Information, I repeatedly cautioned those who looked for dramatic instances that the problems were really the day-to-day barriers, the day-to-day excesses in restriction, the arrogance on occasion of an official who has a proprietary attitude toward Government. In fact, at the subcommittee's very first hearing I said:

"Rather than exploiting the sensational, the subcommittee is trying to develop all the pertinent facts and, in effect, lay bare the attitude of the executive agencies on the issue of whether the public is entitled to all possible information about the activities, plans and the policies of the Federal Government."

Now 11 years later I can, with the assurance of experience, reaffirm the lack of dramatic instances of withholding. The barriers to access, the instances of arbitrary and capricious withholding are dramatic only in their totality.

During the last 11 years, the subcommittee has, with the fullest cooperation from many in Government and from representatives of every facet of the news media, endeavored to build a greater awareness of the need to remove unjustifiable barriers to information, even if that information did not appear to be overly important. I suppose one could regard information as food for the intellect, like a proper diet for the body. It does not have to qualify as a main course to be important intellectual food. It might be just a dash of flavor to sharpen the wit or satisfy the curiosity, but it is as basic to the intellectual diet as are proper seasonings to the physical diet.

Our Constitution recognized this need by guaranteeing free speech and a free press. Mr. Speaker, those wise men who wrote that document—which was then and is now a most radical document—could not have intended to give us empty rights. Inherent in the right of free speech and of free press is the right to know. It is our solemn responsibility as inheritors of the cause to do all in our power to strengthen those rights—to give them meaning. Our actions today in this House will do precisely that.

The present law which S. 1160 amends is the so-called public information section of the 20-year-old Administration Procedure Act. The law now permits withholding of Federal Government records if secrecy is required "in the public interest" or if the records relate "solely to the internal management of an agency." Government information also may be held confidential "for good cause found." Even if no good cause can be found for secrecy, the records will be made available only to "persons properly and directly concerned." These phrases are the warp and woof of the blanket of secrecy which can cover the day-to-day administrative actions of the Federal agencies.

Neither in the Administrative Procedure Act nor its legislative history are these broad phrases defined, nor is there a recognition of the basic right of any person—not just those special classes "properly and directly concerned"—to gain access to the records of official Government actions. Above all, there is no remedy available to a citizen who has been wrongfully denied access to the Government's public records.

S. 1160 would make three major changes in the law.

First. The bill would eliminate the "properly and directly concerned" test of who shall have access to public records, stating that the great majority of records shall be available to "any person." So that there would be no undue burden on the operations of Government agencies, reasonable access regulations would be established.

Second. The bill would set up workable standards for the categories of records which may be exempt from public disclosure, replacing the vague phrases "good cause found," "in the public interest," and "internal management" with specific definitions of information which may be withheld.

**Third.** The bill would give an aggrieved citizen a remedy by permitting him to appeal to a U.S. district court if official records are improperly withheld. Thus, for the first time in our Government's history there would be proper arbitration of conflicts over access to Government documents.

S. 1160 is a moderate bill and carefully worked out. This measure is not intended to impinge upon the appropriate power of the Executive or to harass the agencies of Government. We are simply attempting to enforce a basic public right—the right to access to Government information. We have expressed an intent in the report on this bill which we hope the courts will read with great care.

While the bill establishes a procedure to secure the right to know the facts of Government, it will not force disclosure of specific categories of information such as documents involving true national security or personnel investigative files.

This legislation has twice been passed by the Senate, once near the end of the 88th Congress too late for House action and again last year after extensive hearings. Similar legislation was introduced in the House, at the beginning of the 89th Congress, by myself and 25 other Members, of both political parties, and comprehensive hearings were held on the legislation by the Foreign Operations and Government Information Subcommittee. After the subcommittee selected the Senate version as the best, most workable bill, it was adopted unanimously by the House Government Operations Committee.

S. 1160 has the support of dozens of organizations deeply interested in the workings of the Federal Government—professional groups such as the American Bar Association, business organizations such as the U.S. Chamber of Commerce, committees of newspapermen, editors and broadcasters, and many others. It has been worked out carefully with cooperation of White House officials and representatives of the major Government agencies, and with the utmost cooperation of the Republican members of the subcommittee; Congressman OGDEN R. REID, of New York; Congressman DONALD RUMSFELD, of Illinois; and the Honorable ROBERT P. GRIFFIN, of Michigan, now serving in the Senate. It is the fruit of more than 10 years of study and discussion initiated by such men as the late Dr. Harold L. Cross and added to by scholars such as the late Dr. Jacob Scher. Among those who have given unstintingly of their counsel and advice is a great and distinguished colleague in the House who has given the fullest support. Without that support nothing could have been accomplished. So I take this occasion to pay personal tribute to Congressman WILLIAM L. DAWSON, my friend, my confidant and adviser over the years.

Among those Members of the Congress who have given greatly of their time and effort to develop the legislation before us today are two Senators from the great State of Missouri, the late Senator Thomas Henning and his very distinguished successor, Senator EDWARD LONG who authored the bill before us today.

And there has been no greater champion of the people's right to know the facts of Government than Congressman DANTE B. FASCELL. I want to take this opportunity to pay the most sincere and heartfelt tribute to Congressman FASCELL who helped me set up the Special Subcommittee on Government Information and served as a most effective and dedicated member for nearly 10 years.

The list of editors, broadcasters and newsmen and distinguished members of the corps who have helped develop the legislation over these 10 years is endless.

But I would particularly like to thank those who have served as chairmen of Freedom of Information Committees and various organizations that have supported the legislation.

They include James Pope, formerly of the Louisville Courier-Journal, J. Russell Wiggins of the Washington Post, Herbert Brucker of the Hartford Courant, Eugene S. Pulliam of the Indianapolis News, Creed Black of the Chicago Daily News, Eugene Patterson of the Atlanta Constitution, each of whom served as chairman of the American Society of Newspaper Editors Freedom of Information Committee, and John Colburn of the Wichita Eagle & Beacon who served as chairman of both the ASNE committee and the similar committee of the American Society of Newspaper Publishers.

Also Mason Walsh of the Dallas Times Herald, David Schultz of the Redwood City Tribune, Charles S. Rowe of the Fredericksburg Free Lance Star, Richard D. Smyser of the Oak Ridge Oakridger, and Hu Blonk of the Wenatchee Daily World, each of whom served as chairman of the Associated Press Managing Editors Freedom of Information Committee; V. M. Newton, Jr., of the Tampa Tribune, Julius Frandsen of the United Press International, and Clark Mollenhoff of the Cowles Publications, each of whom served as chairman of the Sigma Delta Chi Freedom of Information Committee, and Joseph Costa, for many years the chairman of the National Press Photographers Freedom of Information Com-

mittee. The closest cooperation has been provided by Stanford Smith, general manager of the American Newspaper Publishers Association and Theodore A. Serrill, executive vice president of the National Newspaper Association.

Mr. Speaker, I strongly urge the favorable vote of every Member of this body on this bill, S. 1160.

Mr. KING of Utah. Mr. Speaker, will the gentleman yield?

Mr. MOSS. I am happy to yield to the gentleman.

Mr. KING of Utah. Mr. Speaker, I commend the distinguished gentlemen now in the well for the work he has done in bringing this bill to fruition today. The gentleman from California is recognized throughout the Nation as one of the leading authorities on the subject of freedom of information. He has worked for 12 years diligently to bring this event to pass.

Mr. Speaker. I wish to take this opportunity to voice my support of S. 1160, the Federal Public Records Act, now popularly referred to as the freedom of information bill. Let me preface my remarks by expressing to my distinguished colleague from California [Mr. Moss], chairman of the Government Information Subcommittee of the House of Representatives, and to the distinguished gentleman from Missouri, Senator EDWARD LONG, chairman of the Administrative Practices and Procedure Subcommittee of the Senate for their untiring efforts toward the advancement of the principle that the public has not only the right to know but the need to know the facts that comprise the business of Government. Under the expert guidance of these gentlemen, an exhaustive study has been conducted and a wealth of information gleaned. Equipped with a strong factual background and an understanding of the complex nature of the myriad of issues raised, we may proceed now to consider appropriate legislative action within a meaningful frame of reference.

S. 1160, the Federal Public Records Act, attempts to establish viable safeguards to protect the public access to sources of information relevant to governmental activities. Protection of public access to information sources was the original intent of the Congress when it enacted into law the Administrative Procedure Act of 1946. Regrettably, in the light of the experience of the intervening 20 years, we are confronted with an ever-growing accumulation of evidence that clearly substantiates the following conclusion: the overall intent of the Congress, as embodied in the Administrative Procedure Act of 1946, has not been realized and the specific safeguards erected to guarantee the right of public access to the information stores of Government appear woefully inadequate to perform the assigned tasks. The time is ripe for a careful and thoughtful reappraisal of the issues inherent in the right to know concept; the time is at hand for a renewal of our dedication to a principle that is at the cornerstone of our democratic society.

What are some of the major factors that have contributed to this widespread breakdown in the flow of information from the Government to the people? The free and total flow of information has been stemmed by the very real and very grave cold war crises that threaten our Nation. It is apparent that if we are to survive as a free nation, we must impose some checks on the flow of data—data which could provide invaluable assistance to our enemies.

The demands of a growing urban, industrial society has become greater both in volume and in complexity. The individual looks to his Government more and more for the satisfactory solution of problems that defy his own personal resources. The growth of the structure of Government commensurate with the demands placed upon it has given rise to confusion, misunderstanding, and a widening gap between the principle and the practice of the popular right to know. Chairman Moss has summarized this dilemma when he said "Government secrecy tends to grow as Government itself grows."

There are additional factors that must be considered. Paradoxically, the broad and somewhat obscure phraseology of section 3 of the public information section of the Administrative Procedure Act has, in effect, narrowed the stream of data and facts that the Federal agencies are and have been willing to release to the American people. Agency personnel charged with the responsibility of interpreting and enforcing the provisions of section 3 have labored under a severe handicap: their working guidelines have made for a host of varying interpretations and fostered numerous misinterpretations. Chaos and confusion have nurtured a needless choking off of information disclosure. Without realistic guidelines within which to operate, officials have exercised extreme caution in an effort to avoid the charges of premature, unwise, or unauthorized disclosure of Government information. Remedial action is called for. The primary purpose underlying S. 1160 is a long overdue and urgently needed clarification of the public information provisions of the Administrative Procedure Act.

Finally, the present condition of nonavailability of public information has perhaps been encouraged by a disregard by the American people of this truism; the freedoms that we daily exercise—our democratic society—were not easily obtained nor are they easily retained. Inroads and encroachments—be they overt or covert, be they internal or external—must be effectively guarded against. For freedoms once diminished are not readily revitalized; freedoms once lost are recovered with difficulty.

Thus far I have discussed some of the major forces that are simultaneously working toward increasing the gap that separates the principle and the practice of the people's right to know the affairs of their Government. The overriding importance of the Federal Public Records Act currently before us can be underscored by a brief examination of the highwater marks that loom large in the historical background of the present dispute concerning the legitimate bounds of the people's right to know the affairs of Government.

If the people are to be informed, they must be first accorded the right to sources of knowledge—and one of the initial queries posed by Americans and their English forebears alike was; What is the nature of the business of the legislative branch of government? Accounts of legislative activities were not always freely known by those whose destinies they were to shape. At the close of the 17th century, the House of Commons and the House of Lords had adopted regulations prohibiting the publishing of their votes and their debates. Since the bans on the publishing of votes and debates initially provided a haven of refuge from a Sovereign's harsh and often arbitrary reprisals, the elimination of these bans was difficult. Privacy was viewed as offering a means of retaining against all challenges—be they from the Sovereign or an inquiring populace—the prerogatives that the House of Parliament had struggled to secure. Not until the late 18th century did the forces favoring public accountability cause significant changes in the milieu that surrounded parliamentary proceedings. Although restrictive disclosure measures heretofore imposed were never formally repealed, their strict enforcement was no longer feasible. The forces championing the popular right to know had gained considerable strength and the odds were clearly against Parliament's retaining many of its jealously guarded prerogatives. To save face, both Houses yielded to the realities of the situation with which they were confronted and allowed representatives of the press—the eyes and ears of the people—to attend and recount their deliberations.

The annals recording the history of freedom of the press tell of dauntless printers who sought means of circumventing the bans in publicizing legislative records. As early as 1703, one Abel Boyer violated the letter and the spirit of the announced restrictions when he published monthly the Political State of Great Britain. He did so, however, without incurring the full measure of official wrath. By omitting the full names of participants in debate, and by delaying publication of the accounts of a session's deliberations until after it had adjourned, he was able to achieve his purpose. Others sought to foil the intent and dilute the effectiveness of the restrictions by revealing the activities of a committee of the House of Commons. Lest others follow similar suit, the Commons soon after passed a resolution stating:

"No news writers do presume in their letters or other papers that they disperse as minutes, or under any denomination, to intermeddle with the debates, or any other proceedings of this House, or any committee thereof."

Those who insisted on defying official pleasure were quickly brought to task. Many were imprisoned, many were fined; some were released having sworn to cease and desist from further offensive actions. Spurred by public demand for additional news, printers and editors devised a fictitious political body and proceeded to relate fictional debates. Their readers were, nevertheless, aware that the accounts were those of Parliament. Public demand for the right to know the information of Government had gained a momentum that could not be slowed. In 1789, the public point of view—a point of view that demanded the removal of the shackles of secrecy—because the parliamentary *modus operandi*. For in that year, one James Perry, of the Morning Chronicle, succeeded in his efforts to have news reporters admitted to Parliament and was able to provide his readers with an account of the previous evening's business. The efforts of Parliament to exclude representatives of the news media were channeled in new directions—with members speaking out against printers and editors, who in their opinion, were unfairly misrepresenting individual points of view; objectivity in reporting Parliament's business became their primary concern.

In the Colonies, too, Americans conducted determined campaigns paralleling those waged in England. Colonial governments demonstrated a formidable hos-

tility toward those who earnestly believed that the rank-and-file citizenry was entitled to a full accounting by its governing bodies. The power that knowledge provides was fully understood; by some it was feared. In 1671, in correspondence to his lords commissioners, Governor Berkeley, of Virginia, wrote:

"I thank God, there are no free schools nor printing; and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best Government. God keep us from both."

In 1725, Massachusetts newspaper printers were "ordered upon their peril not to insert in their prints anything of the Public Affairs of this province relating to the war without the order of the Government." Forty-one years were to pass until, in 1776, a motion offered by James Otis was carried and the proceedings of the Massachusetts General Court were opened to the public on the occasion of the debates surrounding the repeal of the onerous Stamp Act.

The clouds of secrecy that hovered over the American Colonies were not quickly dispelled; vestiges of concealment lingered on until well into the 18th century.

The deliberations that produced the Constitution of the United States were closed. Early meetings of the U.S. Senate were not regularly opened to the public until February of 1794. Some 177 years ago, the House of Representatives heatedly debated and finally tabled a motion that would have excluded members of the press from its sessions. It was the beginning of the 19th century before representatives of the press were formally granted admission to the Chambers of the Senate and the House of Representatives.

While the American people have long fought to expand the scope of their knowledge about Government, their achievements in this direction are being countered by the trend to delegate considerable lawmaking authority to executive departments and agencies. Effective protective measures have not always accompanied the exercise of this newly located rulemaking authority.

Access to the affairs of legislative bodies has become increasingly difficult thanks to another factor: the business of legislatures is being conducted in the committees of the parent body—committees that may choose to call an executive session and subsequently close their doors to the public.

In short, the trend toward more secrecy in government may be seen in the legislative branch. Can this trend be evidenced in the other two branches?

The scope of popular interest in Government operations has run the full gamut. The public has persevered in its assertion that it has an unquestionable right to the knowledge of the proceedings that constitute the legislative as well as the judicial and executive functions of the Government.

One of the greatest weapons in the arsenal of tyranny has been the secret arrest, trial, and punishment of those accused of wrongdoing. Individual liberties, regardless of the lipservice paid them, become empty and meaningless sentiments if they are curtailed or suspended or ignored in the darkness of closed judicial proceedings. The dangers to man's freedoms that lurk in secret judicial deliberations were recognized by the insurgent barons who forced King John to grant as one of many demands that "the King's courts of justice shall be stationary; and shall no longer follow his person; they shall be open to everyone; and justice shall no longer be sold, refused, or delayed by them." This promise was remembered by that generation of Americans that devised our scheme of government. To guarantee the optimum exercise and enjoyment by every man of his fundamental and essential liberties, the authors of the Bill of Rights incorporated these guarantees in the sixth amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

Contemporary developments lend support to the thesis that the rights of the public to be admitted to judicial proceedings is being undermined. More and more courtrooms are being closed to the people on the grounds that the thorough and open discussion of a broad category of offenses would be repugnant to society's consensus of good taste. What is more, court powers that were once exercised within the framework of due process guarantees are being transferred to quasi-judicial agencies, before which many of the due process guarantees have been cast by the wayside.

What is the current status of information availability within the executive departments and agencies? Although the public's right to know has not been openly denied, the march of events has worked a serious diminution in the range and types of information that are being freely dispensed to inquiring citizens, their representatives in Congress, and to members of the press. Counterbalancing the presumption that in a democracy the public has the right to know the busi-

ness of its Government is the executive privilege theory—a theory whose roots run deep in the American political tradition. This concept holds that the President may authorize the withholding of such information as he deems appropriate to the national well-being. Thomas Jefferson stated the principles upon which this privilege rests in these terms:

“With respect to papers, there is certainly a public and a private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature.

To the other belong mere executive proceedings. All nations have found it necessary, that for the advantageous conduct of their affairs, some of these proceedings, at least, should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interests will permit publication. Hence, under our Constitution, in requests of papers, from the legislative to the executive branch, an exception is carefully expressed, as to those which he may deem the public welfare may require not to be disclosed.”

While the bounds of the executive privilege claim have, of late, been more carefully spelled out and, in effect, narrowed, widespread withholding of Government records by executive agency officials continues in spite of the enactment of limiting statutes. In 1958, the Congress passed the Moss-Hennings bill, which granted agency heads considerable leeway in the handling of agency records but gave no official legislative sanction to a general withholding of such records from the public. The enactment of the Administrative Procedure Act held out promise for introducing a measure of uniformity in the administrative regulations that were applied to agency disclosures. According to the terms of section 3 or the public information section of this act:

“Except to the extent that there is involved (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, executive agencies are required to publish or make available to the public, their rules, statements of policy, policy interpretations and modes of operation as well as other data constituting matters of official record.”

Quoting subsection (c) of section 3:

“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.”

A careful analysis of the precise wording of the widely criticized public information section offers ample evidence for doubt, as to the effectiveness of the guarantees which its authors and sponsors sought to effect. Broad withholding powers have grown out of the vague and loosely defined terms with which this act is replete. Federal agencies may curb the distribution of their records should the public interest so require. What specifically is the public interest? The Manual on the Administrative Procedure Act allows each of the agencies to determine those functions which may remain secret in the public interest. Federal agencies may limit the dissemination of a wide range of information that they deem related “solely to the internal management” of the agency. What are the limitations, if any, that are attached to this provision? Federal agencies may withhold information “for good cause found.” What constitutes such a “good cause?” Even if information sought does not violate an agency’s ad hoc definition of the “public interest”—even if information sought does not relate “solely to the internal management” of the agency or if “no good cause” can be found for its retention, agencies may decline to release records to persons other than those “properly and directly concerned.” What are the criteria that an individual must present to establish a “proper and direct concern?” We search in vain if we expect to find meaningful and uniform definitions or reasonable limitations of the qualifying clauses contained in the controversial public information section of the Administrative Procedure Act. We search in vain, for what we seek does not presently exist.

Threats to cherished liberties and fundamental rights are inherent in the relatively unchecked operations of a mushrooming bureaucracy—threats though they be more subtle are no less real and no less dangerous than those which our Founding Fathers labored to prevent.

The changes that are contained in the Federal Public Records Act before us today offer a means of restoring to the American people their free and legitimate access to the affairs of Government. It seeks to accomplish this important objective in a variety of ways. Subsection (a) of S. 1160 clarifies the types of information which Federal agencies will be required to publish in the Federal Register.

By making requisite the publication of "descriptions of an agency's central and field organization and the established places at which, the officers from whom, and the methods whereby the public may secure information, make submittals or requests, or obtain decisions," the individual may be more readily apprised by responsible officials of those aspects of administrative procedure that are of vital personal consequence. Material "readily available" to interested parties may be incorporated "by reference" in the Register. "Incorporation by reference" will provide interested parties with meaningful citations to unabridged sources that contain the desired data. The Director of the Federal Register, rather than individual agency heads, must give approval before material may be so incorporated.

Subsection (b) of the Federal Public Records Act will eliminate the vague provisions that have allowed agency personnel to classify as "unavailable to the public" materials "required for good cause to be held confidential." All material will be considered available upon request unless it clearly falls within one of the specifically defined categories exempt from public disclosure. This subsection should be a boon not only to the frustrated citizen whose requests for the right to know have been denied time and time again. The reasons for denial seldom prove satisfactory or enlightening—for all too often they are couched in administrative jargon that is meaningless to the ordinary citizen. Subsection (b) of S. 1160 should be equally valuable to harried Government officials assigned the monumental responsibility of deciding what information may be released and what must be withheld in light of the proper functioning of the Government. The information guarantees of this subsection state:

"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) staff manuals and instructions to staff that affect any member of the public unless such materials are promptly published and copies offered for sale."

We have labored long and hard to establish firmly the premise that the public has not only the right but the need to know. We have also accepted the fact that the individual is entitled to respect for his right of privacy. The question arises as to how far we are able to extend the right to know doctrine before the inevitable collision with the right of the individual to the enjoyment of confidentiality and privacy. Subsection (b) attempts to resolve this conflict by allowing Federal agencies to delete personally identifying details from publicly inspected opinions, policy statements, policy interpretations, staff manuals, or instructions in order "to prevent a clearly unwarranted invasion of personal privacy." Should agencies delete personal identifications that cannot reasonably be shown to have direct relationship to the general public interest, they must justify in writing the reasons for their actions. This "in writing qualification is incorporated to prevent the "invasion of personal privacy clause" from being distorted and used as a broad shield for unnecessary secrecy.

To insure that no citizen will be denied full access to data that may be of crucial importance to his case, for want of knowledge that the material exists, each agency must "maintain and make available for public inspection and copying a current index providing identifying information to 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."

Perhaps the most serious defect in the present law rests in the qualification contained in subsection (c) of the public information provisions which limits those to whom Federal regulatory and executive agencies may give information to "persons properly and directly concerned." These words have been interpreted over the years in such a fashion as to render this section of the Administrative Procedure Act a vehicle for the withholding from the public eye of information relevant to the conduct of Government operations. Final determination of whether or not a citizen's interest is sufficiently "direct and proper" is made by the various agencies. The taxpaying citizen who feels that he has been unfairly denied access to information has had no avenue of appeal. Subsection (c) of the proposed Federal Public Records Act legislation would require that:

"Every agency in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person."

Should any person be denied the right to inspect agency records, he could appeal to and seek review by a U.S. district court. Quoting the "agency records" subsection of S. 1160:

"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 withholding of agency records and information and to order the production of any agency records or information 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."

While we recognize the merits of and justifications for arguments advanced in support of limited secrecy in a government that must survive in the climate of a cold war, we must also recognize that the gains—however small—made by secrecy effect an overall reduction in freedom. As the forces of secrecy gain, the forces of freedom lose. It is, therefore, incumbent upon us to exercise prudence in accepting measures which constitute limitations on the freedoms of our people. Restrictions must be kept to a minimum and must be carefully circumscribed lest they grow and, in so doing, cause irreparable damage to liberties that are the American heritage and the American way of life.

S. 1160 seeks to open to all citizens, so far as consistent with other national goals of equal importance, the broadest possible range of information. I feel that the limitations imposed are clearly justifiable in terms of other objectives that are ranked equally important within our value system. The presumption prevails in favor of the people's right to know unless information relates to matters that are, first, specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; second, matters related solely to the internal personnel rules and practices of any agency; third, matters specifically exempted from disclosure by other statutes; fourth, trade secrets and commercial or financial information obtained from the public and privileged or confidential; fifth, interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency; sixth, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; seventh, investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; eighth, matters 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 ninth, geological and geophysical information and data concerning wells.

Ours is perhaps the freest government that man has known. Though it be unique in this respect, it will remain so only if we keep a constant vigilance against threats—large or small—to its principles and institutions. If the Federal Public Records Act is enacted, it will be recorded as a landmark in the continuing quest for the preservation of man's fundamental liberties—for it will go far in halting and reversing the growing trend toward more secrecy in Government and less public participation in the decisions of Government.

James Madison eloquently argued on behalf of the people's right to know when he proclaimed that "Knowledge will forever govern ignorance. And a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

This is a measure in which every Member of Congress can take great pride. In the long view, it could eventually rank as the greatest single accomplishment of the 89th Congress.

Not only does it assert in newer and stronger terms the public's right to know, but it also demonstrates anew the ultimate power of the Congress to make national policy on its own—with or without Executive concurrence—where the public interest so demands. It thus helps to reaffirm the initiative of the legislature and the balance of powers, at a time when the Congress is the object of much concern and criticism over the apparent decline of its influence in the policymaking process.

Though I took a place on the Subcommittee on Foreign Operations and Government Information only last year, I take deep pride in my service with it and in the shining role it has played in shaping this historic act. I firmly hope and expect that the act will win the unanimous support of the House.

Mr. OLSEN of Montana. Mr. Speaker, will the gentleman yield?

Mr. MOSS. I am pleased to yield to the gentleman from Montana.

Mr. OLSEN of Montana. Mr. Speaker, I too wish to commend the gentleman in the well for his great work over the years on this subject of freedom of in-

formation as to Government records. However, I do want to ask the gentleman a question with reference to the Bureau of the Census. The Bureau of the Census can only gather the information that it does gather because that information will be held confidential or the sources of information will be held to be confidential. I presume that the provisions on page 5 of the bill under "Exemptions," No. (3), in other words providing that the provisions of this bill shall not be applicable to matters that are "(3) specifically exempted from disclosure by statute;"—that would exempt the Bureau of the Census from this new provision.

Mr. MOSS. That is correct.

Mr. OLSEN of Montana. I thank the gentleman.

Mr. EDMONDSON. Mr. Speaker, will the gentleman yield?

Mr. MOSS. I am very pleased to yield to my colleague.

Mr. EDMONDSON. Mr. Speaker, I rise in support of the bill and congratulate the gentleman from California for the outstanding leadership he has given to this body in a field that vitally affects the basic health of our democracy as this subject matter does.

I think the gentleman from California has won not only the respect and admiration of all of his colleagues in the House for the manner in which he has championed this worthwhile cause, but he has also won the respect and admiration of the people of the United States. I was glad to join him by introducing H.R. 5018 on the same subject and urge approval of S. 1160.

Mr. MOSS. I thank the gentleman.

Mr. MAILLIARD. Mr. Speaker, will the gentleman yield?

Mr. MOSS. I am pleased to yield to my colleague.

Mr. MAILLIARD. Mr. Speaker, I also want to compliment the gentleman for bringing to fruition many years of effort in this field.

I would like to ask my colleague a question, and of course I realize the gentleman cannot answer every question in detail. But I am very much interested in the fact that under the Merchant Marine Act where the computation of a construction subsidy is based upon an estimate that is made in the Maritime Administration, to date the Maritime Administration has refused to divulge to the companies their determination of how much the Government pays and how much the individual owner has to pay. That is based on these computations.

The Maritime Administration has never been willing to reveal to the people directly involved how the determination is made. In the gentleman's opinion, under this bill, would this kind of information be available at least to those whose direct interests are involved?

Mr. MOSS. It is my opinion that that information, unless it is exempted by statute, would be available under the terms of the amendment now before the House.

Mr. MAILLIARD. I appreciate the response of the gentleman very much indeed.

The SPEAKER. The gentleman from California [Mr. Moss] has consumed 20 minutes.

The Chair recognizes the gentleman from New York [Mr. REID].

Mr. REID of New York. Mr. Speaker, I yield myself such time as I may consume.

Mr. Speaker, I rise in strong support of S. 1160, a bill to clarify and protect the right of the public to information, and for other purposes.

It is, I believe, very clear in these United States that the public's right of access, their inherent right to know, and strengthened opportunities for a free press in this country are important, are basic and should be shored up and sustained to the maximum extent possible. The right of the public to information is paramount and each generation must uphold anew that which sustains a free press.

I believe this legislation is clearly in the public interest and will measurably improve the access of the public and the press to information and uphold the principle of the right to know.

To put this legislation in clear perspective, the existing Administrative Procedure Act of 1946 does contain a series of limiting clauses which does not enhance the public's right of access. Specifically it contains four principal qualifications:

First, an individual must be "properly and directly concerned" before information can be made available. It can still be withheld for "good cause found." Matters of "internal management" can be withheld and, specifically and most importantly, section 3 of the act states at the outset that any function of the

United States requiring secrecy in the public interest" does not have to be disclosed.

Section 3 reads in its entirety as follows:

"Except to the extent that there is involved (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—

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—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.

(c) **PUBLIC RECORDS.**—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."

This is a broad delegation to the Executive. Further, none of these key phrases is defined in the statute, nor has any of them—to the best of my knowledge—been interpreted by judicial decisions. The Attorney General's Manual on the Administrative Procedure Act merely states that.

"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 (section 3).

I believe that the present legislation properly limits that practice in several new and significant particulars: "

First, any person will now have the right of access to records of Federal Executive and regulatory agencies. Some of the new provisions include the requirement that any "amendment, revisions, or repeal" of material required to be published in the Federal Register must also be published; and the requirement that every agency make available for "public inspection and copying" all final opinions—including dissents and concurrences—all administrative staff manuals, and a current index of all material it has published. Also, this bill clearly stipulates that this legislation shall not be "authority to withhold information from Congress."

Second, in the bill there is a very clear listing of specific categories of exemptions, and they are more narrowly construed than in the existing Administrative Procedure Act.

Under the present law, information may be withheld—under a broad standard—where there is involved "any function of the United States requiring secrecy in the public interest." The instant bill would create an exemption in this area solely for matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." In my judgment, this more narrow standard will better serve the public interest.

Third, and perhaps most important, an individual has the right of prompt judicial review in the Federal district court in which he resides or has his principal place of business, or in which the agency records are situated. This is not only a new right but it is a right that must be promptly acted on by the courts, as stated on page 4 of the instant bill:

"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."

So the provision for judicial review is, in my judgment, an important one and one that must be expedited.

This legislation also requires an index of all decisions as well as the clear spelling out of the operational mechanics of the agencies and departments, and other certain specifics incident to the public's right to know.

I think it is important also to indicate that this new legislation would cover for example, the Passport Office of the Department of State, and would require an explanation of procedures which have heretofore never been published.

In addition, the legislation requires that there be the publication of the names and salaries of all those who are Federal employees except, of course, the exemptions that specifically apply. I think this is also salutary improvement. The exemptions, I think, are narrowly construed and the public's right to access is much more firmly and properly upheld.

Our distinguished chairman of this subcommittee, who has done so much in this House to make this legislation a reality here today, and is deserving of the commendation of this House, has pointed to the fact that a number of groups and newspaper organizations strongly support the legislation. I would merely state that it does enjoy the support of the American Society of Newspaper Editors, the American Newspaper Publishers Association, Sigma Delta Chi, AP Managing Editors, National Newspaper Association, National Press Association, National Editorial Association, the American Bar Association, the American Civil Liberties Union, the National Association of Broadcasters, the New York State Publishers Association, and others.

Specifically, Mr. Eugene Patterson, chairman of the Freedom of Information Committee of the American Society of Newspaper Editors, has said:

"We feel this carefully drawn and long-debated bill now provides Congress with a sound vehicle for action this year to change the emphasis of the present Administrative Procedure Act, which has the effect of encouraging agencies to withhold information needlessly. We believe the existing instruction to agencies—that they may withhold any information 'for good cause found,' while leaving them as sole judges of their own 'good cause'—naturally has created among some agency heads a feeling that 'anything the American people don't know won't hurt them, whereas anything they do know may hurt me.'"

Mr. Edward J. Hughes, chairman of the legislative committee of the New York State Publishers Association, has written me that obtaining "proper and workable Freedom of Information legislation at the Federal level has been of direct and great interest and importance to us." Mr. Hughes continues that passage of this legislation will "dispose constructively of a longstanding and vexing problem."

I would also say that were Dr. Harold Cross alive today, I believe he would take particular pride in the action I hope this body will take. I knew Dr. Cross and he was perhaps the most knowledgeable man in the United States in this area. He worked closely with the Herald Tribune and I believe he would be particularly happy with regard to this legislation.

Lastly, Mr. Speaker, I believe it is important to make clear not only that this legislation is needed, not only that it specifies more narrowly the areas where information can be withheld by the Government, not only that it greatly strengthens the right of access, but it also should be stated clearly that it is important—and I have no reason to doubt this—that the President sign this legislation promptly.

I would call attention to the fact that there are in the hearings some reports of agencies who, while agreeing with the objective of the legislation, have reservations or outright objections to its particular form. I hope the President will take counsel of the importance of the principle here involved, and of the action of this House today, and that he will sign the bill promptly, because this is clearly in the interest of the public's paramount right to know, of a free press and, in my judgment, in the interest of the Nation.

Mr. FULTON of Pennsylvania. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from Pennsylvania.

Mr. FULTON of Pennsylvania. Mr. Speaker, I compliment my friend the gentleman from New York [Mr. REID] on his excellent statement, and also his dedication to duty in studying and contributing so much to working out good rules for freedom of information in Government departments and agencies.

Along with those others who have been interested in this serious problem of the right of access to Government facts, The gentleman from New York [Mr. REID] should certainly be given the highest credit.

Mr. REID of New York. I thank the gentleman.

Mr. KUNKEL. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from Pennsylvania.

Mr. KUNKEL. Mr. Speaker, I commend the gentleman in the well and the gentleman from California for bringing this legislation to the floor.

I strongly support it.

In fact, I would almost go further than the committee does in this legislation. It is very important to have at least this much enacted promptly. I do hope the President will sign it into law promptly, because right now there are a great many instances occurring from time to time which indicate the necessity of having something like this on the statute books. It is a definite step in the right direction—I am counting on the committee doing a good overseeing job to see that it functions as intended.

Mr. REID of New York. I thank the gentleman for his thoughtful statement. I add merely that the freedom of the press must be reinsured by each generation. I believe the greater access that this bill will provide sustains that great principle.

Mr. LAIRD. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from Wisconsin.

Mr. LAIRD. Mr. Speaker, I thank the gentleman for yielding to me. I rise in support of this legislation, S. 1160.

Mr. Speaker, this legislation is long overdue, and marks a historic breakthrough for freedom of information in that it puts the burden of proof on officials of the bureaus and agencies of the executive branch who seek to withhold information from the press and public, rather than on the inquiring individual who is trying to get essential information as a citizen and taxpayer.

Mr. Speaker, this is not a partisan bill—at least not here in the Congress. We have heard that the administration is not happy about it and has delayed its enactment for a number of years, but the overwhelming support it has received from distinguished members of the Government Operations Committee—both on the majority and minority side—and the absence of any opposition here in the House is clear evidence of the very real concern responsible Members feel over what our Ambassador to the United Nations, Arthur Goldberg, has aptly termed the credibility problem of the U.S. Government. The same concern over the credibility gap is shared by the American public and the press, and it is a great satisfaction to me that the Congress is taking even this first step toward closing it.

Our distinguished minority leader, the gentleman from Michigan [Mr. GERALD R. FORD] at a House Republican policy committee news conference last May 18, challenged the President to sign this bill. I hope the President will sign it, and beyond that, will faithfully execute it so that the people's right to know will be more surely founded in law in the future.

But Mr. Speaker, we cannot legislate candor nor can we compel those who are charged with the life-and-death decisions of this Nation to take the American people into their confidence. We can only plead, as the loyal opposition, that our people are strong, self-reliant, and courageous, and are worthy of such confidence. Americans have faced grave crises in the past and have always responded nobly. It was a great Republican who towered above partisanship who warned that you cannot fool all of the people all of the time, and it was a great Democrat, Woodrow Wilson, who said:

"I am seeking only to face realities and to face them without soft concealments."

Mr. Speaker, I would like to point out that the provisions of this bill do not take effect until 1 year after it becomes law. Thus it will not serve to guarantee any greater freedom of information in the forthcoming political campaign than we have grown accustomed to getting from the executive branch of the Government in recent years. We of the minority would be happy to have it become operative Federal law immediately, but it is perhaps superfluous to say that we are not in control of this Congress.

In any event, if implemented by the continuing vigilance of the press, the public, and the Congress, this bill will make it easier for the citizen and taxpayer to obtain the essential information about his Government which he needs and to which he is entitled. It helps to shred the paper curtain of bureaucracy that covers up public mismanagement with public misinformation, and secret sins with secret silence. I am confident that I speak for most of my Republican colleagues in urging passage of this legislation.

Mr. Speaker, I append the full text of the House Republican Policy Committee statement on the freedom of information bill, S. 1160, adopted and announced on May 18 by my friend, the distinguished chairman of our policy committee, the gentleman from Arizona [Mr. RHODES]:

REPUBLICAN POLICY COMMITTEE STATEMENT ON FREEDOM OF INFORMATION  
LEGISLATION, S. 1160

The Republican Policy Committee commends the Committee on Government Operations for reporting S. 1160. This bill clarifies and protects the right of the public to essential information. Subject to certain exceptions and the right to court review, it would require every executive agency to give public notice or to make available to the public its methods of operation, public procedures, rules, policies, and precedents.

The Republican Policy Committee, the Republican Members of the Committee on Government Operations, and such groups as the American Newspaper Publishers Association, the professional journalism society Sigma Delta Chi, the National Editorial Association and the American Bar Association have long urged the enactment of this legislation. Due to the opposition of the Johnson-Humphrey Administration, however, this proposal has been bottled up in Committee for over a year. Certainly, information regarding the business of the government should be shared with the people. The screen of secrecy which now exists is a barrier to reporters as representatives of the public, to citizens in pursuit of information vital to their welfare, and to Members of Congress as they seek to carry out their constitutional functions.

Under this legislation, if a request for information is denied, the aggrieved person has the right to file an action in a U.S. District Court, and such court may order the production of any agency records that are improperly withheld. So that the court may consider the propriety of withholding, rather than being restricted to judicial sanctioning of agency discretion, the proceedings are de novo. In the trial, the burden of proof is correctly placed upon the agency. A private citizen cannot be asked to prove that an agency has withheld information improperly for he does not know the basis for the agency action.

Certainly, as the Committee report has stated: "No Government employee at any level believes that the 'public interest' would be served by disclosure of his failures or wrongdoings . . ." For example, the cost estimates submitted by contractors in connection with the multimillion-dollar deep sea "Mohole" project were withheld from the public even though it appeared that the firm which had won the lucrative contract had not submitted the lowest bid. Moreover, it was only as a result of searching inquiries by the press and Senator KUCHEL (R., Cal.) that President Kennedy intervened to reverse the National Science Foundation's decision that it would not be "in the public interest" to disclose these estimates."

"The requirements for disclosure in the present law are so hedged with restrictions that it has been cited as the statutory authority for 24 separate classifications devised by Federal agencies to keep administrative information from public view. Bureaucratic gobbledygook used to deny access to information has included such gems as: "Eyes Only," "Limited Official Use," "Confidential Treatment," and "Limitation on Availability of Equipment for Public Preference." This paper curtain must be pierced. This bill is an important first step.

In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear. High officials have warned that our Government is in grave danger of losing the public's confidence both at home and abroad. The credibility gap that has affected the Administration pronouncements on domestic affairs and Vietnam has spread to other parts of the world. The on-again, off-again, obviously less-than-truthful manner in which the reduction of American forces in Europe has been handled has made this country the subject of ridicule and jokes. "Would you believe?" has now become more than a clever saying. It is a legitimate inquiry.

Americans have always taken great pride in their individual and national credibility. We have recognized that men and nations can be no better than their word. This legislation will help to blaze a trail of truthfulness and accurate disclosure in what has become a jungle of falsification, unjustified secrecy, and misstatement by statistic. The Republican Policy Committee urges the prompt enactment of S. 1160."

Mr. PUCINSKI. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. Mr. Speaker, I yield to the gentleman from Illinois.

Mr. PUCINSKI. Mr. Speaker, I rise in support of this legislation. I congratulate the gentleman in the well, the gentleman from New York [Mr. REID]

and the gentleman from California [Mr. Moss], for bringing this legislation to us. Certainly this legislation reaffirms our complete faith in the integrity of our Nation's free press.

It has been wisely stated that a fully informed public and a fully informed press need never engage in reckless or irresponsible speculation. This legislation goes a long way in giving our free press the tools and the information it needs to present a true picture of government properly and correctly to the American people.

As long as we have a fully informed free press in this country, we need never worry about the endurance of freedom in America. I congratulate the gentlemen for this very thoughtful legislation.

Mr. FASCELL. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from Florida.

Mr. FASCELL. I thank the gentleman for yielding.

I commend the distinguished gentleman from New York for his long interest in this struggle. I compliment him also for giving strong bipartisan support, which is necessary for the achievement of this longstanding and vital goal.

Mr. Speaker, this is indeed an historic day for the people of America, for the communications media of America and the entire democratic process. It is, I am sure, a particularly gratifying day for our colleague, the distinguished gentleman from California, JOHN MOSS.

As chairman of the subcommittee he has worked tirelessly for 11 years to enact this public records disclosure law. His determination, perseverance, and dedication to principle makes possible this action today. I am proud to have been a member of the subcommittee and to have cosponsored this bill.

Mr. Speaker, this House now has under consideration a bill concerned with one of the most fundamental issues of our democracy. This is the right of the people to be fully informed about the policies and activities of the Federal Government.

No one would dispute the theoretical validity of this right. But as a matter of practical experience, the people have found the acquisition of full and complete information about the Government to be an increasingly serious problem.

A major cause of this problem can probably be attributed to the sheer size of the Government. The Federal Establishment is now so huge and so complex, with so many departments and agencies responsible for so many functions, that some confusion, misunderstanding, and contradictions are almost inevitable.

We cannot, however, placidly accept this situation or throw up our hands in a gesture of futility. On the contrary, the immensity of the Federal Government, its vast powers, and its intricate and complicated operations make it all the more important that every citizen should know as much as possible about what is taking place.

We need not endorse the devil theory or conspiratorial theory of government to realize that part of the cause of the information freeze can be blamed on some Government officials who under certain circumstances may completely withhold or selectively release material that ought to be readily and completely available.

The present bill amends section 3 of the Administrative Procedure Act of 1946. I have been in favor of such an amendment for a long time. In fact, on February 17, 1965, I introduced a companion bill, H.R. 5013, in this House. Since I first became a member of the Government Information Subcommittee 11 years ago, I have felt that legislation along these lines was essential to promote the free flow of Government information, and the case for its passage now is, if anything, ever stronger.

At first glance section 3 as now written seems innocent enough. It sets forth rules requiring agencies to publish in the Federal Register methods whereby the public may obtain data, general information about agency procedures, and policies and interpretations formulated and adopted by the agency. As a general practice this law appears to make available to the people agency opinions, orders, and public records.

However, 11 years of study, hearings, investigations, and reports have proven that this language has been interpreted so as to defeat the ostensible purpose of the law. Also under present law any citizen who feels that he has been denied information by an agency is left powerless to do anything about it.

The whole of section 3 may be rendered meaningless because the agency can withhold from the public such information as in its judgment involves "any function of the United States requiring secrecy in the public interest." This phrase is not defined in the law, nor is there any authority for any review of the

way it may be used. Again, the law requires an agency to make available for public perusal "all final opinions or orders in the adjudication of cases," but then adds, "except those required for good cause to be held confidential."

Subsection (c) orders agencies to make available its record in general "to persons properly and directly concerned except information held confidential for good cause found." Here indeed is what has been accurately described as a double-barreled loophole. It is left to the agency to decide what persons are "properly and directly concerned," and it is left to the agency to interpret the phrase, "for good cause found."

Finally, as I have already indicated, there is under this section no judicial remedy open to anyone to whom agency records and other information have been denied.

Under the protection of these vague phrases, which they alone must interpret, agency officials are given a wide area of discretion within which they can make capricious and arbitrary decisions about who gets information and who does not.

On the other hand, it should in all fairness be pointed out that these officials should be given more specific directions and guidance than are found in the present law.

For this reason I believe the passage of S. 1160 would be welcomed not only by the public, who would find much more information available to them, but by agency officials as well because they would have a much clearer idea of what they could and could not do.

The enactment of S. 1160 would accomplish what the existing section 3 was supposed to do. It would make it an information disclosure statute.

In the words of Senate Report No. 813 accompanying this bill, S. 1160 would bring about the following major changes:

"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."

As indicated under point 2 above, we all recognize the fact that some information must be withheld from public scrutiny. National security matters come first to mind, but there are other classes of data as well. These include personnel files, disclosure of which would constitute an invasion of privacy, information specifically protected by Executive order or statute, certain inter- and intra-agency memorandums and letters, trade secrets, commercial and financial data, investigatory files, and a few other categories.

Let me make another very important point. S. 1160 opens the way to the Federal court system to any citizen who believes that an agency has unjustly held back information. If an aggrieved person seeks redress in a Federal district court, the burden would fall on the agency to sustain its action. If the court enjoins the agency from continuing to withhold the information, agency officials must comply with the ruling or face punishment for contempt.

I strongly urge my colleagues to join me in giving prompt and overwhelming approval to this measure. In so doing we shall make available to the American people the information to which they are entitled and the information they must have to make their full contribution to a strong and free national government. Furthermore, we shall be reaffirming in the strongest possible manner that democratic principle that all power to govern, including the right to know is vested in the people; the people in turn gave by the adoption of the Constitution a limited grant of that unlimited power to a Federal Government and State governments.

In the constitutional grant the people expressly revalidated the guarantee of freedom of speech and freedom of the press among other guarantees, recognizing in so doing how basic are these guarantees to a constitutional, representative, and democratic government. There is no doubt about the power of the Congress to act and no serious question that it should and must.

Mr. REID of New York. I thank the gentleman from Florida. I note his long and clear dedication to freedom of the press, and his action on behalf of this bill.

Mr. HECHLER. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I am happy to yield to the gentleman from West Virginia.

Mr. HECHLER. Mr. Speaker, I add my words of commendation to the gentleman from California, the gentleman from New York, and others who have worked so hard to bring this bill to the House.

Today—June 20—is West Virginia Day. On June 20, 1863, West Virginia was admitted to the Union as the 35th State. The State motto, "Montani Semper Liberi," is particularly appropriate as we consider this freedom of information bill.

I am very proud to support this legislation, because there is much information which is now withheld from the public which really should be made available to the public. We are all familiar with the examples of Government agencies which try to tell only the good things and suppress anything which they think might hurt the image of the agency or top officials thereof. There are numerous categories of information which would be sprung loose by this legislation.

It seems to me that it would be in the public interest to make public the votes of members of boards and commissions, and also to publicize the views of dissenting members. I understand that six agencies do not presently publicize dissenting views. Also, the Board of Rivers and Harbors, which rules on billions of dollars of Federal construction projects, closes its meetings to the press and declines to divulge the votes of its members on controversial issues.

Therefore, I very much hope that this bill will pass by an overwhelming vote. Under unanimous consent, I include an editorial published in the Huntington, W. Va., Herald-Dispatch, and also an editorial from the Charleston, W. Va., Gazette:

[From the Huntington (W. Va.) Herald-Dispatch, June 16, 1966]

**"FOR FREEDOM OF INFORMATION, SENATE BILL 1160 IS NEEDED**

If ours is truly a government of, by and for the people, then the people should have free access to information on what the government is doing and how it is doing it. Exception should only be made in matters involving the national security.

Yet today there are agencies of government which seek to keep a curtain of secrecy over some of their activities. Records which ought to be available to the public are either resolutely withheld or concealed in such a manner that investigation and disclosure require elaborate and expensive techniques.

A good example occurred last summer, when the Post Office Department, in response to a Presidential directive, hired thousands of young people who were supposed to be "economically and educationally disadvantaged."

Suspicious were aroused that the jobs were being distributed as Congressional patronage to people who did not need them. But when reporters tried to get the names of the jobholders in order to check their qualifications, the Department cited a regulation forbidding release of such information.

The then Postmaster General John Gronouski finally gave out the names (which confirmed the suspicions of the press), but only after Congressional committees of Congress with jurisdiction over the Post Office Department challenged the secrecy regulations.

This incident, more than any other that has occurred recently, persuaded the U.S. Senate to pass a bill known as S. 1160 under which every agency of the federal government would be required to make all its records available to any person upon request. The bill provides for court action in cases of unjustified secrecy. And of course it makes the essential exemptions for "sensitive" government information involving national security.

Congressman DONALD RUMSFELD (R-Ill.), one of the supporters of S. 1160 in the House, calls the bill "one of the most important measures to be considered by Congress in 20 years."

"This bill really goes to the heart of news management," he declared. "If information is being denied, the press can go into Federal Court in the district where it is being denied and demand the agency produce the records."

The Congressman was critical of the press and other information media for failing to make a better campaign on the bill's behalf. He stressed that it was designed for the protection of the public and the public has not been properly warned of the need for the legislation."

"If this is true, it is probably because some newspapers fail to emphasize that press freedom is a public right, not a private privilege.

"S. 1160 would be a substantial aid in protecting the rights of the people to full information about their government. In the exercise of that right, the bill would

give the press additional responsibilities, but also additional methods of discharging them.

"If S. 1160 comes to the House floor, it will be hard to stop. The problem is to get it to the voting stage.

"We urge readers to send a letter or a card to their Congressman, telling him that the whole system of representative government is based on involvement by the people. But through lack of information, the people lose interest and subsequently they lose their rights. S. 1160 will help to prevent both losses."

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"[From the Charleston (W. Va.) Gazette, June 18, 1961]

**"BILL REVEALING U.S. ACTIONS TO PUBLIC VIEW NECESSITY**

"Now pending in the House of Representatives is a Senate-approved bill (S. 1160) to require all federal agencies to make public their records and other information, and to authorize same in federal district courts to obtain information improperly withheld.

"This is legislation of vital importance to the American public, for it would prevent the withholding of information for the purpose of covering up wrongdoing or mistakes, and would guard against the practice of giving out only that which is favorable and suppressing that which is unfavorable.

"The measure would protect certain categories of sensitive government information, such as matters involving national security, but it would put the burden on federal agencies to prove they don't have to supply certain information rather than require interested citizens to show cause why they are entitled to it.

"Rep. DONALD RUMSFELD, R-Ill., who with Rep. JOHN E. MOSS, D-Calif., is leading the fight for the bill in the House, gave perhaps the best reason for enactment of the legislation in these words:

"Our government is so large and so complicated that few understand it well and others barely understand it at all. Yet we must understand it to make it function better."

"The Senate passed the bill by a voice vote last October. The House subcommittee on foreign operations and government information, better known as the Moss subcommittee, approved it on March 30, and the House Committee on Government Operations passed on it April 27. It's expected to go before the House next week.

"Rep. RUMSFELD, who termed the bill 'one of the most important measures to be considered by Congress in 20 years,' cited the case of the Post Office Department and summer employees last year as an example of how a government agency can distort or violate provisions of law under cover of secrecy.

"Newspapers disclosed that the Post Office Department was distributing as congressional patronage thousands of jobs that were supposed to go to economically and educationally disadvantaged youths.

"But the department used regulation 744.44, which states that the names, salaries and other information about postal employees should not be given to any individual, commercial firm, or other non-federal agency—as the basis for refusing to divulge the names of appointees to the press, four congressmen, or the Moss committee, all of whom challenged the secrecy regulations.

"In other words, the department could put political hacks into jobs designed to help disadvantaged youths, and get away with it by hiding under the cloak of a bureaucratic regulation. There finally was a reluctant authorization to release the names, but the department still refused to change the basic regulation. This sort of manipulation would be put on the run by passage of S. 1160.

"The federal government is a vast and complex operation that reaches into every state and every community, with literally millions of employees. Wherever it operates it is using public money and conducting public business, and there is no reason why it should not be held accountable for what it is doing.

"Under present laws, as Rep. RUMSFELD pointed out, 'Any bureaucrat can deny requests for information by calling up Section 3 of the Administrative Procedure Act, passed in 1946. To get information under this act, a person has to show good cause and there are numerous different reasons under the act which a federal agency can use to claim the person is not properly or directly concerned. Most of the reasons are loose catch phrases.'

"Any law or regulation that protects government officials and employees from the public view, will in the very least, incline them to be careless in the way

they conduct the public business. A law that exposes them to that view is bound to encourage competency and honesty. Certainly the pending bill is in the public interest. It should be enacted into law, and we respectfully urge the West Virginia Congressmen to give it their full support."

Mr. REID of New York. I thank the gentleman.

Mr. KUPFERMAN. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from New York.

Mr. KUPFERMAN. Mr. Speaker, the gentleman from New York [Mr. REID] has stated the matter so well that it does not require more discussion from me on behalf of this bill. I commend the gentleman from New York and others associated with him for having brought the bill to the floor and helping us pass it today.

Mr. REID of New York. I thank the gentleman.

Mr. GRIDER. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I yield to the gentleman from Tennessee.

Mr. GRIDER. Mr. Speaker, I rise in support of S. 1160, legislation for clarifying and protecting the right of the public to information.

This legislation has been pending for more than a decade. Although few people question the people's right to know what is going on in their Government, we have quibbled for far too long over the means of making this information available. In the process we may have lost sight of the desired end result—freedom of information.

The need for maintaining security in some of our cold war dealings is not questioned here. As the Commercial Appeal says in an excellent editorial about this legislation:

"The new law would protect necessary secrecy, but the ways of the transgressor against the public interest would be much harder."

Our colleague from California [Mr. Moss] and members of this committee have done a splendid job with this legislation. This bill is clearly in the public interest.

Mr. Speaker, I include at this point in my remarks the editorial "Freedom of Information," which appeared June 16, 1966, in the Memphis Commercial Appeal:

#### FREEDOM OF INFORMATION

"The House of Representatives is scheduled to act Monday on the Freedom of Information Bill, an event of the first class in the unending struggle to let people know how governments operate. Such knowledge is an essential if there is to be sound government by the people.

This bill has been in preparation 13 years. It is coming up for a vote now because pulse feeling in Congress indicated that it will win approval this year in contrast to some other years of foot dragging by members of the House who announce for the principle but doubt the specific procedure.

The Senate has passed an identical bill.

At the heart of the proposed law is an ending of the necessity for a citizen to have to go into court to establish that he is entitled to get documents, for instance showing the rules under which a governmental agency operates, or which officials made what decisions.

This would be reversed. The official will have to prove in court that the requested document can be withheld legally.

A trend toward secrecy seems to be a part of the human nature of officials with responsibility. There are a few things that need to be done behind a temporary veil, especially in preparing the nation's defenses, often in the buying of property, and sometimes in the management of personnel."

"But the urge is to use the "classified" stamp to cover blunders, errors and mistakes which the public must know to obtain corrections.

The new law would protect necessary secrecy but the ways of the transgressor against the public interest would be much harder. The real situation is that a 1946 law intended to open more records to the public has been converted gradually into a shield against questioners. Technically the 1966 proposal is a series of amendments which will clear away the wording behind which reluctant officials have been hiding.

It results from careful preparation by JOHN MOSS (D., Calif.) with the help of many others.

It is most reassuring to have Representative Moss say of a bill which seems to be cleared for adoption that we are about to have for the first time a real guarantee of the right of the people to know the facts of government."

Mr. GRIDER. Mr. Speaker, I ask unanimous consent to revise and extend my remarks, and include an editorial.

The SPEAKER. Is there objection to the request of the gentleman from Tennessee?

There was no objection.

Mr. VAN DEERLIN. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I am happy to yield to the gentleman from California.

Mr. VAN DEERLIN. Mr. Speaker, those of us who have served with JOHN Moss on the California delegation are well aware of the long and considerable effort which he has applied to this subject.

The Associated Press, in a story published less than a week ago, related that 13 of the 14 years this gentleman has served in the House have been devoted to developing the bill before us today. I join my colleagues in recognizing this effort, and I ask unanimous consent to include that Associated Press article in the Record.

The SPEAKER. Is there objection to the request of the gentleman from California?

There was no objection.

The article is as follows:

[From the Los Angeles (Calif.) Times, June 12, 1966]

**HOUSE APPROVAL SEEN ON RIGHT-TO-KNOW BILL—BATTLE AGAINST GOVERNMENT SECRECY, LED BY REPRESENTATIVE MOSS, OF CALIFORNIA, NEARS END**

“WASHINGTON.—A battle most Americans thought was won when the United States was founded is just now moving into its final stage in Congress.

It involves the right of Americans to know what their government is up to. It's a battle against secrecy, locked files and papers stamped “not for public inspection.”

It's been a quiet fight mainly because it has been led by a quiet, careful congressman. Representative JOHN E. MOSS, Democrat, of California, who has been waging it for 13 of the 14 years he has been in the House.

Now, the House is about to act on the product of the years of study, hearings, investigations and reports—a bill that in some quarters is regarded as a sort of new Magna Carta. It's called the freedom of information bill or the right to know.

It would require federal agencies to make available information about the rules they operate under, the people who run them and their acts, decisions and policies that affect the public. Large areas of government activity that must of necessity be kept secret would remain secret.”

**SENATE BILL IDENTICAL**

“House approval is believed certain, and since the Senate has already passed an identical bill, it should wind up on President Johnson's desk this month.

How it will be received at the White House is not clear. In 1960, as vice president-elect, Mr. Johnson told a convention of newspaper editors “the executive branch must see that there is no smoke screen of secrecy.” But the 27 federal departments and agencies that presented their views on the bill to Moss' government information subcommittee opposed its passage.

Norbert A. Schlei, assistant attorney general, who presented the main government case against the bill, said the problem of releasing information to the public was “just too complicated, too ever-changing” to be dealt with in a single piece of legislation.

“If you have enough rules,” he said, “you end up with less information getting out because of the complexity of the rule system you establish . . .”

**BASIC DIFFICULTY**

“I do not think you can take the whole problem, federal governmentwide, and wrap it up in one package. That is the basic difficulty; that is why the federal agencies are ranged against this proposal.”

Another government witness, Fred Burton Smith, acting general counsel of the Treasury Department, said if the bill was enacted “the executive branch will be unable to execute effectively many of the laws designed to protect the public and will be unable to prevent invasions of privacy among individuals whose records have become government records.”

Smith said the exemptions contained in the bill were inadequate and its court provisions inappropriate. In addition, he said, persons without a legitimat

interest in a matter would have access to records and added that the whole package was of doubtful constitutionality."

#### STRENGTHENED FEELING

"Far from deterring him, such testimony has only strengthened Moss's feeling that Congress had to do the job of making more information available to the public because the executive branch obviously wouldn't.

The bill he is bringing to the House floor, June 20, is actually a series of amendments to a law Congress passed in 1946 in the belief it was requiring greater disclosure of government information to the public. And that, for Moss, takes care of the constitutional question.

"If we could pass a weak public information law," he asks, "why can't we strengthen it."

The 1946 law has many interpretations. And the interpretations made by the executive agencies were such that the law, which was intended to open records to the public, is now the chief statutory authority cited by the agencies for keeping them closed."

#### SECRECY PERMITTED

"The law permits withholding of records if secrecy "is required in the public interest," or if the records relate "solely to the internal management of an agency."

If a record doesn't fit those categories it can be kept secret "for good cause found." And even if no good cause is found, the information can only be given to "persons properly and directly concerned."

Between 1946, when that law was enacted, and 1958 the amount of file space occupied by classified documents increased by 1 million cubic feet, and 24 new terms were added to "top secret," "secret," and "confidential," to hide documents from public view."

They ranged from simple "nonpublic," to "while this document is unclassified, it is for use only in industry and not for public release."

#### USED VARIOUS WAYS

"The law has been used as authority for refusing to disclose cost estimates submitted by unsuccessful bidders on nonsecret contracts, for withholding names and salaries of federal employes, and keeping secret dissenting views of regulatory board members.

It was used by the Navy to stamp its Pentagon telephone directories as not for public use on the ground they related to the internal management of the Navy.

S. 1160, as the bill before the House is designated, lists specifically the kind of information that can be withheld and says the rest must be made available promptly to "any" person.

The areas protected against public disclosure include national defense and foreign policy secrets, investigatory files of law enforcement agencies, trade secrets and information gathered in labor-management mediation efforts, reports of financial institutions, personnel and medical files and papers that are solely for the internal use of an agency."

#### IMPORTANT PROVISION

"In the view of many veterans of the fight for the right to know, it's most important provision would require an agency to prove in court that it has authority to withhold a document that has been requested. Under the present law the situation is reversed and the person who wants the document has to prove that it is being improperly withheld.

The bill would require—and here is where an added burden would be placed on the departments—that each agency maintain an index of all documents that become available for public inspection after the law is enacted. To discourage frivolous requests, fees could be charged for record searches.

Moss bumped his head on the government secrecy shield during his first term in Congress when the Civil Service Commission refused to open some records to him.

"I decided right then I had better find out about the ground rules," he said in a recent interview. "While I had no background of law, I had served in the California legislature and such a thing was unheard of."

(California is one of 37 states that have open records laws.)

Moss was given a unique opportunity to learn the ground rules in his second term in Congress when a special subcommittee of Government Operations Committee was created to investigate complaints that government agencies were blocking the flow of information to the press and public.

Although only a junior member of the committee, Moss had already impressed House leaders with his diligence and seriousness of purpose and he was made chairman of the new subcommittee. His characteristics proved valuable in the venture he undertook.

The right of a free people to know how their elected representatives are conducting the public business has been taken for granted by most Americans. But the Constitution contains no requirement that the government keep the people informed.

The seeds of the secrecy controversy were sown during the first session of Congress when it gave the executive branch, in a "housekeeping" act, authority to prescribe rules for the custody, use and preservation of its record. They flourished in the climate created by the separation of the executive and legislative functions of government.

#### EXECUTIVE PRIVILEGE

"Since George Washington, Presidents have relied on a vague concept called "executive privilege" to withhold from Congress information they feel should be kept secret in the national interest.

There are constitutional problems involved in any move by Congress to deal with that issue, and S. 1160 seeks to avoid it entirely.

Moss, acting on the many complaints he receives, has clashed repeatedly with government officials far down the bureaucratic lines who have claimed "executive privilege" in refusing to divulge information, and in 1962 he succeeded in getting a letter from President John F. Kennedy stating that only the President would invoke it in the future.

President Johnson gave Moss a similar pledge last year."

#### BORNE BY NEWSPAPERS

"Until the Moss subcommittee entered the field, the battle against government secrecy had been borne mainly by newspapermen.

In 1953, the American Society of Newspaper Editors published the first comprehensive study of the growing restrictions on public access to government records—a book by Harold L. Cross entitled "The People's Right to Know."

The book provided the basis for the legislative remedy the subcommittee proceeded to seek, and Cross summed up the idea that has driven Moss ever since when he said, "the right to speak and the right to print, without the right to know, are pretty empty."

World War II, with its emphasis on security, gave a tremendous boost to the trend toward secrecy and so did the activities of the late Sen. Joseph McCarthy, Republican, of Wisconsin, as intimidated officials pursued anonymity by keeping everything they could from public view. Expansion of federal activities in recent years made the problem ever more acute.

In 1958, Moss and the late Sen. Tom Hennings, Democrat, of Missouri, succeeded in amending the old "housekeeping" law to make clear it did not grant any right for agencies to withhold their records.

Opposition of the executive branch blocked any further congressional action. Moss, hoping to win administration support, did not push his bill until he was convinced this year it could not be obtained.

Moss feels S1160 marks a legislative milestone in the United States.

"For the first time in the nation's history," he said recently, "the people's right to know the facts of government will be guaranteed." There is wide agreement with this view, but warnings against too much optimism are also being expressed."

Noting the exemptions written into the bill, a Capitol Hill veteran observed, "Any bureaucrat worthy of the name should be able to find some place in those exemptions to tuck a document he doesn't want seen."

Mr. SHRIVER. Mr. Speaker, will the gentleman yield?

Mr. REID of New York. I am happy to yield to the gentleman from Kansas.

Mr. SHRIVER. Mr. Speaker, I rise in support of S. 1160 which clarifies and strengthens section 3 of the Administrative Procedure Act relating to the right of the public to information.

Six years ago when President Johnson was Vice President-elect he made a statement before the convention of the Associated Press Managing Editors Association which was often repeated during hearings on this bill. He declared: "In the years ahead, those of us in the executive branch must see that there is no smokescreen of secrecy. The people of a free country have a right to know about the conduct of their public affairs."

Mr. Speaker, over the past 30 years more and more power has been concentrated in the Federal Government in Washington. Important decisions are made each day affecting the lives of every individual.

Today we are not debating the merits of the growth of Federal Government. But as the Government grows, it is essential that the public be kept aware of what it is doing. Ours is still a system of checks and balances. Therefore as the balance of government is placed more and more at the Federal level, the check of public awareness must be sharpened.

For more than a decade such groups as the American Newspaper Publishers Association, Sigma Delta Chi, the National Editorial Association, and the American Bar Association have urged enactment of this legislation. More than a year ago the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations held extensive hearings on this legislation.

At that time Mr. John H. Colburn, editor and publisher of the Wichita, Kans., Eagle and Beacon, which is one of the outstanding daily newspapers in mid-America, testified in behalf of the American Newspaper Publishers Association.

Mr. Colburn pointed to a screen of secrecy which is a barrier to reporters, as representatives of the public—to citizens in pursuit of information vital to their business enterprises—and is a formidable barrier to many Congressmen seeking to carry out their constitutional functions.

Mr. Colburn, in testifying before the subcommittee, stated:

"Let me emphasize and reiterate the point made by others in the past: Reporters and editors seek no special privileges. Our concern is the concern of any responsible citizen. We recognize that certain areas of information must be protected and withheld in order not to jeopardize the security of this Nation. We recognize legitimate reasons for restricting access to certain other categories of information, which have been spelled out clearly in the proposed legislation.

What disappoints us keenly—what we fail to comprehend is the continued opposition of Government agencies to a simple concept. That is the concept to share the legitimate business of the public with the people."

In calling for congressional action to protect the right to know of the people, Mr. Colburn declared:

Good government in those complex periods needs the participation, support and encouragement of more responsible citizens. Knowing that they can depend on an unrestricted flow of legitimate information would give these citizens more confidence in our agencies and policymakers. Too many now feel frustrated and perplexed.

Therefore, it is absolutely essential that Congress take this step to further protect the rights of the people, also to assure more ready access by Congress, by adopting this disclosure law."

Mr. Speaker, John Colburn and many other interested citizens have made a strong case for this legislation. It is regrettable that it has been bottled up in committee for so long a time.

This bill clarifies and protects the right of the public to essential information. This bill revises section 3 of the Administrative Procedure Act to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions.

Under this legislation, if a request for information is denied, the aggrieved person has the right to file an action in a district court, and such court may order the production of any agency records that are improperly withheld. In such a trial, the burden of proof is correctly upon the agency.

It should not be up to the American public—or to the press—to fight daily battles just to find out how the ordinary business of their government is being conducted. It should be the responsibility of the agencies and bureaus, who conduct this business, to tell them.

We have heard a great deal in recent times about a credibility gap in the pronouncements emanating from official Government sources. In recent years we heard an assistant secretary of defense defend the Government's right to lie. We have seen increasing deletion of testimony by administration spokesmen be-

fore congressional committees and there has been questions raised whether this was done for security reasons or political reasons.

This legislation should help strengthen the public's confidence in the Government. Our efforts to strengthen the public's confidence in the Government. Our efforts to strengthen the public's right to know should not stop here. As representatives of the people we also should make sure our own house is in order. While progress has been made in reducing the number of closed-door committee sessions, the Congress must work to further reduce so-called executive sessions of House and Senate committees. Serious consideration should be given to televising and permitting radio coverage of important House committee hearings.

I hope that the Joint Committee on the Organization of the Congress will give serious considerations to these matters in its recommendations and report.

Mr. REID of New York. Mr. Speaker, I yield the remainder of my time to the gentleman from Illinois [Mr. RUMSFELD].

Mr. MONAGAN. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I am happy to yield to the distinguished gentleman from Connecticut, who serves on this subcommittee.

Mr. MONAGAN. Mr. Speaker, I wish to express my support for this legislation and also to commend the chairman of our subcommittee, who has literally come from his doctor's care to be here today to lead the House in the acceptance of this monumental piece of legislation. His work has been the sine qua non in bringing this important legislation to fruition.

Mr. Speaker, I am happy to support S. 1160, an act to clarify and protect the right of the public to information.

This legislation is a landmark in the constant struggle in these days of big government to preserve for the people access to the information possessed by their own servants. Certainly it is impossible to vote intelligently on issues unless one knows all the facts surrounding them and it is to keep the public properly informed that this legislation is offered today.

I should like to take this opportunity to congratulate our chairman, the gentleman from California [Mr. Moss] on the passage of this significant bill. Over the years he has fought courageously and relentlessly against executive coverup of information which should be available to the people. The reporting and passage of this bill have come only after many years of constant work by the gentleman from California and as we send this bill to the President for signature our chairman should feel proud in the significant role that he has played in raising permanent standards of regulations on the availability of public information. This is a noteworthy accomplishment and will do much to maintain popular control of our growing bureaucracy.

I am happy to have worked with the Subcommittee on Foreign Operations and Government Information and with the House Committee on Government Operations on this bill and to have shared to some degree in the process which has refined this legislation, obtained concurrence of the executive branch and reaches its culmination now.

Mr. HARDY. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I am happy to yield to the distinguished gentleman from Virginia, who also served on the Subcommittee on Government Information.

Mr. HARDY. I thank my good friend for yielding and commend him for his work on this bill.

Mr. Speaker, I just wish to express my support for this measure. I should like for the Members of the House to know that I wholeheartedly support it, and that I am particularly happy the chairman of our subcommittee, the gentleman from California [Mr. Moss] is back with us today. I know he has not been in good health recently, and I am happy to see him looking so well. I congratulate him for the fine job he has done on this most important subject and I am glad to have been privileged to work with him on the subcommittee.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I yield to the gentleman from Iowa.

Mr. GROSS. I join my friend, the gentleman from Illinois, in support of this legislation, but I want to add that it will be up to the Congress, and particularly to the committee which has brought the legislation before the House, to see to it that the agencies of Government conform to this mandate of Congress. It will be meaningless unless Congress does do a thorough oversight job, and I have in mind the attempt already being made to destroy the effectiveness of

the General Accounting Office as well as the efforts of the Defense Department to hide the facts.

Mr. RUMSFELD. The gentleman's comments are most pertinent. Certainly it has been the nature of Government to play down mistakes and to promote successes. This has been the case in the past administrations. Very likely this will be true in the future.

There is no question but that S. 1160 will not change this phenomenon. Rather, the bill will make it considerably more difficult for secrecy-minded bureaucrats to decide arbitrarily that the people should be denied access to information on the conduct of Government or on how an individual Government official is handling his job.

Mr. Speaker, the problem of excessive restrictions on access to Government information is a nonpartisan problem, as the distinguished chairman, the gentleman from California (Mr. Moss) has said. No matter what party has held the political power of Government, there have been attempts to cover up mistakes and errors.

Significantly, S. 1160 provides for an appeal against arbitrary decisions by spelling out the ground rules for access to Government information, and, by providing for a court review of agency decisions under these ground rules, S. 1160 assures public access to information which is basic to the effective operation of a democratic society.

The legislation was initially opposed by a number of agencies and departments, but following the hearings and issuance of the carefully prepared report—which clarifies legislative intent—much of the opposition seems to have subsided. There still remains some opposition on the part of a few Government administrators who resist any change in the routine of government. They are familiar with the inadequacies of the present law, and over the years have learned how to take advantage of its vague phrases. Some possibly believe they hold a vested interest in the machinery of their agencies and bureaus, and there is resentment to any attempt to oversee their activities either by the public, the Congress or appointed Department heads.

But our democratic society is not based upon the vested interests of Government employees. It is based upon the participation of the public who must have full access to the facts of Government to select intelligently their representatives to serve in Congress and in the White House. This legislation provides the machinery for access to Government information necessary for an informed, intelligent electorate.

Mr. Speaker, it is a great privilege for me to be able to speak on behalf of Senate bill 1160, the freedom-of-information bill, which provides for establishment of a Federal public records law.

I believe that the strong bipartisan support enjoyed by S. 1160 is indicative of its merits and of its value to the Nation. Twice before, in 1964 and 1965, the U.S. Senate expressed its approval of this bill. On March 30, 1966, the House Subcommittee on Foreign Operations and Government Information favorably reported the bill, and on April 27, 1966, the House Committee on Government Operations reported the bill out with a do-pass recommendation. It remains for the House of Representatives to record its approval and for the President to sign the bill into law.

I consider this bill to be one of the most important measures to be considered by Congress in the past 20 years. The bill is based on three principles:

First, that public records, which are evidence of official government action, are public property, and that there should be a positive obligation to disclose this information upon request.

Second, this bill would establish a procedure to guarantee individuals access to specific public records, through the courts if necessary.

Finally, the bill would designate certain categories of official records exempt from the disclosure requirement.

I believe it is important also to state what the bill is not. The bill does not affect the relationship between the executive and legislative branches of Government. The report and the legislation itself specifically point out that this legislation deals with the executive branch of the Federal Government in its relationship to all citizens, to all people of this country.

The very special relationship between the executive and the legislative branches is not affected by this legislation.

As the bill and the report both state:

"Members of the Congress have all of the rights of access guaranteed to 'any person' by S. 1160, and the Congress has additional rights of access to all

Government information which it deems necessary to carry out its functions."

Mr. SKUBITZ. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I yield to the gentleman from Kansas who has been very active in behalf of this legislation.

Mr. SKUBITZ. Mr. Speaker, I rise in support of S. 1160. Passage of this legislation will create a more favorable climate for the people's right to know—a right that has too long languished in an environment of bureaucratic negativism and indifference.

From the beginning of our Republic until now, Federal agencies have wrongfully withheld information from members of the electorate. This is intolerable in a form of government where the ultimate authority must rest in the consent of government.

Democracy can only operate effectively when the people have the knowledge upon which to base an intelligent vote.

The bill grants authority to the Federal district court to order production of records improperly withheld and shifts the burden of proof to the agency which chooses to withhold information.

If nothing else, this provision will imbue Government employees with a sense of caution about placing secrecy stamps on documents that a court might order to be produced at a later time. Thus inefficiency or worse will be less subject to concealment.

Mr. QUIE. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I am happy to yield to the gentleman from Minnesota.

Mr. QUIE. Mr. Speaker, may I ask the gentleman, will this enable a Member of Congress to secure the names of people who work for the Post Office Department or any other department?

Mr. RUMSFELD. I know the gentleman almost singlehandedly worked very effectively to bring about the disclosure of such information at a previous point in time. It is certainly my opinion, although the courts would ultimately make these decisions, that his efforts would have been unnecessary had this bill been the law. Certainly there is no provision in this legislation that exempts from disclosure the type of information to which the gentleman refers that I know of.

Mr. QUIE. I thank the gentleman and want to commend him on the work he has done in bringing out this legislation. I believe it is an excellent bill.

#### GENERAL LEAVE TO EXTEND

Mr. REID of New York. Mr. Speaker, will the gentleman yield to me for 1 second?

Mr. RUMSFELD. I am happy to yield to the gentleman from New York, who serves as the ranking minority member of the subcommittee.

Mr. REID of New York. Mr. Speaker, in order that the gentleman may complete his statement, may I ask unanimous consent that any Member of the House may have 5 legislative days in which to include his thoughts and remarks in the Record on this bill?

The SPEAKER. Is there objection to the request of the gentleman from New York?

There was no objection.

Mr. RUMSFELD. Mr. Speaker, in the seconds remaining, I do want to commend my colleague and good friend, the gentleman from California. As the able chairman of this subcommittee, he has worked diligently and effectively these past 11 years to secure a very important right for the people of this country. Bringing this legislation to the floor today is a proper tribute to his efforts. Certainly his work and the work of others whose names have been mentioned, the gentleman from Michigan, now a Member of the other body, Mr. GRIFFIN, who served so effectively as the ranking minority member of our subcommittee and the ranking minority member of our full committee, the gentlewoman from New Jersey (Mrs. DWYER), all shared in the effort and work that resulted in this most important and thoughtful piece of legislation.

Mr. Speaker, I do wish to make one other point about the bill. This bill is not to be considered, I think it is safe to say on behalf of the members of the committee, a withholding statute in any sense of the term. Rather, it is a disclosure statute. This legislation is intended to mark the end of the use of such phrases as "for good cause found," "properly and directly concerned," and "in the public interest," which are all phrases which have been used in the past by individual officials of the executive branch in order to justify, or at least to seem to justify, the withholding of information that properly belongs in the hands of the public.

It is our intent that the courts interpret this legislation broadly, as a disclosure statute and not as an excuse to withhold information from the public.

I must add that the disclosure of Government information is particularly important today because Government is becoming involved in more and more aspects of every person's personal and business life, and so the access to information about how Government is exercising its trust becomes increasingly important. Also, people are so busy today bringing up families, making a living, that it is increasingly difficult for a person to keep informed. The growing complexity of Government itself makes it extremely difficult for a citizen to become and remain knowledgeable enough to exercise his responsibilities as a citizen; without Government secrecy it is difficult, with Government secrecy it is impossible.

Of course, withholding of information by Government is not new. The Federal Government was not a year old when Senator Maclay of Pennsylvania asked the Treasury Department for the receipts Baron von Stueben had given for funds advanced to him. Alexander Hamilton refused the request.

In the United States, three centuries of progress can be seen in the area of access to Government information. Based on the experience of England, the Founders of our Nation established—by law and by the acknowledgment of public men—the theory that the people have a right to know. At local, State, and Federal levels it has been conceded that the people have a right to information.

James Russell Wiggins, editor of the Washington Post, argues eloquently against Government secrecy in his book, "Freedom or Secrecy." He says:

"We began the century with a free government—as free as any ever devised and operated by man. The more that government becomes secret, the less it remains free. To diminish the people's information about government is to diminish the people's participation in government. The consequences of secrecy are not less because the reasons for secrecy are more. The ill effects are the same whether the reasons for secrecy are good or bad. The arguments for more secrecy may be good arguments which, in a world that is menaced by Communist imperialism, we cannot altogether refute. They are, nevertheless, arguments for less freedom."

In August of 1822, President James Madison said:

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."

Thomas Jefferson, in discussing the obligation of the press to criticize and oversee the conduct of Government in the interest of keeping the public informed, said:

"Were it left to me to decide whether we should have a government without newspapers or newspaper without government, I should not hesitate for a moment to prefer the latter. No government ought to be without censors; and where the press is free, none ever will."

President Woodrow Wilson said in 1913:

"Wherever any public business is transacted, wherever plans affecting the public are laid, or enterprises touching the public welfare, comfort or convenience go forward, wherever political programs are formulated, or candidates agreed on—over that place a voice must speak, with the divine prerogative of a people's will, the words: 'Let there be light.'"

House Report No. 1497, submitted to the House by the Committee on Government Operations to accompany S. 1160, concludes:

"A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a political truism needs repeating. And repeated it is, in textbooks and classrooms, in newspapers and broadcasts.

"The repetition is necessary because the ideals of our democratic society have outpaced the machinery which makes that society work. The needs of the electorate have outpaced the laws which guarantee public access to the facts in government. In the time it takes for one generation to grow up and prepare to join the councils of government—from 1946 to 1966—the law which was designed to provide public information about government has become the government's major shield of secrecy.

"S. 1160 will correct this situation. It provides the necessary machinery to assure the availability of government information necessary to an informed electorate."

Mr. Speaker, I was interested to learn that Leonard H. Marks, Director of the U.S. Information Agency—USIA—recently suggested before the Overseas Press Club in New York City the development of a treaty “guaranteeing international freedom of information.” To be sure, this is a commendable suggestion, and one which I would be delighted to hear more about. For the time being, however, I am concerned with the freedom-of-information question here in the United States. Here is our basic challenge. And it is one which we have a responsibility to accept.

The political organization that goes by the name of the United States of America consists of thousands of governing units. It is operated by millions of elected and appointed officials. Our Government is so large and so complicated that few understand it well and others barely understand it at all. Yet, we must understand it to make it function better.

In this country we have placed all our faith on the intelligence and interest of the people. We have said that ours is a Government guided by citizens. From this it follows that Government will serve us well only if the citizens are well informed.

Our system of government is a testimony to our belief that people will find their way to right solutions given sufficient information. This has been a magnificent gamble, but it has worked.

The passage by the House of S. 1160 is an important step toward insuring an informed citizenry which can support or oppose public policy from a position of understanding and knowledge.

The passage of S. 1160 will be an investment in the future; an investment which will guarantee the continuation of our free systems guided by the people.

Mr. Speaker, I urge the passage of this legislation. It merits the enthusiastic support of each Member of the House of Representatives.

Mr. HALL. Mr. Speaker, will the gentleman yield?

Mr. RUMSFELD. I will be happy to yield to the distinguished gentleman from Missouri.

Mr. HALL. Mr. Speaker, I appreciate the gentleman's comments. I hardly see how it can help but improve the practice of separation of the powers as it is conducted in the executive branch of the Government. However, in the days of the right to lie rather than no comment and in the days when reportorial services are being asked to be the handmaidens of Government rather than give them full disclosure, I think it is important to have this legislation.

Mr. Speaker, I want to express my strong support, and to urge the support of my colleagues for the freedom of information bill, designed to protect the right of the public to information relating to the actions and policies of Federal agencies. This bill has been a long time in coming, too long I might add, since the withholding of information, it is designed to prevent, has been a fact of life under the present administration.

I believe this bill is one of the most important pieces of legislation to be considered by Congress, and I support its enactment 100 percent.

As in all such bills, however, the mere passage of legislation will not insure the freedom of information which we hope to achieve. For there are many ways by which executive agencies, determined to conceal public information, can do so, if and when they desire. Where there is a will, there is a way, and while this bill will make that way more difficult, it will take aggressive legislative review and oversight to insure the public's right to know.

To indicate the challenge that lies ahead, I need only refer again to an article from the Overseas Press Club publication Dateline 66, which I inserted in the CONGRESSIONAL RECORD on May 12. Assistant Secretary of Defense for Public Affairs Arthur Sylvester was quoted by CBS Correspondent Morely Safer as saying at a background meeting that—

“Anyone who expects a public official to tell the truth is stupid—”

And as if to emphasize his point, Sylvester was quoted as saying, again:

Did you hear that? Stupid!

Subsequently, at Mr. Sylvester's request, I inserted his letter in reply to the charge, but, since that occasion, at least four other correspondents have confirmed the substance of Morely Safer's charges, and to this date to my knowledge, not a single correspondent present at that meeting in July of 1965, has backed up the Sylvester so-called denial.

So, I repeat that the passage of this legislation will not, in itself, insure the public's right to know, but it is an important first step in that direction. As long as there are people in the administration who wish to cover up or put

out misleading information, it will take vigorous action by the Congress and the Nation's press to make our objectives a reality. Passage of this bill is a great step, on the part of the legislative branch of the U.S. Government, toward proper restoration of the tried and true principle of separation of powers.

Mr. DOLE. Mr. Speaker, will the gentleman yield to me?

Mr. RUMSFELD. I will be happy to yield to the distinguished gentleman from Kansas, who also serves on the Special Subcommittee on Government Information.

Mr. DOLE. Mr. Speaker, I rise in support of S. 1160, which would clarify and protect the right of the public to information.

Since the beginnings of our Republic, the people and their elected Representatives in Congress have been engaged in a sort of ceremonial contest with the executive' bureaucracy over the freedom-of-information issue. The dispute has, to date, failed to produce a practical result.

Government agencies and Federal officials have repeatedly refused to give individuals information to which they were entitled and the documentation of such unauthorized withholding—from the press, the public, and Congress—is voluminous. However, the continued recital of cases of secrecy will never determine the basic issue involved, for the point has already been more than proven. Any circumscription of the public's right to know cannot be arrived at by congressional committee compilations of instances of withholding, nor can it be fixed by presidential fiat. At some point we must stop restating the problem, authorizing investigations, and holding hearings, and come to grips with the problem.

In a democracy, the public must be well informed if it is to intelligently exercise the franchise. Logically, there is little room for secrecy in a democracy. But, we must be realists as well as rationalists and recognize that certain Government information must be protected and that the right of individual privacy must be respected. It is generally agreed that the public's knowledge of its Government should be as complete as possible, consonant with the public interest and national security. The President by virtue of his constitutional powers in the fields of foreign affairs and national defense, without question, has some derived authority to keep secrets. But we cannot leave the determination of the answers to some arrogant or whimsical bureaucrat—they must be written into law.

To that end, I joined other members of this House in introducing and supporting legislation to establish a Federal public records law and to permit court enforcement of the people's right to know.

This bill would require every agency of the Federal Government to "make all its records promptly available to any person," and provides for court action to guarantee the right of access. The proposed law does, however, protect nine categories of sensitive Government information which would be exempted.

The protected categories are matters—

- "(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) interagency or intra-agency memoranda 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.

The bill gives full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties when it exempts from availability to the public matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy."

Thus, the bill takes into consideration the right to know of every citizen while affording the safeguards necessary to the effective functioning of Government.

The balances have too long been weighted in the direction of executive discretion, and the need for clear guidelines is manifest. I am convinced that the answer lies in a clearly delineated and justifiable right to know.

This bill is not perfect, and some critics predict it will cause more confusion without really enhancing the public's right to know. In my opinion, it is at least a step in the right direction and, as was stated in an editorial in the Monday, June 13, issue of the Wichita Eagle:

"It's high time this bill became law. It should have been enacted years ago. Everyone who is interested in good government and his own rights must hope that its passage and the President's approval will be swift."

Mr. JOELSON. Mr. Speaker, I am pleased to support this legislation which protects the right of the public to information. I believe that in a democracy, it is vital that public records and proceedings must be made available to the public in order that we have a fully informed citizenry. I think that the only time that information should be withheld is where there are overriding considerations of national security which require secrecy, where disclosure might result in an unwarranted invasion of personal privacy, impede investigation for law enforcement purposes, or divulge valuable trade or commercial secrets.

Mr. ROSENTHAL. Mr. Speaker, as a member of the House Committee on Government Operations, I am particularly anxious to offer my strongest support for this measure, S. 1160, and praise for its cosponsor, the gentleman from California [Mr. Moss]. I would also like to offer my thanks to our distinguished chairman, the gentleman from Illinois [Mr. DAWSON] for his firm leadership in bringing this measure before the House.

In S. 1160, we have a chance to modernize the machinery of Government and in so doing, further insure a fundamental political right. Democracies derive legitimacy from the consent of the governed. And consent is authoritative when it is informed. In assuring the rights of the citizenry to know the work of its Government, therefore, we provide a permanent check and review of power. And, as many of us on both side of the aisle have pointed out, the continuous growth of Federal powers—particularly that of the executive branch—can be cause for general concern.

It is the disposition of bureaucracies to grow. And frequently, they cover and conceal many of their practices. Institutions as well as people can be ruled by self-interest.

Accordingly, the House Government Operations Committee, and its Subcommittee on Foreign Operations and Government Information, have given particular attention to the information policies of our executive agencies. Through extensive study, the committee has found important procedural loopholes which permit administrative secrecy and thus threaten the public's right to know. Continued vigilance in this area has, for example, revised the notorious house-keeping statute which allowed agencies to withhold certain records. Similar pressure from Congress resulted in President Kennedy's and President Johnson's limitation of the use of Executive privilege in information policy.

The measure before us today continues the search for more open information procedures. For 20 years, the Administrative Procedure Act, in section III, has been an obstacle rather than a means to information availability. The section has usually been invoked to justify refusal to disclose. In the meantime, members of the public have had no remedy to force disclosures or appeal refusals. Our entire information policy, therefore, has been weighed against the right to know and in favor of executive need for secrecy.

I believe S. 1160 takes important steps to rectify that imbalance. Certain ambiguities in section III of the Administrative Procedure Act are clarified. Thus, the properly and directly concerned test access to records is eliminated. Records must now be available, in the new language, to "any person." Instead of the vague language of "good cause found" and "public interest," new standards for exemptable records are specified. And, perhaps most important, aggrieved citizens are given appeal rights to U.S. district courts. This procedure will likely prove a deterrent against excessive or questionable withholdings.

This legislation, Mr. Speaker, should be of particular importance to all Members of Congress. We know, as well as anyone, of the need to keep executive information and practices open to public scrutiny. Our committee, and particularly our subcommittee, headed by our energetic colleague from California, has put together proposals which we believe will reinforce public rights and democratic review.

Mr. POFF. Mr. Speaker, it was my privilege to support S. 1160 today designed to protect the right of the American public to receive full and complete disclosures from the agencies of their Government.

Today, as never before, the Federal Government is a complex entity which touches almost every fiber of the fabric of human life. Too often, the overzealous bureaucrat uses his discretionary power to blot out a bit of intelligence which the people have the right to know. This is true not only with respect to military activities for which there may, on occasion, be a valid reason for withholding full disclosure until after the execution of a particular military maneuver, but also in the case of strictly political decisions in both foreign and domestic fields.

Thomas Jefferson once said that if he could choose between government without newspapers or newspapers without government, he would unhesitatingly choose the latter. The press, in performing its responsibility of digging out facts about the operation of the giant Federal Government should not be restricted and hampered. Yet there are some 24 classifications used by Federal agencies to withhold information from the American people. When Government officials make such statements as "a government has the right to lie to protect itself" and "the only thing I fear are the facts," it is obvious that the need for collective congressional action in the field of public information is acute. In the unique American system, the people need to know all the facts in order that their judgments may be based upon those facts. Anything less is a dilution of the republican form of government.

Mr. BENNETT. Mr. Speaker, legislation of this type has been long needed. The delay, however, is easy to understand because it is a difficult subject in which to draw the precise lines needed without overstepping into areas that might be dangerous to our country. It is my belief that the measure before us does handle the matter in a proper and helpful manner and I am glad to support it.

Mr. CLANCY. Mr. Speaker, a number of important duties and engagements in Cincinnati prevent me from being on the House floor today. However, if it were possible for me to be present today, I would vote for the Freedom of Information Act, S. 1160.

The problem of Government secrecy and news manipulation has reached appalling proportions under the current administration. Both at home and abroad, the credibility of the U.S. Government has repeatedly been called into question.

Not only has the truth frequently been compromised, but in some instances Government spokesmen have more than distorted the facts, they have denied their existence. This shroud of secrecy and deception is deplorable. The man in the street has a right to know about his Government, and this includes its mistakes.

The Cincinnati Enquirer has, in two editorials on the subject of the public's right to know the truth about the activities of its Government, called for passage of the legislation we are considering today. I include these editorials with my remarks at this point because I believe they will be of interest to my colleagues:

[From the Cincinnati (Ohio) Enquirer, June 15, 1966]

#### LET'S OPEN UP FEDERAL RECORDS

"Next Monday the House of Representatives is scheduled to come finally to grips with an issue that has been kicking around official Washington almost since the birth of the Republic—an issue that Congress thought was solved long ago. The issue, in briefest form, is the public's right to know.

Most Americans probably imagine that their right to be informed about what their government is doing is unchallenged. They may wonder about the need for any legislation aimed at reaffirming it. But the fact of the matter is that the cloak of secrecy has been stretched to conceal more and more governmental activities and procedures from public view. Many of these activities and procedures are wholly unrelated to the nation's security or to individual Americans' legitimate right to privacy. They are matters clearly in the public realm.

The legislation due for House consideration next Monday is Senate Bill 1160, the product of a 13-year study of the entire problem of freedom of information directed by Representative JOHN E. MOSS (R., Calif.). The bill has already won Senate approval, and only an affirmative House vote next Monday is necessary to send it to President Johnson's desk.

All of the 27 Federal departments and agencies that have sent witnesses to testify before the House subcommittee that conducted hearings on the bill have opposed it. One complaint is that the issue is too complex to be dealt with in a single piece of legislation.

But Representative Moss feels—and a Senate majority obviously agree with him—that the right of Federal officials to classify government documents has been grossly misused to conceal errors and to deny the public information it is entitled to have.

The bill makes some clear and necessary exemptions—national defense and foreign policy secrets, trade secrets, investigatory files, material collected in the course of labor-management mediation, reports of financial institutions, medical files and paper designed solely for the internal use of a governmental agency.

“Most important, perhaps, the bill would put on the governmental agency the burden of proving that a particular document should be withheld from public view. As matters stand today, the person who seeks a particular document must prove that it is being improperly withheld; the Moss bill would require that the Federal agency involved prove that its release would be detrimental.

“It may be easy for rank-and-file Americans to imagine that the battle Representative Moss has been leading for more than a decade is a battle in the interests of the Nation’s information media. But the right of a free press is not the possession of the publishers and editors; it is the right of the man in the street to know. In this case, it is his right to know about his government—its failures and errors, its triumphs and its expenditures.

“The House should give prompt approval to Senate Bill 1160, and President Johnson should sign it when it reaches his desk.”

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[From the Cincinnati (Ohio) Enquirer, May 29, 1966]

#### THE RIGHT TO KNOW

“It is easy for many Americans to fall into the habit of imagining that the constitutional guarantees of a free press are a matter of interest and concern only to America’s newspaper publishers. And perhaps there are still a few publishers who entertain the same notion.

“In reality, however, the right to a free press is a right that belongs to the public. It is the main in the street’s right to know—in particular, his right to know what his servants in government are doing. Unhappily, however, it is a right whose preservation requires a battle that is never fully won. For at every level of government, there are officials who think that their particular province should be shielded from public scrutiny.

“Another important stride in the right direction came the other day when the House Government Operations Committee unanimously approved a freedom of information bill (Senate Bill 1160). The bill is an attempt to insure freedom of information without jeopardizing the individual’s right of privacy. It exempts nine specific categories of information—including national security, the investigative files of law enforcement agencies and several others. But it clearly reaffirms the citizen’s right to examine the records of his government and the right of the press to do the same in his behalf.

“Senate Bill 1160 is the culmination of a 10-year effort to clarify the provisions of the Administrative Procedure Act, which is so broad that it permits most Federal agencies to define their own rules on the release of information to the press and the public.

“The House should press ahead, accept the recommendations of its committee and translate Senate Bill 1160 into law.”

Mr. EDWARDS of Alabama. Mr. Speaker, I rise in support of S. 1160 which is effectively the same as my bill, H.R. 6739, introduced March 25, 1965.

This measure should have been approved and signed into law long ago as a means of giving the American citizen a greater measure of protection against the natural tendencies of the bureaucracy to prevent information from circulating freely.

I am hopeful that in spite of the President’s opposition to this bill, and in spite of the opposition of executive branch agencies and departments, the President will not veto it.

This measure will not by any means solve all of our problems regarding the citizen’s right to know what his Government is doing. It will still be true that we must rely on the electorate’s vigorous pursuit of the information needed to make self-government work. And we will still rely on the work of an energetic and thorough corps of news reporters.

As an example of the need for this bill I have previously presented information appearing on page 12600 of the CONGRESSIONAL RECORD for June 8. It shows that

one Government agency has made it a practice to refuse to yield information which is significant to operation of the law.

This kind of example is being repeated many times over. In a day of swiftly expanding Government powers, and in a day on which thoughtful citizens the country over are concerned with the encroachment of Government into the lives of all of us, the need for this bill is clear.

Mrs. REID of Illinois. Mr. Speaker, as the sponsor of H.R. 5021, one of the companion bills to S. 1160 which we are considering today, I rise in support of the public's right to know the facts about the operation of their Government. I rise, also, in opposition to the growing and alarming trend toward greater secrecy in the official affairs of our democracy.

It is indeed incongruous that although Americans are guaranteed the freedoms of the Constitution, including freedom of the press, there is no detailed Federal statute outlining the orderly disclosure of public information so essential to proper exercise of this freedom. Yet, the steady growth of bigger government multiplies rather than diminishes the need for such disclosure and the necessity for supplying information to the people. Certainly no one can dispute the fact that access to public records is vital to the basic workings of the democratic process, for it is only when the public business is conducted openly, with appropriate exceptions, that there can be freedom of expression and discussion of policy so vital to an honest national consensus on the issues of the day. It is necessary that free people be well informed, and we need only to look behind the Iron Curtain to see the unhappy consequences of the other alternative.

The need for a more definitive public records law has been apparent for a long time. We recognize today that the Administrative Procedure Act of 1946, while a step in the right direction, is now most inadequate to deal with the problems of disclosure which arise almost daily in a fast-moving and technological age—problems which serve only to lead our citizens to question the integrity and credibility of their Government and its administrators.

But while I do not condone indiscriminate and unauthorized withholding of public information by any Government official, the primary responsibility, in my judgment, rests with us in the Congress. We, as the elected representatives of the people, must provide an explicit and meaningful public information law, and we must then insure that the intent of Congress is not circumvented in the future. The Senate recognized this responsibility when it passed S. 1160 during the first session last year, and I am hopeful that Members of the House will overwhelmingly endorse this measure before us today.

I do not believe that any agency of Government can argue in good faith against the intent of this legislation now under consideration, for the bill contains sufficient safeguards for protecting vital defense information and other sensitive data which might in some way be detrimental to the Government or individuals if improperly released. S. 1160 contains basically the same exceptions as recommended in my bill—H.R. 5021. In sponsoring H.R. 5021, I felt that it would enable all agencies to follow a uniform system to insure adequate dissemination of authorized information, thereby removing much of the confusion resulting from differing policies now possible under existing law.

Government by secrecy, whether intentional or accidental, benefits no one and, in fact, seriously injures the people it is designed to serve. This legislation will establish a much-needed uniform policy of disclosure without impinging upon the rights of any citizen. S. 1160 is worthy legislation, and it deserves the support of every one of us.

Mr. RHODES of Arizona. Mr. Speaker, at a recent meeting of the House Republican policy committee a policy statement regarding S. 1160, freedom-of-information legislation, was adopted. As chairman of the policy committee, I would like to include at this point in the RECORD the complete text of this statement:

REPUBLICAN POLICY COMMITTEE STATEMENT ON FREEDOM OF INFORMATION  
LEGISLATION, S. 1160

"The Republican Policy Committee commends the Committee on Government Operations for reporting S. 1160. This bill clarifies and protects the right of the public to essential information. Subject to certain exceptions and the right to court review, it would require every executive agency to give public notice or to make available to the public its methods of operation, public procedures, rules, policies, and precedents.

"The Republican Policy Committee, the Republican Members of the Committee on Government Operations, and such groups as the American Newspaper Publishers Association, the professional journalism society Sigma Delta Chi, the National Editorial Association and the American Bar Association have long urged the enactment of this legislation. Due to the opposition of the Johnson-Humphrey Administration, however, this proposal has been bottled up in Committee for over a year. Certainly, information regarding the business of the government should be shared with the people. The screen of secrecy which now exists is a barrier to reporters as representatives of the public, to citizens in pursuit of information vital to their welfare, and to Members of Congress as they seek to carry out their constitutional functions.

"Under this legislation, if a request for information is denied, the aggrieved person has a right to file an action in a U.S. District Court, and such court may order the production of any agency records that are improperly withheld. So that the court may consider the propriety of withholding, rather than being restricted to judicial sanctioning of agency discretion, the proceedings are *de novo*. In the trial, the burden of proof is correctly placed upon the agency. A private citizen cannot be asked to prove that an agency has withheld information improperly for he does not know the basis for the agency action.

"Certainly, as the Committee report has stated: "No Government employee at any level believes that the 'public interest' would be served by disclosure of his failures or wrongdoings . . ." For example, the cost estimates submitted by contractors in connection with the multimillion-dollar deep sea "Mohole" project were withheld from the public even though it appeared that the firm which had won the lucrative contract had not submitted the lowest bid. Moreover, it was only as a result of searching inquiries by the press and Senator KUCHEK (R., Cal.) that President Kennedy intervened to reverse the National Science Foundation's decision that it would not be "in the public interest" to disclose these estimates.

"The requirements for disclosure in the present law are so hedged with restrictions that it has been cited as the statutory authority for 24 separate classifications devised by Federal agencies to keep administrative information from public view. Bureaucratic gobbledygook used to deny access to information has included such gems as: "Eyes Only," "Limited Official Use," "Confidential Treatment," and "Limitation on Availability of Equipment for Public Reference." This paper curtain must be pierced. This bill is an important first step.

"In this period of selective disclosures, managed news, half-truths, and admitted distortions, the need for this legislation is abundantly clear. High officials have warned that our Government is in grave danger of losing the public's confidence both at home and abroad. The credibility gap that has affected the Administration pronouncements on domestic affairs and Vietnam has spread to other parts of the world. The on-again, off-again obviously less-than-truthful manner in which the reduction of American forces in Europe has been handled has made this country the subject of ridicule and jokes. "Would you believe?" has now become more than a clever saying. It is a legitimate inquiry.

"Americans have always taken great pride in their individual and national credibility. We have recognized that men and nations can be no better than their word. This legislation will help to blaze a trail of truthfulness and accurate disclosure in what has become a jungle of falsification, unjustified secrecy, and misstatement by statistic. The Republican Policy Committee urges the prompt enactment of S. 1160."

Mr. SCHMIDHAUSER. Mr. Speaker, I believe approval of S. 1160 is absolutely essential to the integrity and strength of our democratic system of government because as the Federal Government has extended its activities to help solve the Nation's problems, the bureaucracy has developed its own form of procedures and case law, which is not always in the best interests of the public. Under the provisions of this measure, these administrative procedures will have to bear the scrutiny of the public as well as that of Congress. This has long been overdue.

Mr. ROUSH. Mr. Speaker, I rise in support of this freedom of information bill. I felt at the time it was acted upon by the Government Operations Committee, of which I am a member, that it was one of the most significant pieces of legislation we had ever acted upon. In a democracy the government's business is the people's business. When we deprive the people of knowledge of what their government is doing then we are indeed treading on dangerous ground. We are trespassing on their right to know. We are depriving them of the opportunity to examine critically the efforts to those who are chosen to labor on their behalf. The

strength of our system lies in the fact that we strive for an enlightened and knowledgeable electorate. We defeat this goal when we hide information behind a cloak of secrecy. We realize our goal when we make available, to those who exercise their right to choose, facts and information which lead them to enlightened decisions.

Mr. ANDERSON of Illinois. Mr. Speaker, I rise in support of S. 1160. The purpose of this bill is to amend section 3 of the Administrative Procedures Act and thereby to lift the veil of secrecy that makes many of the information "closets" of executive agencies inaccessible to the public. The basic consideration involved in passage of this bill, which will clarify and protect the right of the public to information, is that in a democracy like ours the people have an inherent right to know, and government does not have an inherent right to conceal.

Certainly to deny to the public information which is essential neither to government security nor to internal personal and practical functions is to deny any review of policies, findings, and decisions. It would be hard to imagine any agency, including those of executive charter, which is entitled to be above public examination and criticism.

The need for legislation to amend the present section of the Administrative Procedures Act is especially apparent when we consider that much of the information now withheld from the public directly affects matters clearly within the public domain.

For too long and with too much enthusiasm by some Government agencies and too much acquiescence by the public, executive agencies have become little fiefdoms where the head of a particular agency assumes sole power to decide what information shall be made available and then only in an attitude of noblesse oblige.

S. 1160 will amend section 3 of the Administrative Procedures Act by allowing any person access to information—not just those "persons properly and directly concerned." And if access is denied to him he may appeal the agency's decision and apply to the Federal courts.

Consider the contractor whose low bid has been summarily rejected without any logical explanation or the conscientious newspaperman who is seeking material for a serious article that he is preparing on the operations of a particular agency of Government. In many instances if records can in one fashion or another be committed to the "agency's use only" or "Government security" filing cabinets, the contractor or newsman will be denied information simply by having the agency classify him as a person not "properly and directly concerned." When this occurs, the arbitrary use of the power of government can thwart an investigation which is in the public interest.

It was Thomas Jefferson who wrote :

I have sworn upon the altar of God eternal hostility against every form of tyranny over the mind of man.

It is precisely this tyranny over the "mind of man" which is aided and abetted by a lack of freedom of information within government.

I support the efforts contained within this bill to at least partially unshackle some of the restraints on the free flow of legitimate public information that have grown up within bureaucracy in recent years.

Mr. ROGERS of Florida. Mr. Speaker, in a time where public records are more and more becoming private instruments of the Government and personal privacy part of Government record, I am pleased that we are taking steps to eliminate part of the cloud of secrecy which has covered so many parts of the Government.

As an instrument of the people, we have long had the obligation under the Constitution to lay bare the mechanics of government. But the growing tendency, I am afraid, has been to cover up through administrative "magic," much of that information which is public domain.

Through this legislation we will emphasize once again the public's right to know. It is through sheer neglect that we must again define persons "directly concerned" as the American public. For they are the most concerned. The American public must have the right of inspection into its own government or that government fails to belong to the public.

Doings out partial information only cripples the electorate which needs to be strong if a democratic government is to exist.

But this is only half the battle in keeping the scales of democracy in balance. While we are striving to keep the citizens informed in the workings of their government, we must also protect the citizen's right of privacy.

The alarming number of instances of governmental invasion into individual privacy is as dangerous, if not more so, than the instances of government se-

crecy. At almost every turn the Government has been encroaching without law into the business—and yes, even into the private thoughts—of the individual.

This is probably the fastest growing and potentially the most dangerous act in our Nation today.

The instances of wiretapping by governmental agencies have become so commonplace that it no longer stuns the average citizen. But such a repulsive act cannot afford to go uncorrected. Such practices should never be permitted without a court order.

When we discover the training of lockpickers, wiretappers, safecrackers, and eavesdroppers in governmental agencies, the bounds of a democratic society have been overstepped and we approach the realm of a police state.

Let us not be satisfied that we are correcting some of the evils of a much too secretive bureaucracy.

Let us also remember that if we do not stop those inquisitive tentacles which threaten to slowly choke all personal freedoms, we will soon forget that our laws are geared to protect personal liberty.

"Where law ends," William Pitt said, "Tyranny begins."

Action is also needed by the Congress to stop this illegal and unauthorized governmental invasion of a citizen's privacy.

Mr. GALLAGHER. Mr. Speaker, history and American tradition demand passage today of the freedom of information bill. This measure not only will close the final gap in public information laws, but it will once and for all establish the public's right to know certain facts about its government.

In recent years we have seen both the legislative and the executive branches of our Government demonstrate a mutual concern over the increase of instances within the Federal Government in which information was arbitrarily denied the press or the public in general. In 1958, Congress struck down the practice under which department heads used a Federal statute, permitting them to regulate the storage and use of Government records, to withhold these records from the public. Four years later, President Kennedy limited the concept of "Executive privilege," which allowed the President to withhold information from Congress, to only the President, and not to his officers. President Johnson last year affirmed this limitation.

But one loophole remains: Section 3 of the Administrative Procedure Act of 1946, the basic law relating to release of information concerning agency decisions and public access to Government records. S. 1160 would amend this section.

Congress enacted this legislation with the intent that the public's right to information would be respected. Unfortunately, some Government officials have utilized this law for the diametrically opposed use of withholding information from Congress, the press, and the public.

Under the cloak of such generalized phrases in section 3 as "in the public interest" or "for good cause found," virtually any information, whether actually confidential or simply embarrassing to some member of the Federal Government, could be withheld. As Eugene Paterson, editor of the Atlanta Constitution and chairman of the Freedom of Information Committee of the American Society of Newspapers said, such justifications for secrecy "could clap a lid on just about anybody's out-tray."

But more than contemporary needs, this bill relates to a pillar of our democracy, the freedom expressed in the first amendment guaranteeing the right of speech.

"Inherent in the right to speak and the right to print was the right to know—"

States Dr. Harold L. Cross, of the ASNE's Freedom of Information Committee. He pointed out:

"The right to speak and the right to print, without the right to know, are pretty empty."

James Madison, who was chairman of the committee that drafted the first Constitution, had this to say:

"Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."

This is the crux of the question. A free society needs the information required for judgments about the operation of its elected representatives, or it is no longer a free society. Naturally, a balance has to be maintained between the public's right to know and individual privacy and national security.

It is here that the freedom of information bill comes to grips with the central problem of the issue by substituting nine specific exemptions to disclosure for general categories, and by setting up a court review procedure, under which an aggrieved citizen could appeal with the withholding information to a U.S. district court.

One of the most important provisions of the bill is subsection C, which grants authority to the Federal district courts to order production of records improperly withheld. This means that for the first time in the Government's history, a citizen will no longer be at the end of the road when his request for a Government document arbitrarily has been turned down by some bureaucrat. Unless the information the citizen is seeking falls clearly within one of the exemptions listed in the bill, he can seek court action to make the information available.

An important impact of the provision is that in any court action the burden of the proof for withholding is placed solely on the agency. As might be expected, Government witnesses testifying before the House Foreign Operations and Government Information Subcommittee on the bill, vigorously opposed the court provision. They particularly did not like the idea that the burden of proof for withholding would be placed on the agencies, arguing that historically, in court actions, the burden of proof is the responsibility of the plaintiff. But, as the committee report points out:

"A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action."

It can be anticipated that the judicial review provision, if nothing else, will have a major salutary effect, in that Government employees, down the line, are going to be very cautious about placing a secrecy stamp on a document that a district court later might order to be produced. A monumental error in judgment of this type certainly will not enhance an employee's status with his superiors, nor with anyone else in the executive branch.

I am glad to note the judicial review section has an enforcement clause which provides that if there is a noncompliance with a court order to produce records, the responsible agency officers can be cited for contempt.

There has been some speculation that in strengthening the right of access to Government information, the bill, as drafted, may inadvertently permit the disclosure of certain types of information now kept secret by Executive order in the interest of national security.

Such speculation is without foundation. The committee, throughout its extensive hearings on the legislation and in its subsequent report, has made it crystal clear that the bill in no way affects categories of information which the President—as stated in the committee report—has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501.

I would like to reiterate that the bill also prevents the disclosure of other types of "sensitive" Government information such as FBI files, income tax auditors' manual, records of labor-management mediation negotiations and information a private citizen voluntarily supplies.

The FBI would be protected under exemption No. 7 prohibiting disclosures of "investigatory files." Income tax auditors' manual would be protected under No. 2—"related solely to internal personnel rules and practices." Details of labor-management negotiations would be protected under No. 4—"trade secrets and commercial or financial information." Information from private citizens would be protected under No. 6—information which would be an "invasion of privacy."

With the Government becoming larger and more complex, now is the time for Congress to establish guidelines for informational disclosure. As secrecy in Government increases, freedom of the people decreases; and the less citizens know about their Government, the more removed they become from its control. The freedom of information bill, Mr. Speaker, gives meaning to the freedom of speech amendment.

MR. GURNEY. Mr. Speaker, I intend to vote in favor of this vitally important freedom of information bill. With all we hear about the necessity of "truth" bills, such as truth in lending and truth in packaging, I think it is significant that the first of these to be discussed on the floor of this House should be a "truth in Government" bill.

Surely there can be no better place to start telling the truth to the people of America than right here in their own Government. This is especially true in a time such as we have now, when the "credibility gap" is growing wider every day. It has come to the point where even Government leaders cannot believe each other.

This is a bill that should not be necessary—there should be no question but that records of a nonsecurity and nonpersonal nature ought to be available to the public. But recent practice in many agencies and departments has made more than clear the need for action such as we are taking today.

We cannot expect the American people to exercise their rights and responsibilities as citizens when they cannot even find out what their Government is doing with their money. If it were permitted to continue, this policy of secrecy could be the cornerstone of a totalitarian bureaucracy. Even today it constitutes a serious threat to our democratic institutions.

It is not only the citizens and the press who cannot get information from their Government. Even Senators and Members of the House of Representatives are told by nonsecurity departments that such routine information as lists of their employees will not be furnished them. Incredible as this is, I think most of us here have run into similar roadblocks.

The issue is a simple one: that the public's business ought to be open to the public. Too many agencies seem to have lost sight of the fact that they work for the American people. When this attitude is allowed to flourish, and when the people no longer have the right to information about their Government's activities, our system has been seriously undermined.

The bill we consider today is essential if we are to stop this undermining and restore to our citizens their right to be well-informed participants in their Government.

I urge by colleagues to join me in voting for the passage of this bill.

Mrs. DWYER. Mr. Speaker, the present bill is one of the most important to be considered during the 89th Congress. It goes to the heart of our representative and democratic form of government. If enacted, and I feel certain it will be, it will be good for the people and good for the Federal Government.

This bill is the product of 10 years of effort to strengthen the people's right to know what their Government is doing, to guarantee the people's access to Government records, and to prevent Government officials from hiding their mistakes behind a wall of official secrecy.

During these 10 years, we have conducted detailed studies, held lengthy and repeated hearings, and compiled hundreds of cases of the improper withholding of information by Government agencies. Congress is ready, I am confident, to reject administration claims that it alone has the right to decide what the public can know.

As the ranking minority member of the Committee on Government Operations, and as a sponsor of legislation similar to the pending bill, I am proud to pay tribute to the chairman and members of the Subcommittee on Foreign Operations and Government Operations for the long and careful and effective work they have done in alerting the country to the problem and in winning acceptance of a workable solution.

Under present law, Mr. Speaker, improper withholding of information has increased—largely because of loopholes in the law, vague and undefined standards, and the fact that the burden of proof is placed on the public rather than on the Government.

Our bill will close these loopholes, tighten standards, and force Federal officials to justify publicly any decision to withhold information.

Under this legislation, all Federal departments and agencies will be required to make available to the public and the press all their records and other information not specifically exempted by law. By thus assuring to all persons the right of access to Government records, the bill will place the burden of proof on Federal agencies to justify withholding of information. And by providing for court review of withholding of information, the bill will give citizens a remedy for improper withholding, since Federal district courts will be authorized to order the production of records which are found to be improperly withheld.

On the other hand, Mr. Speaker, the legislation is designed to recognize the need of the Government to prevent the dissemination of official information which could damage the national security or harm individual rights. Among the classes of information specifically exempted from the right-to-know provisions of the bill are national defense and foreign policy matters of classified secrecy as specifically determine by Executive order, trade secrets and private business data, and material in personnel files relating to personal and private matters the use of which would clearly be an invasion of privacy.

Aside from these and related exceptions, relatively few in number, it is an unassailable principle of our free system that private citizens have a right to

obtain public records and public information for the simple reason that they need it in order to behave as intelligent, informed and responsible citizens. Conversely, the Government has an obligation, which the present bill makes clear and concrete, to make this information fully available without unnecessary exceptions or delay—however embarrassing such information may be to individual officials or agencies or the administration which happens to be in office.

By improving citizens' access to Government information, Mr. Speaker, this legislation will do two things of major importance: it will strengthen citizen control of their Government and it will force the Government to be more responsible and prudent in making public policy decisions.

What more can we ask of any legislation?

Mr. MATSUNAGA. Mr. Speaker, I rise in support of S. 1160, a bill to clarify and protect the right of the public to information, and to commend the gentleman from California [Mr. Moss] and his subcommittee for reporting the bill out. As chairman of the subcommittee, the gentleman from California [Mr. Moss] has devoted 10 years to a fight for acceptance by the Congress of freedom-of-information legislation. It was not until 1964 that such a bill was passed by the Senate.

Last year the Senate again acted favorably on such a bill and now in this House, the Subcommittee on Government Operations has finally reported the bill to the floor principally through the effort of the gentleman from California [Mr. Moss].

The passage of this bill is in culmination of his long and determined effort to protect the American public from the evils of secret government. Although there has been some talk that the Government agencies are against this measure, the President will certainly not veto it. When signed into law, this bill will serve as a lasting monument to the distinguished and dedicated public servant from California, Mr. JOHN E. MOSS.

As it has been analytically observed by the editor of the Honolulu Star Bulletin:

"What is demanded is not the right to snoop. What is demanded is the people's right to know what goes on in the government that rules them with their consent.

Representative government—government by the freely elected representatives of the people—succeeds only when the people are fully informed.

All sorts of evils can hide in the shadows of governmental secrecy. History has confirmed time and again that when the spotlight is turned on wrongdoing in public life, the people are quick to react.

Freedom of information—the people's right to know—is the best assurance we have that our government will operate as it should in the public interest."

Mr. Speaker, I congratulate the gentleman from California [Mr. Moss] upon his final success in his untiring efforts, for there is no doubt in my mind that this bill will pass without any dissenting vote, but I nevertheless urge unanimous vote.

Mr. HUNGATE. Mr. Speaker, democratic forms of government, in order to be truly representative of popular will, need to be readily accessible and responsive to the demands of the people. Our system of government has characteristically offered numerous avenues of access open to the people. It is equally true that, down through the years, our governmental machinery has grown increasingly complex, not only in regard to size, but in the performance of its activities as well. This growing complexity has, quite justifiably, brought to ultimate fruition a revitalized awareness and concern for the need and right of the people to have made available to them information about the affairs of their Government.

S. 1160, the Federal Public Records Act, a bill authored by my distinguished and capable colleague from Missouri, Senator EDWARD V. LONG, captures the imagination of countless millions of responsible Americans, who know only too well the frustration of being rejected information to which they justly deserve access.

For far too long, guidelines for the proper disclosure of public information by the Government has been ambiguous and at times have placed unwarranted restraint on knowledge that, according to our democratic tradition, should be made readily available to a free and literate society.

Mr. Speaker, I congratulate the gentleman from California, [Mr. Moss], chairman of the Government Information Subcommittee of the House of Representatives, and my colleague from Missouri, Senator EDWARD V. LONG, for their spirited conviction and farsightedness in working for this historical landmark for freedom. It is both an honor and privilege to support the passage of this bill.

Mr. CLARENCE J. BROWN, JR. Mr. Speaker, I should like to go on record as favoring S. 1160, the freedom of information bill; H.R. 13196, the Allied Health Professions Training Act; and H.R. 15119, the Unemployment Insurance Amendments of 1966. All of these measures passed the House last week, but my vote was unrecorded due to my absence from the House when the bills were acted upon.

During this period I was in Georgia, where I had the pleasure of addressing the Georgia Press Association, to meet a commitment made several months ago when I was named judge of the Georgia Press Association's annual Better Newspapers Contest.

My absence from the House came at a time when it was apparent that no very controversial legislation would be up for consideration and vote. These three bills passed either unanimously or with a very small negative vote.

As you might properly assume from the reason for my absence, I am particularly interested in and pleased with the passage of the freedom of information bill, which originated in the Government Operations Committee on which I serve.

I am also pleased at the passage of H.R. 15119, the unemployment insurance amendments bill which provides for a long overdue modernization of the Federal-State unemployment compensation system.

These bills have long been needed, and I am proud to be a Member of the House in the 89th Congress at the time of their passage.

As a newspaper publisher and radio station manager, I have been interested in public access to public records and public business since my journalistic career began. As a member of Sigma Delta Chi and a past president of the Central Ohio Professional Chapter of Sigma Delta Chi, I am dedicated to the proposition expressed in the biblical admonition that the "truth shall make men free." I am also a supporter of Jefferson's view suggesting that, given a choice between government without newspapers and newspapers without government, I would prefer the latter.

If one cannot support the principle of the availability to the public of its governmental records, as covered in this bill, one cannot support the principle of freedom and democracy upon which our Nation is built.

While as I feel the freedom of information bill could still be strengthened in some respects, I am delighted with it as a tremendous step in reaffirming the people's right to know. Every good journalist also rejoices, because the bill will make easier the job of the dedicated, inquiring newspaperman. It will not prevent "government by press release" or the seduction of some reporters by thinking that "handouts" tell the whole story, but it does make life a little easier for all of us who just want to get the facts, Mr. Speaker.

While the record will show that I was paired in favor of all three of these bills, I did want to take this opportunity to express my support publicly for them and, in particular, for the freedom of information bill, which I think is a real milestone for this Nation.

The SPEAKER. The question is on the motion of the gentleman from California [Mr. Moss], that the House suspend the rules and pass the bill S. 1160.

The question was taken; and the Speaker announced that two-thirds had voted in favor thereof.

Mr. REID of New York. 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 Doorkeeper will close the doors, the Sergeant at Arms will notify absent Members, and the Clerk will call the roll.

The question was taken; and there were—yeas 308 nays 0 not voting 125, as follows:

[Omitted]

## Calendar No. 1153

88TH CONGRESS }  
2d Session }

SENATE }

REPORT  
No. 1219CLARIFYING AND PROTECTING THE RIGHT OF THE  
PUBLIC TO INFORMATION AND FOR OTHER PURPOSES

JULY 22, 1964.—Ordered to be printed

Mr. LONG of Missouri, from the Committee on the Judiciary, submitted the following

## R E P O R T

[To accompany S. 1666]

The Committee on the Judiciary, to which was referred the bill (S. 1666) to clarify and protect the right of the public to information, and for other purposes, having considered the same, reports favorably thereon, with amendments and recommends that the bill, as amended, do pass.

## AMENDMENTS

*Amendment No. 1.* On page 1, line 7, and page 2, line 1, delete "in the public interest" and insert in lieu thereof "for the protection of the national security".

*Amendment No. 2.* On page 2, line 3, after the word "Register" insert "for the guidance of the public" and delete this same phrase on lines 15 and 16 of page 2.

*Amendment No. 3.* On page 2, lines 4 and 5, delete "including delegations by the agency of authority".

*Amendment No. 4.* On page 2, line 6, after "which," insert "the officers from whom," and on line 7, change the first "or" to a comma and, after "requests" insert "or obtain decisions", and on page 2, line 11, after "available" insert "or the places at which forms may be obtained".

*Amendment No. 5.* On page 2, line 13, after "rules" insert "of general applicability"; and on page 2, line 15, after "interpretations" insert "of general applicability".

*Amendment No. 6.* On page 2, line 17, delete "No" and insert in lieu thereof "Except to the extent that he has actual notice of the terms thereof, no".

*Amendment No. 7.* On page 2, lines 19 and 20, delete "organization, procedure, or other rule, statement, or interpretation thereof" and insert in lieu thereof "matter".

*Amendment No. 8.* On page 2, line 21, delete "so", and before the period insert "therein or in a publication incorporated by reference in the Federal Register".

*Amendment No. 9.* On page 2, beginning on line 23 with "(1)" delete all through "practices of any agency" on line 3 of page 3 and insert in lieu thereof—

(1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute.

*Amendment No. 10.* On page 3, line 6, before "orders" insert "all"; on page 3, line 7, after "cases" insert a comma; on page 3, line 7, delete "all" and insert in lieu thereof "those"; on page 3, line 8, after "interpretations" insert "which have been"; on page 3, line 8, after "agency" insert a comma; on page 3, line 8, delete "and affecting" and insert in lieu thereof "affect"; and on page 3, line 9, after "public," insert "and are not required to be published in the Federal Register".

*Amendment No. 11.* On page 3, lines 11 and 12, delete "protect the public interest" and insert in lieu thereof "prevent a clearly unwarranted invasion of personal privacy,"; on page 3, lines 13 and 14, delete "an opinion, order, rule, statement, or interpretation" and insert in lieu thereof "an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation"; and on page 3, line 14, delete "such cases" and insert in lieu thereof "any case".

*Amendment No. 12.* On page 3, line 17, delete "adequate" and insert in lieu thereof "identifying", and on page 3, line 19, after "interpretation" add "of general applicability".

*Amendment No. 13.* On page 3, lines 19 and 20, delete "No final order, opinion, rule, statement or policy, or interpretation" and insert in lieu thereof—

No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted or promulgated after the effective date of this Act.

*Amendment No. 14.* On page 3, line 23, before the period insert "or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof".

*Amendment No. 15.* On page 4, line 1, before "its" insert "all".

*Amendment No. 16.* On page 4, beginning with "(1)" on line 3, delete all through "matters." on line 8, and insert in lieu thereof—

(1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure

of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (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.

*Amendment No. 17.* On page 4, line 8, delete "The" and insert in lieu thereof "Upon complaint, the" and on page 4, lines 11 and 12, delete "upon complaint".

*Amendment No. 18.* On page 4, line 12, before "to order" insert "to enjoin the agency from further withholding, and".

*Amendment No. 19.* On page 4, line 18, add the following:

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.

*Amendment No. 20.* On page 4, line 20, delete "individual" and insert in lieu thereof "final", and on page 4, line 22, after "defense" insert "or foreign policy".

*Amendment No. 21.* On page 5, line 4, after "Congress." add the following subsections:

(f) As used in this section, "Private party" means any party other than an agency.

(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act.

#### PURPOSE OF AMENDMENTS

*Amendment No. 1.* The change of standard from "in the public interest" to "for the protection of the national security" is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase "public interest" in section 3(a) of the Administrative Procedure Act (and in S. 1666 as it was introduced) has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended—the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with this section's general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.

*Amendment No. 2.* It is the purpose of this change to have the phrase "for the guidance of the public" changed from a limitation in subsection (C) to a descriptive phrase applicable to all matter being published in the Federal Register.

*Amendment No. 3.* Under the existing Administrative Procedure Act, publication of delegations of authority are limited to "delegations by the agency of final authority." As very little *final* authority is normally delegated, there have been very few publications by agencies of delegations of authority. In an attempt to correct this unforeseen weakness in the Administrative Procedure Act, the drafters of S. 1666 deleted the word "final." However, as has been pointed out in agency comments to the committee, inclusion in the Federal Register of *all* delegations would result in the publication of a mass of unwarranted and unwanted material in the Register, assuming that agencies could and would comply with the requirement. Therefore, it is believed that it would be preferable to return to the original Senate version of the Administrative Procedure Act which did not contain a specific provision with respect to delegations. It is believed that proper descriptions of central and field organizations should include a description of those delegations of authority which are of interest to the public.

*Amendment No. 4.* This change, which complements that made by amendment No. 3, is designed to spell out in more detail that information which it is necessary for the public to have if it is to be able to deal efficiently with its Government. The public should have information as to the officers from whom it can obtain decisions.

*Amendment No. 5.* In section 2 of the Administrative Procedure Act, rules are defined in such a way that there is no distinction between those of particular applicability (such as rates) and those of general applicability. It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability or legion in number and have no place in the Federal Register and are presently excepted but by more cumbersome language.

*Amendment No. 6.* The provision regarding actual notice has been added to insure that a person having actual notice is equally bound by a rule as a person having notice by publication of the matter in the Federal Register. Certainly actual notice should be equally as effective as constructive notice.

In their comments upon the bill, many agencies gave examples of rules and procedures of which interested parties would have actual notice before there was any opportunity to have the rules or procedures published in the Federal Register and thus given constructive notice. For example, the Forest Service might close a forest, forbid fishing in a certain stream, or take many similar actions simply by posting signs of the rule in conspicuous places. Any person reading the sign would be more effectively informed than by relying upon knowledge of the content of the Federal Register.

*Amendment No. 7.* This is a purely grammatical change. It is believed that "matter" covers "organization, procedure, or other rule, statement, or interpretation thereof."

*Amendment No. 8.* There are many agencies whose activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc. It would seem advantageous to avoid the repetition of much of this material in the Federal Register when it can be incorporated by reference and is readily available to interested members of the public. This is one way in which the Federal Register can be kept down to a manageable size.

However, the items listed in this subsection must be in the Federal Register to be enforceable, either by actual incorporation or incorporation by reference. For purposes of this subsection, the latter phrase is defined to include: (1) uniformity of indexing, (2) clarity that incorporation by reference is intended, (3) precision in description of the substitute publication, (4) availability of the incorporated material to the public, and, most important, (5) that private interests are protected by completeness, accuracy, and ease in handling.

In connection with this change, it is not intended that only a few persons having a special working knowledge of an agency's activities be aware of the location and scope of these materials. Any member of the public must be able to familiarize himself with the enumerated items in this subsection by the use of the Federal Register, or the statutory standards mentioned above will not have been met.

*Amendment No. 9.* This change involves the redrafting of the three exceptions which are to govern subsection (b) in order that the exceptions in the various subsections have some uniformity of order.

Exception No. 1 in subsections (a), (b), and (c) relate to "national security" or "national defense or foreign policy"; and exception No. 2 relates to "internal management" or "internal personnel rules and practices." It will be noted that there is a broader exemption in subsections (a), i.e., "national security," than in subsection (b), i.e., "specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy." Also, it will be noted that subsections (b) and (c) have the additional exception, (3), covering matter which "is specifically exempted from disclosure by statute."

*Amendment No. 10.* These changes were made to define more precisely that matter which must be made available for public inspection and copying; it deletes the necessity to make available that material which is published in the Federal Register.

As the legislation is redrafted, there are three categories of agency material that are covered by the provisions of section (3b) providing for inspection and copying. These three are: (1) *all* final opinions, (2) *all* orders made in the adjudication of cases, (3) those rules, statements of policy, and interpretations which have been (a) adopted by the agency, (b) affect the public, and (c) are not required to be published in the Federal Register.

Thus (a), (b), and (c) apply only to the third category: rules, statements of policy, and interpretations.

The substantive reason for the amendment is to clarify whatever agency action is formally adopted by the agency, affects the public, and is not otherwise required to be published or made publicly available, is subject to section 3(b)'s provisions.

However, certain rules, interpretations, and statements of policy may not affect the public. For example, rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like may be adopted by the agency and not be required to be published in the Federal Register.

The term "affect the public" should be construed broadly to cover such materials as agency manuals issued to agency personnel which set forth procedures for determining entitlement to claims or benefits and the like.

*Amendment No. 11.* S. 1666 contains a provision to permit agencies to delete certain identifying details in opinions, orders, rules, state-

ments of policy, and interpretations. Agencies would be permitted to do so "to the extent required to protect the public's interest." It is believed that this is a proper standard for deletions of identifying details in the case of rules, statements of policy, or interpretations. However, such a standard is not readily applicable to or proper with respect to opinions and orders; it is believed that the correct standard here is "clearly unwarranted invasion of personal privacy." This change is interrelated to an additional exemption placed in subsection (c). (See amendment No. 16, *infra*.)

*Amendment No. 12.* This change substitutes the more specific term "identifying" for the vague term "adequate" as a modifier of "Index." This is, in fact, what the agencies' indexes should already do, i.e., identify the materials so that interested persons may easily find them. The criterion is that any competent practitioner who exercises diligence may familiarize himself with the materials through use of the index.

The words "of general applicability" were added for the same reasons they were added in amendment No. 5 (*supra*).

*Amendment No. 13.* This change makes the requirement of indexing prospective in application. It is necessary because some agencies have not kept any form of index, and will be overburdened with the task of indexing all their rules, statements, etc., retrospectively.

*Amendment No. 14.* As with amendment No. 6, actual notice is considered at least the equal of constructive notice.

*Amendment No. 15.* The addition of the word "all" before "its records" is to make clear that there is not intended to be any silent limitations attached to the records which are to be made available to the public.

*Amendment No. 16.* By this amendment, the three exceptions in subsection (c) are renumbered, rephrased, and supplemented by four additional exceptions.

Exceptions Nos. 1, 2, and 3 are the same as in subsection (b).

Exception No. 4 is for "trade secrets and other information obtained from the public and customarily privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses.

Exception No. 5 relates to "those parts of intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency

Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public.

Exception No. 6 relates to "clearly unwarranted invasion of personal privacy." In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording "and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are forced to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

Exception No. 7 deals with "investigatory files." As was the case with "trade secrets," it was originally thought that many agencies had statutory exemption for investigatory files. In fact, they do not; and there is a general consensus that such an exemption should be placed in this statute.

Exception No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.

*Amendment No. 17.* This amendment is purely grammatical.

*Amendment No. 18.* The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power.

*Amendment No. 19.* This is another addition which has been made to avoid any possible misunderstanding as to the courts' powers.

Further, this change would give precedence to actions for withholding. Without this, the remedy might be of little practical value.

*Amendment No. 20.* It was pointed out in the comments of the agencies that there might be considerable disadvantage of disclosure of preliminary votes by agency members. The committee agrees that this subsection should apply only to final votes.

*Amendment No. 21.* This remedies a discrepancy caused by use of the term "private party" in this act without being otherwise defined.

The 1-year period before this act goes into effect is to allow ample time for the agencies to conform their practices to the requirements of this act.

## PURPOSE OF BILL

In introducing the present bill, S. 1666, Senator Long quoted the words of Madison, who was chairman of the committee which drafted the first amendment:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

At no time in our history has this been truer than it is today, when the very vastness of our Government and its myriad of agencies makes it so difficult for the electorate to obtain that "popular information" of which Madison spoke. Only when one further considers that hundreds of departments, branches, and agencies are not directly responsible to the people, does one begin to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure. Many witnesses on S. 1666 testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," "required for good cause to be held confidential," and "properly and directly concerned."

It is the purpose of the present bill (S. 1666) to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. 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.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

## HISTORY OF LEGISLATION

After it became apparent that section 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.

The first of these proposals arose out of recommendations by the Hoover Commission Task Force, S. 2504, 84th Congress, introduced by Senator Wiley and S. 2541, 84th Congress, by Senator McCarthy. These were quickly followed by the Henning's bill, S. 2148, 85th, and by S. 4094, 85th, introduced by Senators Ervin and Butler, which was incorporated as a part of the proposed Code of Federal Administrative Procedure.

S. 4094 was reintroduced by Senator Hennings in the 86th Congress as S. 186. This was followed in the second session by a slightly revised version of the same bill, numbered S. 2780. Senators Ervin and Butler reintroduced S. 4094 which was now designated S. 1070, 86th Congress.

During the past Congress, Senator Carroll introduced S. 1567, co-sponsored by Senators Hart, Long, and Proxmire. Also introduced were the Ervin bill, S. 1887, its companion bill in the House, H.R. 9926, S. 1907 by Senator Proxmire, and S. 3410 introduced by Senators Dirksen and Carroll.

Although hearings were held on the Henning's bills, and considerable interest was aroused by all of the bills, no legislation resulted.

## INADEQUACY OF PRESENT LAW

The present section 3 of the Administrative Procedure Act, which would be replaced by S. 1666, is so brief that it can be profitably placed at this point in the report:

## PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (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—

(a) RULES. Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—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.

(c) **PUBLIC RECORDS.**—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.

In retrospect, the serious deficiencies in this section are glaringly obvious. They fall into four categories:

(1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest \* \* \*." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of interpretations of this phrase by Federal officials who wish to withhold information.

(2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it negates this command by adding the following limitation: "\* \* \* except those required for good cause to be held confidential \* \* \*."

(3) As to public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.

**PRESENT SECTION 3 OF ADMINISTRATIVE PROCEDURE ACT IS WITHHOLDING STATUTE, NOT DISCLOSURE STATUTE**

It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Precisely the opposite has been true: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish disclosed.

Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no ingenuity for any official to think up a reason why a piece of information should not be withheld (1) as a matter of "public interest," (2) "for good cause found," or (3) that the person making the request is not "properly and directly concerned." And, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available

## WHAT S. 1666 WOULD DO

S. 1666 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(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. It also provides a different set of standards in the three different subsections that deal with different types of information.

(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 right to privacy and a need for confidentiality in some aspects of Government operations and these are protected as specifically as possible; 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.

## AGENCY COMMENTS TO S. 1666

The Government agencies in their comments, both oral and written, which are on file with the committee, pointed to a number of types of Government files which were not exempted from disclosure but which, they believe, should be exempted and which are covered by the amendments proposed herein. A fairly detailed description of the bill, as amended, follows:

## DESCRIPTION OF SUBSECTION (a)

Subsection (a) deals entirely with publication of material in the Federal Register. This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of *too much* publication rather than *too little*.

There are, however, some changes. The vague and objectionable standard of "public interest" has been replaced by "national security," so that, under the revised subsection, the requirement for publication would have only two exceptions:

- (1) any function of the United States requiring secrecy for the protection of the national security, or (2) any matter relating solely to the internal management of an agency \* \* \*.

There are a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.

There is also a provision, suggested by a number of agencies, for incorporation of other publications by reference in the Federal Register. This may be helpful in reducing the bulky present size of the Register.

The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added for several reasons. The old sanction was inadequate and unclear. The new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights. This gives added incentive to the agencies to publish the required material.

The following technical changes were also made with regard to subsection 3(a).

The phrase "~~\* \* \* but not rules addressed to and served upon named persons in accordance with law \* \* \*~~" was stricken because section 3(a) as amended only requires the publication of rules of general applicability.

"Rules of procedure" was added to remove an uncertainty. "Descriptions of forms available" was added to eliminate the need of publishing lengthy forms.

The new subsection 3(a)(2)(D) is an obvious change, added for the sake of completeness and clarity.

#### DESCRIPTION OF SUBSECTION (b)

Subsection (b) of S. 1666 [as subsec. (b) of sec. 3 of the Administrative Procedure Act] deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available.

There are three categories of exceptions. The first two are similar to those in subsection (a), and relate to matter which (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; or (2) relates solely to the internal personnel rules and practices of any agency. It will be noted that these exemptions are similar to those in subsection (a), but more tightly drawn.

Exception No. 3 relates to matter which "is specifically exempted from disclosure by statute." This exception has been added to insure that S. 1666 is not interpreted to override specific statutory exemptions.

With the above three exceptions, agencies must make available for public inspection and copying all final opinions (including concurring and dissenting opinions); all orders made in the adjudication of cases; and those rules, statements of policy, and interpretations which have been adopted by the agency, which affect the public, and which are not required to be published in the Federal Register.

There is a provision for the deletion of certain details in orders and opinions to prevent "a clearly unwarranted invasion of personal privacy." The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.

Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably

with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion, which the agency knows about, but which has been unavailable to the citizen simply because he had no way in which to discover it. However, considerations of time and expense cause this indexing requirement to be made prospective in application only.

Subsection (b) contains its own sanction that orders, opinions, rules, etc., which are not properly indexed and made available to the public may not be relied upon or cited as precedent by an agency.

There are also a number of technical changes in section 3(b):

The phrase “\* \* \* and copying \* \* \*” was added because it is frequently of little use to be able to inspect orders, rules, or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

The addition of “\* \* \* concurring and dissenting opinions \* \* \*” is added to insure that, if one or more agency members dissent or concur, the public as well as the parties should have access to these views and ideas.

The enumeration of orders, rules, etc., defines what materials are subject to section 3(b)'s requirements. The “unless” clause was added to provide the agencies with an alternative means of making these materials available through publication.

#### DESCRIPTION OF SUBSECTION (c)

Subsection (c) deals with “agency records” and would have almost the reverse result of present subsection (c) which deals with “public records.” Whereas the present subsection 3(c) of the Administrative Procedure Act has been construed to authorize widespread withholding of information, subsection 3(c) of S. 1666 requires its disclosure except in certain enumerated categories. The first three of these exceptions are the same as those in subsection (b).

The fourth exception is for “trade secrets and other information obtained from the public and customarily privileged or confidential.” This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges. To the extent that the information is not covered by this or the other exceptions, it would be available to public inspection, subject to the payment of lawfully prescribed fees to cover the expense of making the information available, such as bringing it from storage warehouses.

Exception No. 5 would exempt “intraagency or interagency memoranda or letters dealing solely with matters of law or policy.” This exemption was made upon the strong urging of virtually every Government agency. It is their contention, and one that the committee believes has merit, that there are certain governmental processes relating to legal and policy matters which cannot be carried out efficiently if they must be carried out “in a goldfish bowl.” Govern-

ment officials would be most hesitant to give their frank and conscientious opinion on legal and policy matters to their superiors and coworkers if they knew that, at any future date, their opinions of the moment would be spread on the public record. The committee is of the opinion that the Government cannot operate effectively or honestly under such circumstances. Exception No. 5 has been included to cover this situation, and it will be noted that there is no exemption for matters of a factual nature.

Exception No. 6 contains an exemption for "personnel files, medical files, and similar matter, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." As with "trade secrets," before the receipt of agency comments and before the hearings, there was a belief that there was specific statutory authority in most cases to cover such things as personnel files, medical files, etc. However, it was discovered that such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., had great quantities of files, the confidentiality of which was maintained by rule but without statutory authority. There is a general consensus that these "personnel files" should not be opened to the public, and the committee again decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption will be held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."

Exception No. 7 is an exemption for "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." It was believed that most agencies had statutory authorization for withholding investigatory files. However, this proved to be incorrect, and even such agencies as the FBI did not possess such authority. The exemption covers investigatory files in general, but is limited in time of application.

Exception 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such agencies.

Subsection (c) contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel. The aggrieved person can bring an action in the district court where he resides, has his place of business, or in which the agency is situated. If the court finds that the information was wrongfully withheld, the court may require the agency to pay the cost and reasonable attorney's fees of the complainant. This power of the court to assess costs and reasonable attorney's fees is provided so that a private citizen or the press will be less prone to hesitate to use the remedy provided in section 3(c) because of financial inability or risk.

That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency and requiring it to sustain its action by a preponderance of the evidence puts the task of justifying and withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has

improperly withheld public information, when he will not know the reasons for it.

The court is authorized to give actions under this subsection precedence on the docket over other causes. Complaints of wrongful withholding shall be heard "at the earliest practicable date and expedited in every way."

#### DESCRIPTION OF SUBSECTION (d)

This subsection provides that a record be kept of all final votes by agency members in every agency proceeding and that this record of votes be available to the public.

Agency practice in this area varies. This change makes the publication of final votes of agency members a uniform practice and provides the public with a very important part of the agency's decisional process.

The only exemptions are to "protect the national defense or foreign policy" of the United States.

#### DESCRIPTION OF SUBSECTION (e)

The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exceptions in section 3. Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.

#### CONCLUSION

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.

A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended.

#### CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law (60 Stat. 237) 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):

#### PUBLIC INFORMATION

SEC. 3. [Except to the extent there is involved (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—]

(a) **[RULES.—]** *PUBLICATION IN THE FEDERAL REGISTER.—Except to the extent that there is involved (1) any function of the United States requiring secrecy for the protection of the national security or (2) any matter relating solely to the internal management of an agency, every agency shall separately state and currently publish in the Federal Register for the guidance of the public [(1)] (A) descriptions of its central and field organization [including delegations by the agency of final authority] and the established places at which, the officers from whom, and methods whereby, the public may secure information, [or] make submissions or requests or obtain decisions; [(2)] (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 [as well as], 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; [and (3)] (C) 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 [for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law.] and (D) every amendment, revision, or repeal of the foregoing. Except to the extent that he has actual notice of the terms thereof, no person shall in any manner be required to resort to, or be bound or adversely affected by any [organization or procedure] matter required to be published in the Federal Register and not [so] published therein or in a publication incorporated by reference in the Federal Register.*

(b) **AGENCY OPINIONS [AND], ORDERS, AND RULES.—***Except to the extent that matter (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute, every agency shall, [publish or] in accordance with published rules, make available [to] for public inspection and copying all final opinions [or] (including concurring and dissenting opinions) and all orders made in the adjudication of cases, [(except those required for good cause to be held confidential and not cited as precedents)] and [all] those rules, statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register, unless such opinions, orders, rules, statements, and interpretations 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 or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any 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 each final order, opinion, rule, statement of policy, and interpretation of general applicability. No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted or promulgated after the effective date of this Act may be relied upon, used, or cited as precedent*

by any agency against any private party unless it has been indexed and either made available or published as provided in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

(c) **[PUBLIC] AGENCY RECORDS.**—**[Save as otherwise required by statute, matters of official record]** Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, **[be made]** make all its records promptly available to any person **[to persons properly and directly concerned except information held confidential for good cause found.]** except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (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. 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 is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of 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 by a preponderance of the evidence. 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 except to the extent required to protect the national defense or foreign policy such record shall be available for public inspection.

(e) **LIMITATION OF EXEMPTION.**—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.

(f) As used in this section "Private party" means any party other than an agency.

(g) **EFFECTIVE DATE.**—This amendment shall become effective one year following the date of the enactment of this Act.

## S. 1666 Considered and Passed Senate, July 28, 1964, 110 Cong. Rec. 17086

## AMENDMENT OF ADMINISTRATIVE PROCEDURE ACT

Mr. MANSFIELD. Mr. President, with the concurrence of the distinguished minority leader, the Senator from Illinois [Mr. DIRKSEN], and the distinguished Senator from Missouri [Mr. LONG], I ask unanimous consent that the Senate proceed to the consideration of Calendar No. 1153, Senate bill 1666.

The ACTING PRESIDENT pro tempore. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (S. 1666) 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.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with amendments, on page 1, line 7, after the word "secrecy", to strike out "in the public interest" and insert "for the protection of national security"; on page 2, line 3, after the word "Register", to insert "for the guidance of the public"; in line 4, after the word "organization", to strike out "including delegations by the agency of authority"; in line 6, after the word "which", to insert "the officers from whom,"; in line 7, after the word "secure", to strike out "information or" and insert "information"; in line 8, after the word "or", to strike out "requests;" and insert "requests, or obtain decisions,;"; in line 12 after the word "forms", to strike out "available" and insert "available or the places at which forms may be obtained"; in line 15, after the word "rules", to insert "of general applicability"; in line 17, after the word "interpretations", to insert "of general applicability"; in line 18, after the word "agency", to strike out "for the guidance of the public"; in line 20, after the word "going", to strike out "No" and insert "Except to the extent that he has actual notice of the terms thereof, no"; at the beginning of line 23, to strike out "organization, procedure, or other rule, statement, or interpretation thereof" and insert "matter"; in line 25, after the word "not", to strike out "so published" and insert "published therein or in a publication incorporated by reference in the Federal Register,;"; on page 3, line 4, after the word "matter", to strike out "(1) is specifically exempted from disclosure by statute, or (2) involves any function of the United States requiring secrecy to protect the national defense and is specifically exempted from disclosure by Executive order or (3) relates solely to the internal employment rules and practices of any agency." and insert "(1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute,;"; in line 17, after the word "and", where it appears the first time, to insert "all"; in the same line, after the word "of", to strike out "cases" and insert "cases,;"; at the beginning of line 18, to strike out "all" and insert "those"; in the same line, after the word "interpretations", to insert "which have been"; in line 19, after the word "agency", to strike out "and affecting" and insert "affect"; at the beginning of line 20, to strike out "public," and insert "public and are not required to be published in the Federal Register,;"; in line 23, after the word "to", where it appears the second time, to strike out "protect the public interest" and insert "prevent a clearly unwarranted invasion of personal privacy,;"; on page 4, line 1, after the word "publishes", to strike out "an opinion, order, rule, statement, or interpretation,;" and insert "an opinion or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation,;"; at the beginning of line 6, to strike out "such cases" and insert "any case"; in line 9, after the word "providing", to strike out "adequate" and insert "identifying"; in line 11, after the word "and", to strike out "interpretation." and insert "interpretation of general applicability,;"; in line 12, after the amendment just above

stated, to strike "No final order, opinion, rule, statement of policy, or interpretation" and insert "No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted, or promulgated after the effective date of this Act"; in line 19, after the word "this", to strike out "subsection." and insert "subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof."; in line 24, after the word "make", to insert "all"; on page 5, line 1, after the word "able", to insert "to any person"; in line 2, after the word "are", to strike out "(1) specifically exempt from disclosure by statute; (2) specifically required by Executive order to be kept secret for the protection of the national defense; and (3) the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rulemaking matters."; after line 7, to insert: "(1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (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."

In line 23, after the amendment just above stated, to strike out "The" and insert "Upon complaint, the"; on page 6, line 3, after the word "jurisdiction", to strike out "upon complaint" and insert "to enjoin the agency from further withholding, and"; in line 10, after the word "evidence.", to insert "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."; in line 19, after the word "the", to strike out "individual" and insert "final"; at the beginning of line 22, to insert "or foreign policy."; on page 7, line 5, after the word "from", to strike out "Congress." and insert "Congress."; after line 5, to insert:

"(f) PRIVATE PARTY.—As used in this section, "private party" means any party other than an agency."

And, after line 7, to insert:

"(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act."

So as to make the bill read:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:*

"SEC. 3. (a) PUBLICATION IN THE FEDERAL REGISTER.—Except to the extent that there is involved (1) any function of the United States requiring secrecy for the protection of national security or (2) any matter relating solely to the internal management of an agency, 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 methods whereby, the public may secure 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 or informal procedures available, 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; (C) 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 (D) every amendment, revision, or repeal of the foregoing. Except to the extent that he has actual notice of the terms thereof, no person shall in any manner be required to resort to, or be bound or adversely affected

by any matter required to be published in the Federal Register and not published therein or in a publication incorporated by reference in the Federal Register.

“(b) **AGENCY OPINIONS, ORDERS, AND RULE.**—Except to the extent that matter (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute, every agency shall, in accordance with published rules, make available for public inspection and copying all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, and those rules, statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register, unless such opinions, orders, rules, statements, and interpretations 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 or order; and to the extent required to protect the public interest, an agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any 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 each final order, opinion, rule, statement of policy, and interpretation of general applicability. No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted, or promulgated after the effective date of this Act 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 in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

“**AGENCY RECORDS.**—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (7) investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein; and (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. 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 is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorney's fees of 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 by a preponderance of the evidence. 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 except to the extent required to protect the national defense or foreign policy, such record shall be available for public inspection.

“(e) **LIMITATION OF EXEMPTION.**—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.

"(f) PRIVATE PARTY.—As used in this section, 'private party' means any party other than an agency.

"(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act."

Mr. LONG of Missouri. Mr. President, I am gratified that the Senate is today considering this important piece of legislation. The bill's enactment is long overdue. In the words of Madison, who was the chairman of the committee which drafted the first amendment of our Constitution :

"Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both."

At no time in our history has this been more true than it is today, when the vastness of our Government and its myriad of agencies makes it so difficult for the electorate to obtain that "popular information" of which Madison spoke. Only when one further considers that the hundreds of departments, branches, and agencies are not directly responsible to the people, does one begin to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure. Many witnesses on S. 1666 testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities.

This coverup must be stopped, and this bill takes a forward step in that direction.

A government by secrecy benefits no one. It injures the people it seeks to serve; it damages its own integrity and operation. It breeds distrust, dampens the fervor of its citizens and mocks their loyalty.

Therefore, Mr. President, I urge the Senate to pass this bill as reported by the Senate Judiciary Committee.

Mr. DIRKSEN. Mr. President, in the hearings which we have held and in the many discussions the committee has had, two things have become crystal clear.

The first is the Administrative Procedure Act which covers the conduct of the proceedings of the myriad of administrative agencies, those that are called independent as well as those that are housed within the departments in the executive branch, must be revised if these agencies are to cope with the ever-increasing workload and problems before them and the public is to be adequately informed about agency proceedings and the other actions of Government departments and agencies.

The second is that there is a wide disagreement on what reforms should be made. It seems that it all depends on whose ox is being gored.

The American Bar Association, the press, and the people of this country favor reforms which the Government departments and agencies seem to generally oppose. These departments and agencies have been invested by us in the Congress with certain functions and duties in the administration of programs we have authorized. They hand out grants or benefits or regulate segments of our economy or prosecute those who violate the law within their jurisdiction. And from that interest in the outcome there flows the result that the administrative agencies want one kind of a procedure and the members of the public who come before these agencies in some form of opposition or supplication or petition want another kind of procedure to be used in the presentation and decision of these matters.

I am afraid that that means the burden of devising the proper procedures falls upon us in the Congress who have established the administrative system. We must contrive the best possible procedures taking into account all the various viewpoints and this we have tried and are trying to do.

This legislation which we have before us now is of the greatest importance because fair and just administrative proceedings require, first of all, that the people know not only what the statutory law is, but what the administrative rules and regulations are, where to go, who to see, what is required and how they must present their matter. They must be informed in advance about the decisions which the administrative agencies and departments may use as precedent in determining their matter and whether these decisions were unanimous or di-

vided. And, they should have the same right to the inspection of the information which the government may use against them as they would have to inspect the information which some private party might use against them. In addition, section 3 of the Administrative Procedure Act has a broader purpose. It provides the means by which the people of this country can become informed and thus be able to scrutinize the activities and operation of their Government.

Mr. President, in these few words I have probably summed up the basic elements of section 3 of the Administrative Procedure Act as Congress intended it to be when it passed that bill just 2 years short of two decades ago. It was made crystal clear at that time in the report of the Judiciary Committee which said:

"The public information requirements of section 3 are in many ways among the most important, far-reaching, and useful provisions of the bill. For the information and protection of the public wherever located, these provisions require agencies to take the mystery out of administrative procedure by stating it.

The introductory clause states the only general exceptions. The first, which excepts matters requiring secrecy in the public interest, as necessary but is not to be construed to defeat the purpose of the remaining provisions. It would include confidential operations in any agency, such as some of the investigating or prosecuting functions of the Secret Service or the Federal Bureau of Investigation, but no other functions or operations in those or other agencies. Closely related is the second exception, of matters relating solely to internal agency management, which may not be construed to defeat other provisions of the bill or permit withholding of information as to operations which remaining provisions of this section or of the whole bill require to be public or publicly available."

With respect to subsection (a) the committee said:

"The subsection forbids secrecy of rules binding or applicable to the public, or delegations of authority."

Concerning the need for subsection (b) the committee said:

"Some agencies published sets of some of their decisions, but otherwise the public is not informed as to how and where they may see decisions or consult precedents."

The Judiciary Committee of the House, in a report submitted by the late Representative Walter, who was active in this field up to the day of his death, said:

"The public information provisions of section 3 are among the most useful provisions of the bill. The general public is entitled to know agency procedures and methods or to have the ready means of knowing with certainty. This section requires agencies to disclose their setups and procedures, to publish rules and interpretations intended as guides for the solution of cases, and to proceed in consistent accordance therewith until publicly changed."

In describing the bill on the floor of the House of Representatives, on May 24 of that same year, the late Francis Walter said:

"Public information requirements of section 3 are among the most important and useful provisions of the bill. Excepted are matters requiring secrecy in the public interest—such as certain operations of the Secret Service or FBI—and matters relating solely to the internal management of an agency."

And, with respect to the public records subsection he said:

"Section 3(c) also requires agencies to make matters of official record available to inspection except as by rule it may require them to be held confidential for legal cause."

Now what do we have today? Refusal on top of refusal of Government agencies and departments to make available to the public that information which affects the public. In overruling the contention of a Federal agency, a judge of the U.S. District Court said earlier this year:

"If the report of the experts employed by the Commission is accurate, then the public has a right to know these facts."

Just the other day I noted an article under a headline "Secrecy Is Criticized on Federal Projects." This charge was leveled by the chairman of the Arlington County Board who was reported as saying:

"It is always a secret, closed meeting when Federal projects are discussed. They don't make it public knowledge, so that when it is all ready the President can present a fait accompli."

That is fine for the President, he said, "but it certainly fouls up any planning we do for the area." So we have a situation where Federal Government agencies keep their plans for spending the peoples money secret, at taxpayers expense because the local governments cannot take these Federal plans into account in their own planning.

Then, Mr. President, we have another type of example which I consider even more significant because it must affect every citizen of this country, as an individual, at one time or another. The particular example which I am going to cite involves something as simple as crop acreage allotments. The work is performed by local committees under the direction of the Department of Agriculture. A little over a year ago I received a complaint from one of my constituents that he felt his corn acreage allotment had been unfairly reduced. He had asked the local committee why and they said they had information against him. He asked what that information was in order that he could meet it with his own evidence but they denied his request. Then he brought his complaint to me. I took the matter up with the Department of Agriculture, asking that an investigation be made of his complaint that he had never been shown the evidence against him. In due course I received a reply which said:

"Included in the records of this case are statements from farmers having knowledge of the history acreage of this farm which were obtained by the county committee of a confidential basis. For county committees to divulge the source of information received in confidence, when release of the information would impair the legitimate interest of persons supplying the information, would not in our opinion be proper and would result in less effective administration of programs at the local level."

I was not satisfied with this reply. It is a basic tenet of our law that if a man is accused, he is entitled to know the evidence against him and to confront his accusers. I, therefore, requested from the Department of Agriculture "the specific authority relied upon by the Department in connection with its position on this matter."

This time the answer came back from the head of the Department, Secretary Freeman. I want to read to you from that letter:

"This is in reply to your letter of July 17, 1962, requesting advice as to specific authority relied upon by the Department of Agriculture in withholding from a producer the names of persons supplying information adverse to him in connection with his participation in the feed grain program.

"Department regulations governing the availability of information from records comply with the requirements of section 3 of the Administrative Procedure Act, 5 U.S.C. 1002. Such section provides as follows:

"SECTION 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest, or (2) any matter relating solely to the internal management of the agency.

"(c) PUBLIC RECORD.—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."

"§36(b) [of the Department's regulation] constitutes a statement of those matters considered to be confidential."

Thus, the Department of Agriculture is saying that the evidence against any farmer in this country can be withheld from him because it is "information held confidential held for good cause found." No wonder there is such interest in revising the Administrative Procedure Act as we have in this bill, to protect against such departmental and agency abuse.

Mr. President, this bill to revise section 3 of the Administrative Procedure Act is one step along the way of our difficult journey through the labyrinth of administrative procedure. It takes some of the twists and turns and some of the blind alleys out of those procedures. It will permit the people of this country to move with greater understanding and knowledge along a less tortuous path in their dealings with the Government. This is an essential step unless we wish to perpetuate the wall which the zealous Government servants have built around their actions—a wall which divides the people from their Government and which should be torn down.

Mr. MANSFIELD. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 1219), explaining the purposes of the bill.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

"Section 3 of the Administrative Procedure Act, that section which S. 1666 would amend, is full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that withheld information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases in section 3 of the Administrative Pro-

cedure Act, as—'requiring secrecy in the public interest,' 'required for good cause to be held confidential,' and 'properly and directly concerned.'

"It is the purpose of the present bill (S. 1666) to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as 'for good cause' are certainly not sufficient.

"At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. 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.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the committee amendments be considered en bloc.

The ACTING PRESIDENT pro tempore. Without objection, the committee amendments will be considered en bloc. Without objection, the amendments are agreed to.

The bill is open to further amendment. If there be no further amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

#### AMENDMENT OF SECTION 3 OF ADMINISTRATIVE PROCEDURE ACT OF 1946

Mr. HUMPHREY. Mr. President, I ask unanimous consent that the Senate proceed to reconsider Senate bill 1666, and that the Senate reconsider the votes by which the bill was ordered to be engrossed for a third reading, and was read the third time, and passed.

Mr. KUCHEL. Mr. President, reserving the right to object, has this matter been cleared?

Mr. HUMPHREY. Yes, it has been cleared, I assure the Senator.

The PRESIDING OFFICER. The bill will be stated by title.

The LEGISLATIVE CLERK. A bill (S. 1666) 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.

The PRESIDING OFFICER. Is there objection to the unanimous-consent request to reconsider the engrossment, third reading, and passage of the bill?

The Chair hears no objection.

The bill is before the Senate.

Mr. HUMPHREY. Mr. President, on Tuesday, July 28, 1964, the Senate passed without debate S. 1666, amendments to section 3 of the Administrative Procedure Act of 1946 (60 Stat. 238). I entered subsequently a motion of reconsideration of S. 1666, and the bill returned to the calendar.

I want to make it crystal clear to every Senator that I am not opposed to S. 1666. It deals with the vital subject of access of information in Federal agencies and every Senator knows that certain agencies through the years have abused in a most flagrant manner the legitimate right to withhold certain privileged or confidential information. The time for a thorough revision of the statutes dealing with governmental disclosure of information is long overdue.

I did, however, believe that an opportunity should be afforded for some debate and discussion on this important bill. For this reason, and for this reason alone, I entered a motion of reconsideration.

The Senator from Minnesota is not a lawyer and not a member of the Judiciary Committee. The distinguished Senator from Missouri [Mr. LONG] conducted hearings in October 1963, and again last week on this legislation. The committee approved 21 amendments to the original text of S. 1666; it is my understanding that these amendments removed a number of problems which

had arisen in relation to the original bill. I commend the distinguished and able Senator from Missouri [Mr. Long] for his diligent labor to produce a fair and balanced bill.

There have been brought to my attention several areas where additional clarification would be helpful. I have prepared certain amendments which would, in my opinion, assist in clarifying these sections. It may, however, be possible to accomplish the objective of removing these potential ambiguities or uncertainties through a more complete exposition of the committee's intention without actually having to amend S. 1666.

I would, therefore, like to discuss these possible amendments with the distinguished Senator from Missouri, seek his advice and counsel for their desirability, and achieve whatever clarification he deems to be necessary.

Let me read through these proposals in their entirety.

First. On page 4, lines 19-20, strike the words "prior to the commencement of the proceedings".

Since agencies often group cases for hearing and decision, it should not be necessary to index one of them before the others can be decided.

Second. On page 5, lines 12-14, amend clause (4) of section 3(c) to read as follows:

"(4) trade secrets and information obtained from the public in confidence or customarily privileged or confidential."

The existing clause (4) of the revised section 3(c) which purports to exempt from disclosure information obtained from the public which is "customarily privileged or confidential" would not appear to exempt wage data submitted to the Bureau of Labor Statistics, and the Wage and Hour Division of the U.S. Department of Labor in confidence and used by them in preparing and publishing wage studies and surveys. This situation should be remedied because these wage studies and surveys are used by the Department as a basis for prevailing wage determinations which the Department is required to make. Unless the Bureau of Labor Statistics can continue to assure those from whom wage data are obtained that these data will be kept confidential, the Bureau's sources of information in these vital fields could be seriously jeopardized. As presently drafted, clause (4) might interfere with the effective enforcement of the Fair Labor Standards Act, the Labor-Management Reporting and Disclosure Act, and the Welfare and Pension Plans Disclosure Act.

Third. On page 5, lines 14-15, amend clause (5) of section 3(c) to read as follows:

"(5) intra-agency or interagency memorandums or letters dealing with matters of fact, law or policy."

As presently written clause (5) of the amended section 3(c) appears not to exempt intra-agency or interagency memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge that their views might be made public information would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

Fourth. On page 5, lines 18 to 20, amend clause (7) of section 3(c) to read as follows:

(7) investigatory files.

On page 5, beginning on line 18, insert a new clause (8), as follows, and renumber the present clause (8) as clause (9);

(8) statements of agency witnesses until such witnesses are called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross examination.

Clause (7) of the amended section (3) would appear to open up investigatory files to an extent that goes beyond anything required by the courts, including the decision of the Supreme Court in the Jencks case. This clause, for example, which provides for disclosure of investigatory files as soon as they "affect an action or proceeding or a private party's effective participation therein" is susceptible to the interpretation that once a complaint of unfair labor practice is filed by the General Counsel of the NLRB, access could be had to the statements of all witnesses, whether or not these statements are relied upon to support the complaint.

Witnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing. While witnesses would continue to be protected in testifying at the hearing, they would enjoy no protection prior to that time. Substantial litigation would be required before the full scope and effects of clause (7) would be clear.

A pending draft report of the ABA Committee on Board Practice and Procedure states that :

In the consideration of section 102.118 of the Board's rules by last year's Committee on Board Practice and Procedure there was considerable opposition to any rule which would permit a party to engage in a fishing expedition into the Board's investigation files. It was felt that the opening of the Board's files to inspection would seriously handicap the Board in the investigation of charges.

The committee concluded that the Board's investigatory files should be exempt from disclosure. The Board would, of course, like all other administrative agencies of the Government, continue to be governed by the rules laid down by the U.S. Supreme Court in the Jencks case.

Mr. President, I have cited these proposals and I would welcome comment from the able chairman of the committee.

Mr. LONG of Missouri. Mr. President, I thank the distinguished majority whip for bringing these matters to the attention of the Senate. I think it is very helpful to have discussions of these matters before the bill is finally passed and sent to the House.

I have listened with great interest to the suggestions made by the Senior Senator from Minnesota and would like to comment on them one by one.

First, there is a suggestion with respect to an amendment to section 3(b), eliminating the words "prior to the commencement of the proceeding." These words were added to protect private parties from being surprised in a proceeding of which they could have had no knowledge. Therefore, I believe they should be retained in the section.

The next suggestion relates to the exemption in section 3(c), relating to "trade secrets and other information obtained from the public and customarily privileged or confidential." This language in itself is quite broad and I believe would certainly cover such material as "wage data submitted to the Bureau of Labor Statistics" as mentioned by the senior Senator from Minnesota. The suggestion that we add the words "in confidence" to the phrase "information obtained from the public" might result in certain agencies taking much information from the public "in confidence" in the future that has not customarily been considered confidential or privileged. This is something which we should seek to avoid and I believe that the language in the present exemption number (4) is sufficiently broad.

The suggestion with respect to exception (5), adding "matters of fact" to "matters of law or policy" would result in a great lessening of information available to the public and to the press. Furthermore, the example cited with respect to intra-agency memorandums giving evidence of the credibility of evidence obtained from witnesses or other sources, leads me to point out that there is nothing in this bill which would override normal privileges dealing with the work product and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public.

The last two suggestions relate to investigatory files and an inclusion in the bill of the substance of the Jencks rule. I believe that this is a valuable suggestion but I would suggest as a substitute for the Senator's proposals that we combine them and restate exception (7) as a new proposal which would read as follows: "investigatory files compiled for law enforcement purposes except to the extent they are by law available to a private party."

If this language is agreeable to the Senator from Minnesota, I hereby move that the bill is amended accordingly.

Mr. HUMPHREY. In other words, one amendment can take care of the situation.

Mr. LONG of Missouri. Yes; one amendment.

Mr. HUMPHREY. I would be very appreciative if the Senator would do that.

Mr. LONG of Missouri. The amendment is at the desk.

The PRESIDING OFFICER. The amendment will be stated.

The LEGISLATIVE CLERK. On page 5, at lines 18 to 20, it is proposed to amend clause (7) to read as follows: "investigatory files compiled for law enforcement purposes except to the extent they are by law available to a private party."

The PRESIDING OFFICER. The question is on agreeing to the amendment offered by the Senator from Missouri.

The amendment was agreed to.

The PRESIDING OFFICER. The bill is before the Senate and open to further amendment.

Mr. HUMPHREY. I thank the Senator from Missouri for his great courtesy and his patience in this matter. I deeply regret that I found it necessary to move to reconsider the vote by which the bill had been passed. I told the Senator privately, and I now tell him publicly, that this is a very complex piece of legislation, and he has devoted hours of work to it. He is to be highly commended for his diligence and careful attention to this very important subject. We all wish to have governmental information made available; and proper public access to information, I am sure, is one of the real objectives of a free society. We must seek to strike a workable balance in this controversial area. I know that the House will wish to examine into this proposed legislation with the same diligence that the Senator and his subcommittee have given to this bill. This is a most difficult area in which to legislate and I know the House committee will examine these proposals with care and objectivity.

Mr. LONG of Missouri. I thank the distinguished Senator from Minnesota for his help. I am grateful to him. I am sure the committee is very appreciative of his help and his courtesy and interest in this matter. He has been very helpful.

The PRESIDING OFFICER. The bill is open to further amendment. If there be no further amendment to be proposed, the question is one the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, and was read the third time.

The PRESIDING OFFICER. The bill having been read the third time, the question is, Shall it pass?

The bill (S. 1666) was passed, as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 3 of chapter 324 of the Act of June 11, 1946 (60 Stat. 238), is amended to read as follows:

"SEC. 3. (a) PUBLICATION IN THE FEDERAL REGISTER.—Except to the extent that there is involved (1) any function of the United States requiring secrecy for the protection of national security or (2) any matter relating solely to the internal management of an agency, 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 methods whereby, the public may secure 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 or informal procedures available, 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; (C) 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 (D) every amendment, revision, or repeal of the foregoing. Except to the extent that he has actual notice of the terms thereof, no person shall in any manner be required to resort to, or be bound or adversely affected by any matter required to be published in the Federal Register and not published therein or in a publication incorporated by reference in the Federal Register.

"(b) AGENCY OPINIONS, ORDERS, AND RULES.—Except to the extent that matter (1) is specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; or (3) is specifically exempted from disclosure by statute, every agency shall, in accordance with published rules, make available for public inspection and copying all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases, and those rules, statements of policy, and interpretations which have been adopted by the agency, affect the public and are not required to be published in the Federal Register, unless such opinions, orders, rules, statements, and interpretations 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 or order; and to the extent required to protect the public interest, an

agency may delete identifying details when it makes available or publishes a rule, statement of policy, or interpretation; however, in any 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 each final order, opinion, rule, statement of policy, and interpretation of general applicability. No final order or opinion may be cited as precedent, and no opinion, rule, statement of policy, or interpretation which is issued, adopted, or promulgated after the effective date of this Act 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 in this subsection or unless prior to the commencement of the proceeding all private parties shall have actual notice of the terms thereof.

“(c) AGENCY RECORDS.—Every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person except those particular records or parts thereof which are (1) specifically required by Executive order to be kept secret for the protection of the national defense or foreign policy; (2) relates solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and other information obtained from the public and customarily privileged or confidential; (5) intra-agency or interagency memorandums or letters dealing solely with matters of law or policy; (6) personnel files, medical files, and similar matter the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and (7) investigatory files compiled for law enforcement purposes except to the extent they are by law available to a private party; and (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. 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 is situated shall have jurisdiction to enjoin the agency from further withholding, and to order the production of any agency records or information improperly withheld from the complainant by the agency and to assess against the agency the cost and reasonable attorneys' fees of 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 by a preponderance of the evidence. 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 except to the extent required to protect the national defense or foreign policy, such record shall be available for public inspection.

“(e) LIMITATION OF EXEMPTION.—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.

“(f) PRIVATE PARTY.—As used in this section, ‘private party’ means any party other than an agency.

“(g) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act.”

Mr. LONG of Missouri. Mr. President, I move that the Senate reconsider the vote by which the bill was passed.

Mr. HUMPHREY. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

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#### Revised Statutes, Title IV, Executive Departments, Sec. 161

SEC. 161. The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

## Public Law 85-619, Amending Sec. 161 of the Revised Statutes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 161 of the Revised Statutes of the United States (5 U.S.C. 22) is amended by adding at the end thereof the following new sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

Approved August 12, 1958.

Administration Procedure Act Sec. 3, P.L. 404, Ch. 324, 79th Cong., 2d Sess.

## PUBLIC INFORMATION

SEC. 3. Except to the extent that there is involved (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—

(a) **RULES.**—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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. No person shall in any manner be required to resort to organization or procedure not so published.

(b) **OPINIONS AND ORDERS.**—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.

(c) **PUBLIC RECORDS.**—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.

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*Scars v. Gottschalk*, 357 F.Supp. 1327 (E.D. Va. 1973).  
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SEC. 552 (B) (5)—EXEMPTION FOR INTER- AND INTRA-AGENCY MEMORANDA

*Aspin v. Department of Defense*, F.2d (D.C. Cir. 1973) Civ. A. No. 72-2147.  
*Ditlow v. Volpe*, F.Supp. (D.D.C. 1973) Civ. A. No. 2370-72, Rev'd.—F.2d—(D.C. Cir. 1974) Civ. A. No. 73-1984.  
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*Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 482 F.2d 710 (D.C. Cir. 1973).  
*Long v. Internal Revenue Service*, 339 F. Supp. 1266 (W.D. Wash., 1971).  
*Long v. Internal Revenue Service*, 349 F. Supp. 871 (W.D. Wash. 1972).  
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*Philadelphia Newspapers Inc. v. Department of Housing and Urban Development*, 343 F. Supp. 1176 (E.D. Pennsylvania 1972).  
*Stern v. Richardson*, F. Supp. (D.D.C. 1973) Civ. A. No. 179-73.  
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*Rose v. Department of the Air Force*,—F. Supp.—(S.D. N.Y. 1972) Civ. A. No. 72-1605.

SEC. 552 (B) (6)—EXEMPTION FOR PERSONNEL, MEDICAL AND SIMILAR FILES

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*Tuchinsky v. Selective Service System*, 294 F. Supp. 803 (N.D. Ill. 1969). aff'd. 418 F. 2d 155 (7th Cir. 1969).  
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SEC. 552 (B) (7)—EXEMPTION FOR INVESTIGATORY FILES

*Aspin v. Department of Defense*, 348 F. Supp. 1081 (D. D.C. 1972).  
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*M. A. Schapiro & Co., Inc. v. Securities and Exchange Commission*, 339 F. Supp. 467.  
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*Williams v. Internal Revenue Service*, 345 F. Supp. 591 (D. Del. 1972).  
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*Commercial Envelope Manufacturing Co. v. S.F.C.*, 450 F. 2d 342 (2 Cir. 1971).  
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- Vaughn v. Rosen*, — F. 2d — (D.C. Cir. 1973) Civ. A. No. 73-1039.

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*Petkas v. Staats*, 364 F. Supp. 680 (D.D.C. 1973).

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*American Mail Line, Ltd. v. Gulick*, 411 F. 2d 696 (D.C. Cir. 1969).

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*Aspin v. Department of Defense*, — F. 2d — (D.C. Cir. 1973) Civ. A. No. 71-2147.  
*Cuneo v. Laird*, 338 F. Supp. 504 (D.D.C. 1972).  
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*Ackerley v. Ley*, 420 F. 2d 1336 (D.C. Cir. 1969).

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*Charles River Park "A" Inc. v. Department of Housing and Urban Development*, F. Supp. (D.D.C. 1973) Civ. A. No. 1861-72.

*Philadelphia Newspapers Inc. v. Department of Housing and Urban Development*, 343 F. Supp. 1176 (E.D. Pennsylvania 1972).

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*Tennessean Newspaper, Inc. v. Federal Housing Administration*, 464 F. 2d 657 (6 Cir. 1972).

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## DEPARTMENT OF JUSTICE

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*Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970).  
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## DEPARTMENT OF TRANSPORTATION

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- Consumer Union of United States, Inc. v. Veterans' Administration*, 301 F. Supp.  
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## INTRODUCTION TO CASE SUMMARIES

Section 3 of the Administrative Procedure Act of 1946 contained the first general statutory provision providing for public disclosure of executive agency information. Labeled "Public Information" section of the Administrative Procedure Act for the purpose of making information available to the public, the original Act (5 U.S.C. 1002 [1964]) fell short of this objective and was frequently referred to as the statutory authority for withholding information, rather than disclosing information.

Amending the original section 3, the new Freedom of Information Act, P.L. 89-487, 80 Stat. 250 (1966), 5 U.S.C. section 552 (1970), was signed by President Lyndon B. Johnson on July 4, 1966 and went into effect on July 1, 1967. This law required the executive agencies to make available to any member of the public all of their identifiable records except those involving matters which are within nine specifically stated exemptions. 5 U.S.C. sec. 552(b) (1)-(9).

One of the more important features of the Freedom of Information Act is the provision providing for judicial review for the unlawful retention of Government information from the public. (Sec. 552(a) (3)). Under this provision, the district courts have the authority to enjoin the continuous withholding of records if it is found to be improper. These court proceedings are required to "be *de novo* . . . in order . . . [to] prevent [them] from becoming meaningless judicial sanctioning of agency discretion." (S. Rept. No. 813, 89th Cong. 1st Sess. 8 [1965]). The court is further authorized to give complaints filed under this Act precedence over other actions on the docket with an additional proviso that they be heard "at the earliest practical date and expedited in every way." (S. Rept., *supra*, at 8).

The summaries in this report represent the disposition of those cases which for the most part are reflective of interpretations and definitive opinions relative to applicable sections of the Act. Only those portions of each case dealing with the Freedom of Information Act have been so summarized.

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[Note: The Subcommittee wishes to express its appreciation to Messrs. Wallace and Zafren and Ms. Helen Ward for their efforts in preparing this section of the Sourcebook.]

## CASE SUMMARIES

### *Ackerly v. Ley*

420 F. 2d 1336 (D.C. Cir. 1969)

#### *Agency:*

Food and Drug Administration (Commissioner of Food and Drugs in HEW).

#### *Record(s) involved:*

On proposal by Commissioner to bar carbon tetrachloride from interstate commerce as hazardous substance, documents relative to degree and nature of hazard contained in proposal.

#### *Sections of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.  
Sec. 552(b) (6)—Exemption for personnel, medical and similar files.

#### *Judgment:*

Order of District Court denying request of petitioner invalidated and sent back for reconsideration.

Appellant's complaint in the District Court sought equitable relief, in the form of compelled disclosure of documents, against appellee Commissioner of

Food and Drugs in the United States Department of Health, Education and Welfare.

The Commissioner gave notice in the Federal Register of a proposal on his part to bar from inter-state commerce, as a "banned hazardous substance" within the purview of the Federal Hazardous Substances Act carbon tetrachloride and mixtures containing it.

Appellant, by letter sought permission "to review and inspect and/or copy all of the records" in the possession of the Commissioner "which relate in any way to the degree or nature of the hazard" referred to in the Commissioner's proposal.

After reviewing the documents *in camera*, the District Court rendered summary judgment for the Commissioner.

**HELD:** *Vacated and remanded for further consideration.*

Whereas District Court only stated that the documents were internal records based on medical reports secured in confidential capacity, it did not detail the nature of the documents nor give reference to their exemptions enumerated in the Freedom of Information Act.

The fact that the information sought under the Freedom of Information Act might be ferreted out by intuition and diligent search by persons seeking information is no reason for failure to disclose or refusal to compel disclosure.

The District Court's ruling was not susceptible of an appellate review which would generate confidence in either a reversal or an affirmance.

### *American Mail Line, Ltd. v. Gulick*

411 F. 2d 696 (D.C. Cir. 1969)

*Agency:*

Maritime Subsidy Board for Department of Commerce

*Record(s) involved:*

Memorandum prepared by agency staff which provided the basis for ruling and requiring the petitioners to refund approximately \$3,300,000 in subsidy payments.

*Section of the Act:*

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner.

Action by steamship operators under Freedom of Information Act brought after the Maritime Subsidy Board for the Department of Commerce had required the operators to refund approximately \$3,300,000 in subsidy payments.

The plaintiffs contend that in an attempt to formulate a meaningful agreement in their petition for reconsideration by the Board order, they filed with the Board an "application to inspect records" and in the alternative a renewed request for the reasons for and a summary of the evidence upon which the Board based its ruling. The Board stated that its ruling was based upon a 31 page memorandum from which they clipped the last 5 pages and recorded it as its own findings in the matter and sent to appellants. Upon final refusal to produce the memorandum in whole, the appellants filed suit in the district court under the Freedom of Information Act (5 U.S.C. sec. 552 (Supp. III, 1965-1967)). The U.S. District Court for the District of Columbia granted defendant's motion for summary judgment and plaintiffs appealed.

Appellants contend that the April 11 decision, transmitted by the letter of April 12, constituted an order to them and the Act specifically states that "the agency must disclose to any person upon request all final opinions. . . as well as orders made in the adjudication of cases; (5 U.S.C. sec. 552 (a) (2) (A)).

Appellees contend that it is exempt from discovery because it is an "intra-agency memorandum(s) . . . which would not be available by law to a party other than an agency in litigation with the agency" under 5 U.S.C. sec. 552 (b) (5).

**HELD:** *Reversed and remanded.*

"The appellee failed to meet the burden requiring it to show that its April ruling did not have immediate operative effect. Appellants were ordered to refund approximately \$3,300,000 and this order was stayed only pending the Board's decision on reconsideration. We therefore conclude that the Board's ruling of April 11

transmitted to appellants by letter of April 12 constitutes a decision and order within the meaning of 5 U.S.C. sec. 552(a)(2)(A).

"We do not feel that appellee should be required to 'operate in a fishbowl', but by the same token we do not feel that appellants should be required to operate in a darkroom. If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based upon that memorandum, giving no other reasons or basis for its action. When it chose this course of action 'as a matter of convenience' the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants (5 U.S.C. sec. 552(b)(5)). Thus we conclude that the Board's April 11 ruling clearly falls within the confines of 5 U.S.C. sec. 552(a)(2)(A) and consequently it must be produced for public inspection."

### *Aspin v. Department of Defense*

— F 2d — (D.C. Circ. 1973) Civ. A. No. 72-2147

*Agency:*

Department of Defense

*Record(s) involved:*

Report entitled "Department of the Army Review of the Preliminary Investigations into the Mylai Incident".

*Sections of the Act:*

Section 552 (a) (3)—Disclosure of "identifiable records"

Section 552 (b) (5)—Exemption for inter- or intra-agency memoranda.

Section 552 (b) (7)—Exemption for investigatory files.

*Judgment:*

In favor of defendants.

Plaintiff brought action in District Court to compel disclosure of report of investigation conducted by the Army into the MyLai Incident. The Army had brought charges against fifteen officers relying on evidence contained in the report. District Court ruled in favor of defendants holding that the report was exempt under § 552 (b) (7) as investigatory files compiled for law enforcement purposes. The Court stated that the test for determining whether exemption (b) (7) applied was "whether the files sought relate to anything that can be fairly described as an enforcement proceeding. The Court found that the report was exempt because it "figured prominently in the initiation of subsequent court-martial proceedings." The Court also found that the report fell under Exemption (b) (5) as intra-agency memoranda because it was "principally made up of internal working papers in which opinions are expressed and policies formulated and recommended." Plaintiffs appealed.

*HELD: Affirmed.*

Plaintiff argued that the report was not exempt under section 552 (b) (7) because 1) the report is not an "investigatory file" and 2) even if it once was, the report is no longer entitled to exemption under section 552(b)(7) because no court-martials are to be held in the future—i.e. that exemption (b) (7) cannot, as a matter of law, continue as to documents which were involved in prior law enforcement proceedings. The Court rejected both arguments. The report was produced as an "investigatory file" compiled for law enforcement purposes and therefore is exempt under section 552 (b) (7). Further, the fact that enforcement proceedings were terminated prior to the request for disclosure of material which formed the basis for that enforcement proceeding does not take such material outside of exemption (b) (7). If investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Exemption (b) (7) remains available after the termination of investigation and enforcement proceedings. Since the Court held that the report was exempt under section 552 (b) (7), it found it unnecessary to consider whether the report is entitled to exemption under section 552 (b) (5).

***Bannercraft Clothing Company, David B. Lilly Company, Inc.,  
Astro Communication Laboratory v. The Renegotiation Board***  
— U.S. — (1974) Civ. A. No. 72-822

**Agency:**

The Renegotiation Board.

**Record(s) involved:**

Documents that served as basis for the Renegotiation Board's finding of excessive profits.

**Sections of the Act:**

Section 552(a) (3)—Court review.

**Judgment:**

In favor of defendants (Renegotiation Board).

Plaintiffs brought action in District Court to enjoin renegotiation proceedings and to compel disclosure of the Board's statements of facts and reasons upon which a determination had been made that the contractor had realized excessive profits.

The District Court granted a preliminary injunction and ordered disclosure of the statement. Defendants disclosed the report. Plaintiffs then made a further request for the documents which served as a basis for the Board's conclusions. The Board claimed exemption of some of the documents under 5 U.S.C. § 552(b) (5) and asserted as to the others, that they were not covered by the Act. The Board also moved to dissolve the preliminary injunction claiming that it had fulfilled its obligations under the F.O.I.A. The District Court denied the Defendant's motion and Defendants appealed to the D.C. Circuit Court. The Circuit Court affirmed holding that in enacting the F.O.I.A., the Congress intended to confer equity powers on the Courts to enjoin administrative proceedings pending resolution of claims under the F.O.I.A. The Court also held that the contractors only needed to exhaust their administrative remedies under the F.O.I.A. and not their administrative remedies under the Renegotiation Act, as a condition precedent to requesting injunctive relief. Defendants petitioned the Supreme Court for a writ of certiorari and it was granted.

**HELD:** *Reversed and remanded.*

The Supreme Court held that the Renegotiation Board falls within the definition of "agency" under the F.O.I.A. Congress did not intend that the provision granting the Courts the power to compel disclosure be the exclusive method for enforcing the disclosure requirements under the Act. The District Court has authority under its broad equity powers to enjoin administrative proceedings pending resolution of a claim under the F.O.I.A. However, the Court held that the contractor was obliged to pursue the administrative remedies provided under the Renegotiation Act before he could obtain relief through judicial interference. The effect of negotiation and its aims are not to be supplanted by an F.O.I.A. suit. The process under the Renegotiation Act is one of negotiation and nothing in the F.O.I.A. indicates that Congress wished to change the Renegotiation Act's "purposeful design of negotiation without interruption for judicial review." "The contractor may institute its de novo proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence." "Without a clear showing of irreparable injury, failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process."

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***Barceloneta Shoe Corp. v. Compton***

**271 F. Supp. 591 (D. Puerto Rico 1967)**

**Agency:**

National Labor Relations Board

**Record(s) involved:**

Statements made by witnesses to NLRB investigators during investigation of unfair labor practices charge.

**Sections of the Act:**

Sec. 552(b) (4)—Exemption for trade secrets and confidential information.  
Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

Plaintiff filed a complaint pursuant to the Administrative Procedure Act seeking to order defendant to produce Agency (NLRB) records which contained evidence received by them during the course of an investigation involving an alleged unfair labor practice. Defendant has previously refused such request stating that it would follow its normal procedures making investigation affidavits and statements of witnesses available to plaintiffs during any hearing before the Agency but only after the witnesses had testified on direct examination. Defendant contends, that its refusal is supported by the specific exemptions contained in the new Act, particularly sections 3(c) (4) and (7).

HELD: For defendant (*motion to dismiss granted*).

In enacting the public information section of the Adm. Procedure Act, Congress did not intend to give private parties charged with violation of federal regulatory statutes any greater right to inspect investigative file material than has been granted to persons accused of violating federal criminal laws. 5 U.S.C.A. sec. 552(b) (4), (7).

If disclosure, as urged by Plaintiffs, is allowed, persons interviewed by Board agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure at any time before they have actually testified at a public hearing.

Defendant (NLRB) has shown a better right to keep its commitment to the persons giving such confidential statements, than have Plaintiffs made for the disclosure of said documents prior to the hearings.

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***Benson v. General Services Administration***

289 F. Supp. 590 (W.D. Wash. 1968), aff'd 415 F. 2d 878 (9th Cir. 1969)

*Agency:*

General Services Administration

*Record(s) involved:*

Documents dealing with sale of real estate and negotiations surrounding sale.

*Sections of the Act:*

Sec. 552(b) (2)—Exemptions for internal procedures.

Sec. 552(b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner.

Action under the Information Act to enjoin the General Services Administration from withholding certain agency records dealing with a sale of real estate and negotiations surrounding the sale. The property purchased by plaintiff's partnership from GSA, and to which the requested information relates, has been resold. Plaintiff, and other members of the partnership as well treated the profits from the resale as long-term capital gains on their income tax returns. The Internal Revenue Service is questioning this characterization, and the information contained in the requested documents is needed to clarify the nature of the transaction.

GSA argues that the withholding of the records sought was proper because each one was exempt from disclosure under one or more of three exemptions described in subsection (b) of the Act. The paragraphs relied upon as making disclosure inapplicable describe matters:

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

(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.

**HELD:** *For Plaintiff. Affirmed by U.S. Court of Appeals.*

With respect to paragraph (2) of the Act, none of the information sought related to internal personnel rules and practices.

With respect to paragraph (4) of the Act, this exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes, but reveals to the government under the express or implied promise by the government that the information will be kept confidential. The appraisal report on the other hand, is kept confidential by the appraiser on the client's behalf, not on his own behalf, and the client here is GSA. Thus the exemption does not apply to the appraisal report.

With respect to paragraph (5) of the Act, the House Report interpreted this language to say that "any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

### *Benson v. United States*

**309 F. Supp. 1144 (D. Neb. 1970)**

**Agency:**

U.S. Department of the Air Force.

**Record(s) involved:**

Statements of individuals which were the results of an investigation and which were later utilized by an administrative board reviewing the possibility of petitioner's discharge.

**Section of the Act:**

Sec. 552(b) (7)—Exemption for investigatory files.

**Judgment:**

For defendant (Agency).

This action is filed pursuant to Section 552 of Title 5, United States Code. Plaintiff faces the possibility of being discharged from the Air Force under provisions of the Air Force Regulations. [AFR 39-12]. Plaintiff specifically requests the U.S. District Court to enjoin the defendants from withholding from him certain statements which he claims will aid him in preventing his discharge.

It is the government's contention that these statements, which were the result of an OSI [Office of Special Investigation] investigation and are being utilized at present by an administrative board reviewing the possibility of plaintiff's discharge, fall within an exception to sec. 552 which allows a refusal to produce the documents. The exception to which the government refers is sec. 552(b) (7) which states "This section [sec. 552(a)] does not apply to matters that are . . . [1] investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than the agency."

**HELD:** *Complaint dismissed.*

It is the decision of the Court that the government is entitled to withhold the documents because of the exemption previously stated. The legislative history of this statute indicates that is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any laws including "files prepared in connection with related government litigation and adjudicative proceedings." H.R. Report #1497, 89th Cong., 2d Session, pg. 11.

*Quote from case on intent and scope of the Act:* "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

***Bristol-Myers Company v. Federal Trade Commission***

284 F. Supp. 745 (D.D.C. 1968), aff'd in part, rev'd in part, 424 F. 2d 935 (D. C. Cir. 1970), cert. den. 400 U.S. 824 (1970)

*Agency:*

Federal Trade Commission

*Record(s) involved:*

Various documents relevant to a rulemaking proceeding initiated by the Commission on the basis of staff investigation, accumulated experience and available studies and reports.

*Sections of the Act:*

Sec. 552(b) (4)—Exemption for trade secrets and confidential information.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For petitioner.

The Bristol-Myers Company seeks an order compelling the Federal Trade Commission to produce certain documents relevant to a rulemaking proceeding initiated by the Commission on the basis of "extensive staff investigation," . . . accumulated experience and available studies and reports. . . ." The Commission refused to produce the documents, and the District Court dismissed the complaint, ruling that the material sought did not constitute "identifiable records" whose production is required by statute, and furthermore that many of the documents sought fell within the statutory exemptions for trade secrets, internal agency documents, or investigatory files compiled for law enforcement purposes.

**Held:** *With regard to production of records under the Freedom of Information Act, the order of the District Court is reversed and remanded. Other claims not related to the Act are affirmed.*

The District Court failed to examine the disputed documents, and explain the specified justification for withholding particular items. A bare claim of confidentiality will not immunize files of a government agency from scrutiny.

*Quote from case on intent and scope of the Act:* "Before 1967, the Administrative Procedure Act contained a Public Information Section full of loopholes which allowed agencies to deny legitimate information to the public.' When Congress acted to close those loopholes, it clearly intended to avoid creating new ones."

***California v. Richardson***

351 F. Supp. 733 (N. Cal. 1972)

*Agency:*

Department of Health, Education and Welfare

*Record(s) involved:*

Extended Care Facility Reports (Form SSA-1569) relative to California nursing homes receiving Medicare reimbursement.

*Section of the Act:*

Sec. 552(b) (3)—Exemption by statute.

*Judgment:*

For defendants (Agency).

The California Attorney General, on behalf of the people of California, and two senior citizens' organizations seek an order requiring the Department of Health, Education and Welfare to disclose annual reports certifying whether California nursing homes comply with Medicare requirements. They argue that these reports are the only records by which Medicare patients can determine which nursing homes provide safe, sanitary, and humane care.

HEW argues that the requested annual reports fall within section 552(b) (3), which authorized nondisclosure of records "specifically exempted from disclosure by statute." The statute upon by HEW (42 U.S.C. sec. 1306(a)) allows the Secretary of Health, Education and Welfare to determine by regulation whether information obtained in the course of his duties shall be made public.

Plaintiffs urge that the Freedom of Information Act does not encompass Section 1306 because no material is "specifically exempted from disclosure" by statute.

**HELD:** Reports are not subject to disclosure.

42 U.S.C. sec. 1306(a) should be considered sufficiently specific for purposes of sec. 552(b) (3). Several statutes employ the method of sec. 1306 and allow agency heads to determine by regulation whether specified information shall be made public. While a respectable argument can be made that such statutes do not specifically exempt the information from disclosure, that interpretation would defeat the intent of these various statutes. It is unlikely that Congress intended such a wholesale repeal of these nondisclosure statutes.

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***Charles River Park "A" Inc. v. Department of Housing and Urban Development***

**Civ. A. No. 1861-72 (D.D.C. 1973)**

***Agency:***

Department of Housing and Urban Development.

***Record(s) involved:***

Financial information regarding plaintiffs.

***Sections of the Act:***

Sec. 552 (b) (1-9)—Exemptions not referred to individually.

***Judgment:***

In favor of plaintiffs (party seeking to get permanent injunction *against* agency disclosure of financial information concerning plaintiffs).

Plaintiffs filed action in equity in District Court to prevent Defendant (HUD) from disclosing information regarding plaintiffs. Because case did not involve a person seeking information under the F.O.I.A., the Court held that the Act did not apply here. Defendant Agency did not have standing to use the FOIA as justification for disclosure. The case is therefore governed by other law.

Financial information is confidential by its very nature and was furnished with the implied understanding that it would remain confidential. Disclosure is unauthorized and would constitute an abuse of agency discretion. Court has the power in equity to issue a permanent injunction against disclosure.

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***City of Concord v. Ambrose***

**333 F. Supp. 958 (N.D. Cal. 1971)**

***Agency:***

Bureau of Customs

***Record(s) involved:***

Texts used by the Bureau of Customs to train law enforcement agents in art and science of conducting effective surveillance of suspected and known violators of the customs laws.

***Sections of the Act:***

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (2)—Exemption for personnel rules.

***Judgment:***

For defendant (Agency).

Action by police officer and city to compel the Commissioner of Customs, under the Freedom of Information Act, to disclose certain texts used by the Bureau of Customs to train law enforcement agents in the art and science of conducting effective surveillance of suspected and known violators of the customs laws. **HELD:** Judgment for defendant.

The requested materials do not fall within the definition of sec. 552(a) (2) (C) ("administrative staff manuals and instructions to staff that affect a member of the public") and were not otherwise disclosable under sec. 552(a) (3).

Although labeled dicta by the court itself without a firm conclusion, the court discussed the possible applicability of sec. 552(b) (2) and (5) exemptions.

***Clement Brothers Company v. National Labor Relations Board***

282 F. Supp. 540 (N.D. Ga. 1968)

***Agency:***

National Labor Relations Board

***Record(s) involved:***

Documents relative to Board's investigation of alleged unfair labor practices arising out of representation election.

***Section of the Act:***

Sec. 552(b) (7)—Exemption for investigatory files.

***Judgment:***

For defendant (Agency).

Action brought by employer against the National Labor Relations Board, *inter alia*, under the Public Information Section of the Administrative Procedure Act in an effort to compel the N.L.R.B. to permit the inspection and copying of documents obtained by the Board in its investigation of alleged unfair labor practices arising out of a representation election.

The pertinent portion of the Freedom of Information Act upon which the plaintiff relies provides as follows:

" . . . (E)ach agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to any person." (5 U.S.C. 552(a) (3)).

The above cited general directory is limited in application by several specific exemptions, one of which states:

"This section does not apply to matters that are . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. (5 U.S.C. 552(b) (7))."

The plaintiff contends that this exemption is not applicable because it refers only to law enforcement of a criminal nature.

**HELD:** Plaintiff's request for an injunction ordering the protection of the employee statements is denied.

In addition to the common sense necessity of protecting the investigatory function and procedures of the Board, the legislative history of the Act itself makes it clear that the exemption in question is not limited solely to criminal law enforcement but rather applies to law enforcement activities of all natures.

The Court is of the opinion that the plaintiff has placed unwarranted reliance on the Freedom of Information Act; the Court cannot accept the plaintiff's position that the Act opened for employers the Pandora's box of accessibility to employee statements given to the Board in furtherance of its investigatory function.

***Commercial Envelope Manufacturing Co. v. S.E.C.***

450 F.2d 342 (2 Cir. 1972)

***Agency:***

Securities and Exchange Commission

***Record(s) involved:***

Letter allegedly sent to S.E.C. Commission by third party and alleged to be libelous and to have been sent to the Commission with the intention of influencing Commission to withhold approval of plaintiff's registration statement.

***Sections of the Act:***

Case did not deal with specific sections of the Act, but with a question of jurisdiction.

***Judgment:***

In favor of agency on question of jurisdiction.

Plaintiffs brought action in Court of Appeals to compel S.E.C. to disclose letter. Plaintiff rested their claim on Sec. 9 of S.E.C. Act of 1933, 15 U.S.C.

Sec. 77i (1970), a disclosure provision which confers jurisdiction for court review of disclosure on the Court of Appeals. Commission moved to dismiss for lack of jurisdiction.

**HELD:** *Motion to dismiss for lack of jurisdiction granted.*

Letter in question did not fall within kind of material covered by 15 U.S.C. Sec. 77i (1970). The only other basis for disclosure would be the Freedom of Information Act. However, the F.O.I.A. confers jurisdiction for review of non-disclosure by agencies on District Court not the Court of Appeals. Therefore the Court of Appeals lacks jurisdiction to hear plaintiff's claim.

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## *Committee for Nuclear Responsibility v. Seaborg*

—F. 2d—(D.C. Cir. 1971), 3 ERC 1210

**Agency:**

Atomic Energy Commission

**Record(s) involved:**

Document relative to a proposed underground nuclear test, code named Cannikin, on Amchitka Island, Alaska.

**Sections of the Act:**

None specifically mentioned in the reported opinion. The claim of executive privilege was raised by the government.

**Judgment:**

None decided by Court of Appeals. Held that executive privilege does not prevent federal district court from ordering *in camera* inspection of the documents.

Action brought by environmental groups to halt the Amchitka Island underground nuclear test. The District Court held that plaintiffs had presented a cognizable claim, which the courts were obligated to determine, that the Atomic Energy Commission had failed to carry out the mandate of Congress in the National Environmental Policy Act (NEPA), 42 U.S.C. secs. 4331 et seq. (1970), to set forth all pertinent environmental effects of the project, and thus to provide the disclosure which is indispensable to informed appraisal of the project by the Executive, Congress and the public. The government filed a motion to dismiss the lawsuit and the plaintiffs appealed to the Circuit Court of Appeals. The Circuit Court of Appeals remanded the case to the District Court so that plaintiffs might present evidence in support of their allegations, and continue the pretrial discovery that had been untimely curtailed by the government's motion to dismiss the lawsuit.

On remand plaintiffs sought to have the government produce documents in its possession allegedly containing information needed by plaintiffs for substantiation of their claim. The government resisted and raised a claim of executive privilege. To resolve the question of privilege, the District Court ordered the government to submit the documents at issue for personal *in camera* inspection by the District Court. The government filed an application for allowance of an immediate appeal, challenging the order on the grounds that executive privilege precludes even *in camera* screening by the District Court.

**HELD:** *Affirmed.*

Executive privilege does not prevent federal district court from ordering *in camera* inspection of documents, except those reflecting military and diplomatic secrets. The court exercises its authority with due deference to the position of the executive. It will take into account all proper considerations, including the importance of maintaining the integrity of executive decision-making processes. But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say-so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office.

***Consumer Union of United States, Inc. v. Veterans Administration***  
**301 F. Supp. 796 (S.D.N.Y. 1969), appeal dismissed as moot, 39 LW**  
**2419 (1971)**

*Agency:*

Veterans Administration

*Record(s) involved:*

Records that contain information relative to the VA's hearing-aid testing program.

*Sections of the Act:*

Sec. 552(b) (2)—Exemption for personnel rules.

Sec. 552(b) (3)—Exempt by statute.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner (in part).

The Veterans Administration (VA) hearing aid testing program was initiated as a means of evaluating hearing aids for procurement and distribution to veterans. Consumer Union of the United States, Inc. brings this action to compel the VA to make the raw scores, scoring schemes and quality point scores regarding the testing available to it. The raw scores are objective measures of the samples performance. In the past, the results of the test and the evaluation based thereon have been primarily for VA use only, without regard to any other governmental or private agency.

**HELD:** *Injunction issued enjoining the defendants from withholding records of the raw scores but information regarding quality point scores should be released.*

Although neither the raw scores or quality point scores come within exemption (2) of the Act, matters related solely to the internal personnel rules and practices of an agency; exemption (3), matters which are specifically exempted from disclosure by statute; exemption (4), matters that are trade secrets and commercial and/or financial information obtained from a person and privileged or confidential; exemption (5), matters that are inter-agency or intra-agency memorandums or letters to a party other than an agency in litigation with the agency, the court is not bound under the Act to automatically order the disclosure. Therefore, the rule that will be followed based upon the equity jurisdiction conferred by the Act is: where agency records are not exempted from disclosure by the Freedom of Information Act, a court must order their disclosure unless the agency proves that disclosure will result in significantly greater harm than good. In view thereof, the evidence presented indicates that the benefits of releasing the raw scores outweigh any harm, but the danger of the public being misled by releasing the quality point scores and the disruption of the VA programs that releasing the scoring scheme would cause outweighs any benefits.

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***Cook v. Willingham***

**400 F. 2d 885 (10th Cir. 1968)**

*Agency:*

United States Penitentiary

*Record(s) involved:*

Copy of presentence investigation report.

*Sections of the Act:*

None cited in the opinion of the court.

*Judgment:*

For defendants (Agency).

Action by prisoner against warden of a United States penitentiary for a copy of his presentence report. District court held that the presentence report is made for the use of the sentencing court and thereafter remains in the

exclusive control of that court despite any joint utility it may eventually serve.

HELD: *Affirmed.*

The Freedom of Information Act does not apply to "the courts of the United States." A presentence investigation is made and the report submitted to the sentencing court pursuant to Rule 32(c) of the Federal Rules of Criminal Procedure. A presentence report is clearly not an agency record and is therefore not available to the public under the Act.

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***Cooney v. Sun Shipbuilding & Drydock Co***

288 F. Supp. 708 (E.D. Pa. 1968)

**Agency:**

U.S. Department of Labor

**Record(s) involved:**

Report of shipyard accident prepared by investigators representing the Office of Occupational Safety, Bureau of Labor Standards, U.S. Department of Labor.

**Sections of the Act:**

Sec. 552(b) (7)—Exemption for investigatory files.

**Judgment:**

For petitioner.

Civil suit for damages arising out of the accidental death of plaintiff's decedent, an employee of defendant, Sun Shipbuilding and Drydock Company. The plaintiff sought by subpoena *duces tecum* the disclosure of a report of the accident prepared immediately after its occurrence by investigators representing the Office of Occupational Safety, Bureau of Labor Standards, U.S. Department of Labor. The report is purported to consist of statements of witnesses, factual findings made by investigators, and their conclusions as to the causes of the accident. In support of his motion to compel production, the plaintiff argues that the report is "necessary, material and relevant to a full presentation of the plaintiff's case in court, and non-production will impair the plaintiff's ability to meet his burden of proof."

The government *inter alia* purports to find justification for withholding the report in one of the exemptions provisions—sec. 552(b) (7)—which exempts from disclosure "matters that are . . . (7) investigatory files compiled for law enforcement purposes, except to the extent available by law to private party . . ."

HELD: "The document sought by the subpoena *duces tecum* is not, by virtue of 5 U.S.C. sec. 552(b) (7) entitled to absolute immunity from disclosure; rather, only those portions representing statements of witnesses and deliberations or recommendations by the federal officials were exempted from disclosure."

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***Cowles Communications, Inc. v. Department of Justice***

325 F. Supp. 726 (N.D. Cal. 1971)

**Agency:**

Office of the Director of Immigration and Naturalization Service.

**Record(s) involved:**

File relating to a certain named individual.

**Section of the Act:**

Sec. 552(b) (7)—Exemption for investigatory files.

**Judgment:**

File ordered to be delivered to the Court for an *in camera* inspection so that the Court could determine whether it was an investigatory file compiled for law enforcement purposes.

Action under the Freedom of Information Act to obtain records in the office of the Director of the Immigration and Naturalization Service relating to one Salvatore Marino. The Government contends that the files are exempt under

the Act (5 U.S.C. sec. 552(b)(7)) as investigatory files compiled for law enforcement purposes. The plaintiff contends that the exemption does not apply since there are no proceedings pending against Marino.

**HELD:**

Investigatory files compiled for law enforcement purposes are protected by the Act. "A file is no less compiled for law enforcement purposes because after the compilation it is decided for some reason there will be no enforcement proceeding."

There are at least two reasons why investigation files should be kept secret. "The informant may not inform unless he knows that what he says is not available to private persons at their request, but more important in this day of increasing concern over the conflict between the citizen's right of privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons." The Government should not be allowed to file an affidavit that a given file is an investigatory file and by so doing foreclose any other determination of the fact. Thus, the Government will be required to deliver the file to the court for an *in camera* inspection.

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***Cuneo v. Laird***

**338 F. Supp. 504 (D.D.C. 1972)**

*Agency:*

Department of Defense

*Record(s) involved:*

Three-volume Contract Audit Manual (DCAAM-7640.1) of the Defense Contract Audit Agency of the D.O.D.

*Sections of the Act:*

Sec. 552(b)(2)—Exemption for internal personnel rules.

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For defendant (Agency).

Action under 5 U.S.C. sec. 552 to compel the disclosure of the three-volume Contract Audit manual (DCAAM-7640.1) of the Defense Contract Audit Agency of the Department of Defense.

Certain portions of the Manual are available to the public and, therefore, are readily available to the plaintiffs. The defendants contend that the remaining portions of the Manual, that is, the non-public portions, are "related solely to the internal personnel rules and practices of an agency" and, further, 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."

**HELD:** Non-public portions of government contract audit manual which set forth the criteria to be used in relation to deciding what should be audited, how it should be audited, the depth of the audit, and the reliance that could be placed upon defense contractors' own internal controls were exempt from disclosure to plaintiffs under 5 U.S.C. secs. 552(b)(2), and (b)(5).

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***Ditlow v. Volpe***

**Civ. A. No. 2370-72 (D.D.C. 1973)**

*Agency:*

National Highway Traffic Safety Administration (N.H.T.S.A.).

*Record(s) involved:*

Material relating to investigation of safety defects in new automobiles.

*Sections of the Act:*

Sec. 552(b)(3)—Exemption for material specifically exempt by statute.

Sec. 552(b)(4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552 (b) (7)—Exemption for investigatory files compiled for law enforcement purposes.

**Judgment:**

For plaintiffs (in part).

Plaintiffs filed action in District Court to compel N.H.T.S.A. to disclose 1) all correspondence between N.H.T.S.A. and the auto manufacturers in connection with pending safety defect investigations, 2) Book D of the submission of General Motors Corp. to N.H.T.S.A. of Oct. 1970, and 3) a report of N.H.T.S.A.'s Office of Standards Enforcement concerning the enforceability of Federal Motor Vehicle Safety Standards. These materials were examined in camera.

1) Correspondence: Exemption 3 and 4: N.H.T.S.A. claimed these exemptions through Section 1905 of Title 18 which authorizes criminal sanctions for release of trade secrets and confidential commercial information. Since this material is also protected by Exemption (b) (4), Section 1905 of Title 18 should not be more broadly interpreted than exemption (b) (4). Thus exemption (b) (3), exempting material which is exempt by statute, is, in this case, co-extensive with exemption (b) (4). Exemption (b) (4) requires a showing that the material is independently confidential. Defendants have failed to make that showing and thus have failed to establish exemption under (b) (3) or (b) (4).

Exemption 7: Exemption under F.O.I.A. must be construed narrowly. Mere labeling of material by the agency as investigatory is not sufficient. Must show that disclosure of the material would cause serious harm to law enforcement efficiency. Defendants have failed to make that showing.

Court orders disclosure of the correspondence.

2) Book D: Material relating to open lawsuits: Exemption 4—Defendants failed to make required showing that disclosure would cause serious harm to law enforcement efficiency. Court ordered disclosure of Book D.

3) Office of Standards Report: Exemption 5—The court makes a distinction between memoranda which are a final analysis of factual data (material not exempt under exemption 5 and memoranda containing opinions on policy-making (e.g. suggestions for modification of standards) which are protected by exemption 5.

Court found that the report contained recommendations and not factual data and therefore was exempt under § 552 (b) (5).

Court granted Defendant's motion for summary judgment as to the report only.

(Reversed relying on *Weisburg en banc* by Court of Appeals, — F2d — (D.C. Cir. 1974) Civ. A. No. 73-1984)

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***Epstein v. Resor***

296 F. Supp. 214 (N.D. Cal. 1969), aff'd 421 F. 2d 930 (9th Cir. 1970),  
cert. den. 398 U.S. 965 (1970)

**Agency:**

Department of the Army—Department of Defense

**Records(s) involved:**

File described as "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul."

**Sections of the Act:**

Sec. 552(b) (1)—Exemption for information withheld by Executive order.

**Judgment:**

For defendant (Agency).

Plaintiff, a historian, brings this action pursuant to section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 552, to enjoin the Secretary of the Army from withholding a file described as "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul." The file has been classified Top Secret since 1948 pursuant to the provisions of Executive Order 10501, 3 C.F.R. 484 (Supp. 1968). Plaintiff contends that the Top Secret classification on the file he seeks, is unwarranted and that the Court has the power to hold a trial *de novo* on the merits of this classification.

**HELD:** Motion to dismiss the complaint denied, and the motion for summary judgment granted in favor of the defendants. Affirmed by United States Court of Appeals. Certiorari denied, 398 U.C. 965.

Section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 552 provides that the section does not apply to matters that are "*specifically required* by Executive order to be kept secret in the interests of the national defense or foreign policy." Therefore, the jurisdiction of the District Court does not apply to information that falls within the exemptions set forth in subsection (b) of Section 3. To hold that the agencies have the burden of proving their action proper even in areas covered by the exemptions would render the exemption provision meaningless.

*Dictum:* The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

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***Ethyl Corporation v. Environmental Protection Agency***  
**— F. Supp. — (E.D. Va., 1972), Civil Action No. 447-72-R**

*Agency:*

Environmental Protection Agency

*Record(s) involved:*

Documents related to proposed regulations on use of lead additives in gasoline

*Section of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner.

Plaintiff seeks pursuant to the Freedom of Information Act documents relative to proposed regulations on the use of lead additives in gasoline.

The defendants contend that the material is exempt from disclosure under sec. 552(b) (5) of the Act and assert a claim of Executive Privilege.

**HELD:** Judgment partially favorable to plaintiff.

The Court is convinced that academically the common law aspect of Executive Privilege has been codified by the Congress in its enactment of the Freedom of Information Act. Therefore, a bare conclusory assertion of Executive Privilege does not limit the courts authority to participate in determining the scope of the privilege by *in camera* inspection.

The Freedom of Information Act requires the disclosure of those portions of documents which are factual and scientific in nature as distinguished from those which represent the opinions and recommendations of the agency.

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***Evans v. Department of Transportation***

**446 F. 2d 821 (5th Cir. 1971), cert. den. 405 U.S. 918 (1972)**

*Agency:*

Department of Transportation.

*Record(s) involved:*

Letters to Agency referring to plaintiff's capabilities as a commercial airline pilot.

*Sections of the Act:*

Sec. 552(b) (3)—Exemption by statute.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

Action under the Freedom of Information Act by a pilot seeking disclosure of certain letters written by another in 1960 to the Federal Aviation Agency

which described his alleged problems of behavior disorder and mental abnormality as related to his qualifications to fly. The first letter did not identify the pilot. In response, the Agency wrote that the letter would be kept confidential. In response to that, the pilot was identified and details given. After an *in camera* inspection of the letters, the District Court granted the defendant's motion for summary judgment, finding that the material is exempted from disclosure by 5 U.S.C. sec. 552(b) (3) and (7) and 49 U.S.C. sec. 1504.

**HELD:** Affirmed.

(1) The efforts of the Federal Aviation Agency to investigate and take appropriate action as to the mental and physical health of pilots would be seriously jeopardized if individuals could not confidentially call facts to the attention of the Agency which might affect the safety and lives of millions of passengers. It was just such situations as this which prompted Congress to exempt from the terms of the Act "investigatory files compiled for law enforcement purposes" set forth in 5 U.S.C. sec. 552(b) (7). "We are of the further opinion that Congress could not possibly intended that such letters should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the Federal Aviation Agency of something which might justify investigation."

(2) By virtue of 5 U.S.C. sec. 552(b) (3), matters that are specifically exempted from disclosure by statute are exempt from the terms of the Freedom of Information Act. 49 U.S.C. sec. 1504 provides that any person may make written objection to the public disclosure of information contained in a document filed pursuant to the Federal aviation program. It further provides that whenever such objection is made, the board or administrator shall order such information withheld from public disclosure when, in their judgment, a disclosure of such information would adversely affect the interests of such person and is not required in the interest of the public. Here, assurances of confidentiality were made.

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### *Farrell v. Ignatius*

283 F. Supp. 58 (S.D.N.Y. 1968)

*Agency:*

Department of the Navy

*Record (s) involved:*

Aircraft accident report.

*Section of the Act:*

Sec. 552(a) (3)—Court review.

*Judgment:*

For defendant (Agency).

An *ex parte* order was obtained by plaintiff requiring the Secretary of the Navy to show cause why an order should not be made pursuant to the Freedom of Information Act enjoining him from withholding a certain aircraft accident report. The Secretary by cross motion moved to dismiss the action for lack of jurisdiction because no action has been commenced in court.

**HELD:** Order to show cause vacated.

The District Court obtains jurisdiction under the Act only "on complaint" of the party aggrieved. Here, since no complaint was filed and no summons was issued, no action was commenced and the court has no jurisdiction to act.

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### *Field v. Internal Revenue Service*

— F. Supp. — (D.D.C. 1973) Civil No. 841-72

*Agency:*

Internal Revenue Service

*Record (s) involved:*

Private IRS letter rulings and other related documents including the index to the rulings.

*Section of Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For plaintiff.

## PRESS RELEASE

WASHINGTON, D.C.—A U.S. District Court here has ruled in favor of Tax Analysts and Advocates in its Freedom of Information suit to open to public examination private internal Revenue Service rulings. In addition, Judge Aubrey E. Robinson ordered that certain related documents be made public including an index to the rulings. Rulings are official IRS interpretations of the tax laws which are furnished in response to requests by corporations and individual taxpayers.

The basic impact of the court's decision will be to make available to the general public rulings that have been known to date, only by a few select tax lawyers.

As Judge Robinson stated in his 14-page opinion, "private letter rulings are, in fact, widely disseminated among the tax bar and taxpayers with similar interests and problems and . . . the IRS is aware of this practice." Thus, he said, "a body of 'private law' has been created which is accessible to knowledgeable tax practitioners and those able to afford their services. It is only the general public which has been denied access to the IRS private rulings."

Judge Robinson wrote that "public availability and scrutiny are the very fundamental policies of the Freedom of Information Act. For one fundamental principle is that 'secret law is an abomination.'"

The decision means, for example, that documents pertaining to the controversial acquisition of the Hartford Fire Insurance Co. by the International Telephone and Telegraph Corp. will now be available to the press and public. A favorable tax ruling was key to that acquisition.

TA/A is preparing requests for documents relating to a number of letter rulings, including the one rendered in the ITT-Hartford case.

"This decision will probably result in the most basic change in IRS administrative procedures since the agency was forced by Congress to liberalize its publication practices more than 20 years ago," asserted Thomas F. Field, executive director of TA/A, a Washington-based interest tax law firm.

Prior to 1952, the IRS was publishing a few score rulings each year. At that time it increased the number and it currently averages between 500 and 600 a year out of about 30,000. The rest are so-called "letter rulings"—unpublished letters sent to taxpayers who have asked for an IRS determination of the tax consequences of actions contemplated or already taken.

Many of these are routine but thousands are retained permanently by IRS for reference purposes. TA/A contended, and the court agreed, that, under the Freedom of Information Act, letter rulings are "interpretations . . . adopted by the agency" and, thus, required to be publicly available.

Judge Robinson's decision means that four types of documents must be made available to the press and the public:

Letter rulings which are used as reference for future rulings.

Technical advice memoranda, which are sent to IRS agents in the field who have been asked for advice about how to handle an audit of a taxpayer.

The index to the private rulings that are used for reference by the IRS.

Correspondence for Congress, business firms and the general public with respect to rulings.

Field disputed comments by some critics who had argued that if TA/A were successful in the suit, it would destroy the IRS rulemaking process and delay answers to taxpayer requests for an IRS opinion on their tax problems.

"We are confident on the basis of extended discussions with tax practitioners that the rulemaking process will actually benefit from this decision," Field said. "The process will definitely not be destroyed any more than the judicial system is damaged by making court opinions public.

"As for a slowdown, the net result may actually be faster decisions due to a decreased IRS workload. Public availability of heretofore private rulings will tell all taxpayers what the IRS position is in certain fact situations that may be generally applicable. This will make it unnecessary for many taxpayers to ask for a separate opinion."

Field said that TA/A recognizes that the usefulness of this decision to the public and tax practitioners outside of Washington will be diminished if no

practical access to the now-public documents is established. Thus, he said, TA/A will announce next week a service which will enable interested members of the tax bar and the press to obtain such access.

Judge Robinson's decision was made in response to a TA/A request for documents relating to percentage depletion for producers of hard minerals. TA/A wanted to determine whether IRS hearings on proposed (since adopted) percentage depletion regulations (section 613 of the Internal Revenue Code) were, in part, a sham because IRS letter rulings already had committed the agency into a position on the regulations. "If we find that this, indeed, was the case," Field said, "we will consider further legal action."

The suit originally was filed April 28, 1972. Judge Robinson ordered the IRS to make the documents available within 30 days.

The attorney in the suit was William A. Dobrovir, Washington public interest lawyer, who has handled most of the leading freedom of information cases in the past few years.

The decision came less than a week after TA/A accepted a Treasury Department settlement offer in another Freedom of Information suit to require that Treasury open to public scrutiny the Treasury's tax correspondence and formal reports to Congress on tax legislation.

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[U.S. District Court for the District of Columbia, Civil Action No. 841-72]

TAX ANALYST AND ADVOCATES THOMAS F. FIELD V. INTERNAL REVENUE SERVICE, ET AL.

ORDER

Upon the considerations expressed in the Opinion entered herein this date, and upon consideration of the entire record, it is this 6th day of June, 1973,

Ordered, that Defendants' Motion for Summary Judgment be and hereby is denied, and it is

Further ordered, that Plaintiffs' Motion for Summary Judgment be and hereby is granted, and it is

Further ordered, that Defendants shall make available to Plaintiffs for inspection and copying within thirty (30) days of date all letter rulings, technical advice memoranda and communications sought by Plaintiffs herein, intact and without deletion, except for those items which, within said thirty (30) days period, Defendants submit to the Court sealed and intact, without deletion but with any proposed deletions indicated, for in camera review as to whether proposed deletion of information is justified under the Freedom of Information Act, together with a detailed written explanation of the justification for each deletion, and it is

Further ordered, that Defendants shall make available to Plaintiffs for inspection and copying within thirty (30) days of date all items in the Internal Revenue Service's index-digest reference card file sought by Plaintiffs herein, and all memoranda of conferences and telephone calls relating to the letter rulings and technical advice memoranda involved herein, unless within said thirty (30) day period those items are submitted to the Court for in camera review as to whether they may be properly withheld as internal memoranda within the meaning of exemption 5, 5 U.S.C. § 552(b)(5), of the Freedom of Information Act.

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*Fisher v. Renegotiation Board*

— F. 2d — (D.C. Cir. 1972), 41 LW 2263

*Agency:*

Renegotiation Board.

*Record(s) involved:*

Documents that contain information relative to settlement agreements, contractors' identities and reports, and minutes of settlement negotiations.

*Sections of the Act:*

Sec. 552(b)(4)—Exemption for information given in confidence.

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For plaintiff.

Action was brought under the Freedom of Information Act against the Renegotiation Board for specified documents and the identity of several contractors which had been intentionally deleted from the unilateral orders of the board. The District Court granted summary judgment for the board, giving no reasons.

**Held:** *Reversed and remanded.*

If the District Court rules against disclosure, it must identify the exemption supporting nondisclosure.

"After examination of those documents the district court must decide whether they contain commercial or financial information which the contractor would not reveal to the public and therefore are exempt from disclosure or are subject to release only after appropriate deletions have been made."

Unlike the case in *Grunman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F. 2d 578, the identity of Government contractors *per se* is not an unwarranted invasion of personal privacy and thus considered as confidential under exemption 4.

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***Frankel v. Securities and Exchange Commission***

460 F. 2d 813 (2d Cir. 1972)

*Agency:*

Securities and Exchange Commission.

*Record(s) involved:*

Investigatory file compiled and utilized by S.E.C. in an enforcement proceeding.

*Sections of the Act:*

Sec. 552(b) (3)—Exemption by statute.

Sec. 552(b) (4)—Exemption for information given in confidence.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

In November, 1970, the Commission began a non-public investigation of Occidental Petroleum Corporation and some of its officers and directors to determine whether certain statements of, and omissions to state, facts relating to various real estate transactions, in documents filed with the Commission and in press releases, violated Sec. 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. sec. 78j(b) (1970) and Rule 10b-5, 17 C.F.R. 240, 10b-5 (1972). On the basis of information obtained during the investigation, the Commission commenced a civil action against Occidental on March 4, 1971. On March 5, the Commission and the defendants agreed upon a consent decree, and both the investigation and the suit were terminated when the court entered judgment on the basis of the consent decree.

The shareholders of Occidental in this action commenced a class action for damages against Occidental and Hammer.

To support their complaint, the shareholders requested from the Commission documentary evidence used by the Commission in its suit against Occidental and Hammer.

Having received no ruling on their request, the shareholders commenced this action on May 27 seeking injunctive relief against continued withholding of the documents.

The Commission contends that the documents were not subject to mandatory public disclosure requirements of the Freedom of Information Act by virtue of 5 U.S.C. secs. 552(b) (7), 552(b) (4), 552(b) (5) and 552(b) (3).

Granting in part the shareholders motion for an injunction against continued withholding of the documents, the District Court took the position that, since the original investigation of Occidental and Hammer had been concluded on the date of the entry of the consent judgment, and since the Commission has taken no affirmative action "to maintain the file as a legitimate one 'compiled for [current] law enforcement purposes'," the exemption from disclosure provided by sec. 552(b) (7) no longer applied to the requested documents.

**Held:** Reversed and remanded with directions to enter summary judgment for appellants.

Under the Freedom of Information Act, the exemption from disclosure to any person of matter contained in an investigatory file compiled and utilized by an agency in an enforcement proceeding applies after the investigation and the enforcement proceeding has terminated. 5 U.S.C. sec. 552(b) (3, 5, 7).

"... Congress could not possibly have intended that such [matter] should be disclosed once an investigation is completed. If this were so, and disclosure were made, it would soon become a matter of common knowledge with the result that few individuals, if any, would come forth to embroil themselves in controversy or possible recrimination by notifying the [agency] of something which might justify investigation."

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***General Services Administration v. Benson***

**415 F. 2d 878 (9 Cir. 1969)**

***Agency:***

General Services Administration.

***Record(s) involved:***

Records relating to sale of land to plaintiff by G.S.A.

***Sections of the Act:***

Sec. 552 (a) (3)—Disclosure of identifiable records.

Sec. 552 (b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

***Judgment:***

In favor of plaintiff.

Plaintiff, member of a partnership, filed action in District Court seeking documents (needed to characterize profits from resale of property) relating to original purchase of property from G.S.A. District Court enjoined G.S.A. from withholding the documents. Defendants appealed.

**HELD:** *Affirmed.*

Court found material at issue to be statements of policy available under Sec. 552 (a) (2) (B) and not advisory opinions made for policymaking purposes which would be exempt under Sec. 552(b) (5). Exemption 4 condones withholding information only when it is sought from a person outside the agency who submitted it to the agency with the wish that it remain confidential. The appraisal reports are not confidential within the meaning of Sec. 552(b) (4) and therefore are not protected by that exemption.

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***Getman v. National Labor Relations Board***

**450 F. 2d 670 (D.C. Cir. 1971), app'l. for stay of order den. 404 U.S.**

**1204 (1971)**

***Agency:***

National Labor Relations Board

***Record(s) involved:***

List of names and home addresses of employees eligible to vote in certain elections.

***Sections of the Act:***

Sec. 552(b) (4)—Exemption for information given in confidence.

Sec. 552(b) (6)—Exemption for personnel, medical and similar files.

Sec. 552(b) (7)—Exemption for investigatory files.

***Judgment:***

For petitioner.

Two law professors undertaking a study of labor representation elections, applied for and obtained an order from the District Court requiring the NLRB to provide them with names and addresses of employees eligible to vote in approxi-

mately 35 elections to be designated by them. The claim was based upon 5 U.S.C. 552(a) (3) of the Freedom of Information Act.

The Board argued that the Freedom of Information Act does not require it to furnish the information because such information falls within Exemptions (4), (6) and (7) of the Act.

The District Court granted relief and the Board appealed.

**HELD:** *Affirmed.*

Exemption 4. Obviously, a bare list of names and addresses of employees which employers are required by law to give the Board, without any express promise of confidentiality, and which cannot be fairly characterized as "trade secrets" or "financial" or "commercial information" is not exempted from disclosure by subsection (b) (4).

Exemption 6. We find that, although a limited number of employees will suffer an invasion of privacy in losing their anonymity and in being asked over the telephone if they would be willing to be interviewed in connection with the voting study, the loss of privacy resulting from this particular disclosure should be characterized as relatively minor. Exemption (6) requires a court *de novo* to balance the right of the public to be informed; and the statutory language "clearly unwarranted" instructs the court to tilt the balance in favor of disclosure.

Exemption 7. The "excelsior" lists are not files prepared primarily or even secondarily to prosecute law violators, and even if they ever were to be used for law enforcement purposes, it is impossible to imagine how their disclosure could prejudice the Government's case in court.

"The board was created by Congress and Congress has seen fit to make identifiable records of the board and other Government agencies available to any person upon proper request. I find no exception in the Freedom of Information Act which would authorize the board to refuse promptly to turn over the requested records." Justice Black.

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### ***Ginsburg v. Richardson***

**436 F.2d 1146 (3 Cir. 1971)**

***Agency:***

Department of Health, Education and Welfare.

***Record(s) involved:***

All records in possession of HEW dealing with investigation into HEW Social Security hearing on plaintiff's claim for old-age benefits.

***Sections of the Act:***

Sec. 552(b) (5)—Exemption for inter-and-intra-agency memoranda.

***Judgment:***

In favor of defendant.

Plaintiff brought action in District Court seeking to overturn HEW Secretary's decision on Plaintiff's eligibility for old-age benefits. Plaintiff also relied on FOIA to request disclosure of material gathered by HEW in their investigation of plaintiff's Social Security hearing. District Court ruled in favor of HEW. Plaintiff appealed.

**HELD:** *Affirmed.*

HEW investigation of proceeding considered exempt under Sec. 552(b) (5) as inter-agency memoranda.

Further, the Court saw no need for the records dealing with the investigation by HEW into the conduct of the hearing examiner which were requested by plaintiff under the FOIA. The Court found that it did not need to go beyond the record of proceedings before the hearing examiner in order to determine plaintiff's claim that she was wrongfully denied old-age benefits.

**Grumman Aircraft Engineering Corp. v. Renegotiation Board**

425 F. 2d 578 (D.C. Cir. 1970)

*Agency:*

Renegotiation Board.

*Record (so involved):*

Opinions and orders of the Renegotiation Board issued during the renegotiation of contracts for fourteen companies and certain documents relating to petitioner's own renegotiations.

*Sections of the Act:*

Sec. 552 (b) (3)—Exemption by statute.

Sec. 552 (b) (4)—Exemption for information given in confidence.

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner.

This is an appeal to the United States Court of Appeals from a summary judgment refusing to order production of documents under the Freedom of Information Act, 5 U.S.C. sec. 552 (Supp. IV, 1969). The issue in the case is the scope of the statutory exemption for confidential information furnished to a federal administrative agency. Appellant, an aerospace contractor, seeks an order compelling the Renegotiation Board to produce (1) the orders and opinions issued during the years 1962 to 1965, and (2) certain documents relating to Grumman's own renegotiations for 1965. The Board contends that the documents are exempt from disclosure because they contain trade secrets and other confidential information. The U.S. District Court for the District of Columbia granted the Board's motion for summary judgment, without opinion.

*HELD: Reversed and remanded.*

5 U.S.C. sec. 552 (b) (4) Supp. 5V, 1969) was designed to prevent the unwarranted invasions of personal privacy which might be caused by the Government's indiscriminate release of confidential information. The statutory history does not indicate, however, that Congress intended to exempt an entire document merely because it contained some confidential information (H.R. Rep. No. 1497). On the contrary, should data which falls within exemption (4) appear in any Board opinion or order, both the Act and the Board's regulations (5 U.S.C. sec. 552 (a) (2) (Supp. IV, 1969)) recognize that the interests of confidentiality can be protected by striking identifying details prior to releasing the document.

*Quote from case on intent and scope of the act:* "Congress intended that sec. 552 would make available to the general public any agency records which would routinely be disclosed to a private party through the discovery process in litigation with the agency."

**Grumman Aircraft Engineering Corporation v. Renegotiation Board**

482 F.2d 710 (D.C. Cir. 1973)

*Agency:*

Renegotiation Board

*Record(s) involved:*

Documents explaining decisions of the Board and its decision-making delegates, the Regional Boards, made between 1962 and 1965 as to whether 14 companies accrued excess profits in their business with the Government.

*Sections of the Act:*

Sec. 552(a) (2) (A)—Disclosure of “final opinions, including concurring and dissenting opinions.”

Sec. 552(a) (3)—Disclosure of identifiable records.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

In favor of plaintiff.

Plaintiffs brought action in District Court to compel disclosure of documents explaining decisions of the Board and its decisionmaking delegates, the Regional Boards, made between 1962 and 1965, on whether 14 companies accrued excess profits in their business with the Government. Plaintiffs based their claim on Sec. 552(a) (2) (A) which provides for public inspection and copying of “final opinions, as well as orders, made in the adjudication of cases.” Initially, the District Court refused to order disclosure on the ground that the requested documents contained trade secrets and other confidential information exempted by Sec. 552(b) (4). Plaintiffs appealed. The Circuit Court remanded the case to the District Court in order to have the identifying details excised from the documents and to determine which of the documents or parts thereof should be produced under the Act. On remand, the Board agreed to produce many of the documents requested but disagreement remained as to whether certain documents were final opinions, including concurring and dissenting opinions” producible under 5 U.S.C. Sec. 552(a) (2) (A) or, as defendant contended, inter- or intra-agency memoranda exempt from production under Sec. 552(b) (5). The District Court ruled that the documents at issue were not exempt under Sec. 552(b) (5) and should be produced under the Act as “final opinions, including concurring and dissenting opinions.”

**HELD:** *Affirmed.*

Defendants argued that the documents in which the Regional Board decides that a clearance or finding of no excess profits liability is proper, were merely advisory in that the National Board is the final decision-maker and that the unrecorded and undisclosed reasons for the National Board’s finding might have been different from those contained in the Regional Board’s report. The Court rejected this argument stating that the practicalities of National Board procedure dictates that the Regional Board’s decision is tantamount to a final opinion of the National Board. The Regional report is the only report that is the only report that is kept on file once the National Board decides that a clearance of the Regional Board’s decision should be granted. Thus, the Regional Board’s have enough substantial independent authority to come within the classification of “agency” to which the provision for disclosure of “final opinions” under the Act applies.

The Court concluded that the Regional reports at issue were “final opinions” of an “agency” and thus subject to disclosure under 5 U.S.C. section 552(a) (2) (A). Thus the reports could not be considered “inter- or intra-agency memoranda” under exemption 5 because they involved final opinions and not opinions expressed in the policy-making process. Therefore, the documents were not exempt under the Act.

In addition, the reports also fell within the classification of “identifiable records” disclosable under 5 U.S.C. section 552 (a) (3).

“A document which a decision-maker treats as justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document other than what it is.”

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***Harbolt v. Alldredge***

464 F. 2d 1243 (10th Cir. 1972)

*Agency:*

U.S. Reformatory.

*Record(s) involved:*

F.B.I. interrogation reports.

*Section of the Act:*

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

Plaintiff, a prisoner in custody at a Federal Correctional Institution, seeks in his complaint compensatory and punitive damages incurred as a result of having been denied copies of his F.B.I. interrogation reports thereby depriving him of reasonable access to the courts.

The District Court dismissed the action and plaintiff appealed.

**Held:** *Affirmed.*

5 U.S.C. sec. 552(b) (7) makes it clear that F.B.I. interrogation reports are not subject to production or disclosure.

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***Hawkes v. Internal Revenue Service***

467 F. 2d 787 (6th Cir. 1972)

*Agency:*

Internal Revenue Service.

*Record(s) involved:*

Certain IRS forms relating to the assessment and payment of taxes by petitioner.

Information respecting a survey and audit of petitioner's 1965 tax returns. Portions of the IRS Manual.

*Section of the Act:*

Sec. 55. 2(b) (2)—Exemption for internal personnel rules.

*Judgment:*

For petitioner.

The taxpayer was indicted for criminal tax fraud. As part of his effort to prepare a defense he wrote the IRS seeking, among other things, portions of the Internal Revenue Manual relating to the examination of returns, interrogation of taxpayers by IRS agents and other matters. The Internal Revenue Service rejected the taxpayer's request with regard to the manual.

During the pendency of the criminal charge, the taxpayer began a civil suit seeking an order requiring the IRS to disclose the manual under the Freedom of Information Act, 5 U.S.C. sec. 552.

The IRS contends that the manual is not subject to disclosure under (a) (2) (C) of the Freedom of Information Act and/or is any event exempted from disclosure by exemption (b) (2).

**Held:** *Case remanded in order that the District Court may reconsider appellant's request for disclosure of the Manual in light of the construction placed upon the Information Act in this opinion.*

S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965), which accompanied the bill on its passage through the Senate provides: "The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the confidential nature of instructions to personnel prosecuting violations of law in court, while permitting a public examination of the basis of administrative action." Consequently, it would seem logical to assume that the intent of the limit on (a) (2) (C) was to bar disclosure of information which, if known to the public, would significantly impede the law enforcement process. Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by that agency does not impede law enforcement and is not excluded from compulsory disclosure under (a) (2) (C); materials providing such information are administrative in character and clearly discloseable.

The internal practices and policies referred to in exemption (b) (2) of the Act relate only to the employer-employee type concerns upon which the Senate Report focused. With such view in mind it is apparent that the type of material one would expect to find in the Manual sought by appellant is unlikely to be exempted from disclosure by (b) (2).

*Quote from case on intent and scope of the act:* "Congress did not intend to require exhaustion of the criminal discovery process as a prerequisite to disclosure under the Act."

**Hicks v. Freeman**

397 F. 2d 193 (4th Cir. 1968)

**Agency:**

Department of Agriculture.

**Record(s) involved:**

None were specifically requested.

**Section of the Act:**

Sec. 552(b) (2)—Exemption for personnel rules.

**Judgment:**

For defendant (Agency).

Action by tobacco inspector against the Secretary of Agriculture to recover for violation of the compensation provisions of his employment contract after the policy guaranteeing inspectors a minimum period of pay status was discontinued.

Hicks contends that the Secretary of Agriculture was required to follow the standard reduction-in-force procedures in determining which inspectors were to be given further assignments on the burley tobacco market. "The Code of Federal Regulations purports to establish a procedure that an agency is required to furlough 'when it releases a competing employee from his competitive level by . . . furlough for more than thirty days.'"

**HELD:** For defendant (Agency).

Although the Civil Service Commission Federal Personnel Manual and Department of Agriculture Regulations were not filed with the Federal Register or published in the Code of Federal Regulations, their efficacy in regard to reduction-in-personnel procedures were not limited since such procedures are "related solely to . . . internal personnel rules and practices," 5 U.S.C.A. sec. 552 (b) (2), and "have no general applicability and legal effect."

**Hogg v. United States**

428 F. 2d 274 (6th Cir. 1970), cert. den. 401 U.S. 910 (1971)

**Agency:**

Department of Justice.

**Record(s) involved:**

An internal delegation of authority.

**Sections of the Act:**

Sec. 525(a) (1)—Requiring an agency to publish its rules.

**Judgment:**

For defendant (Agency).

In a suit for refund of income taxes paid, *inter alia*, the taxpayer asserted that a certain section of an Attorney General's order dealing with regulations governing appellate proceedings for officers of the Department of Justice was ineffective because it had not been published in the Federal Register as required by 5 U.S.C. sec. 552.

**HELD:** The Administrative Procedure Act does not require that all internal delegations of authority from the Attorney General must be published in order to be effective. The requirement for publication attaches only to matters which if not published would adversely affect a member of the public. Here, the non-publication of internal instructions to officers of the Department of Justice as to their functions in the conduct of litigation to which the United States is a party cannot adversely affect a taxpayer.

***Institute for Weight Control, Inc. v. Klassen***

348 F. Supp. 1304 (D.N.J. 1972)

***Agency:***

Postal Service.

***Record(s) involved:***

Previously filed complaint by the Postal Service against the plaintiff and the resulting Compromise Agreement.

***Section of the Act:***

Sec. 552(b) (7)—Exemption for investigatory files.

***Judgment:***

For defendant (Agency).

In an action which plaintiff seeks injunctive relief against enforcement of what it alleges is an illegal mail stop order, issued by the Postal Service under 39 U.S.C. sec. 3005, after an administrative determination of false advertising; plaintiff contends that the Judicial Officer erred in refusing to order production of the Post Office files relating to the complaint and the discussion relative to the June 15, 1971 Compromise Agreement. The record indicates that the Postal Service offered to consider any specific request for specific documents; however, the plaintiff refused to be specific, but rather insisted on obtaining the complete file, which the Postal Service contended contained inspection Service investigative reports, among other things.

**HELD:** The judicial officer did not err in refusing to order the production of Postal Service files inasmuch as the plaintiff refused to make a request for specific documents and inasmuch as among other things, the files contained Inspection Service investigative reports which were exempt from disclosure by statute. 5 U.S.C.A. sec. 552.

***International Paper Company v. Federal Power Commission***

438 F. 2d 1349 (2d Cir. 1971), cert. den. 404 U.S. 827 (1971)

***Agency:***

Federal Power Commission.

***Record(s) involved:***

All staff memoranda in three earlier disclaimer cases, claimed to be precedent cases.

***Sections of the Act:***

Sec. 552(a) (3)—Request for identifiable records.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

***Judgment:***

For defendant (Agency).

This appeal from a decision of the Federal Power Commission (FPC) claims that the Commission unlawfully attempted to extend its jurisdiction beyond its statutory authority; and that in the performance of its duties, it not only had violated "the separation of functions" provisions of the Administrative Procedure Act, 5 U.S.C. sec. 554(d) but also the Freedom of Information Act, 5 U.S.C. sec. 552. Consolidated in the appeal, is a related court decision from the Southern District of New York, dismissing the International Paper Company's (International's) separate court action requesting the production of certain Commission records alleged to have been wrongfully withheld under FIA sec. 552(a) (3) which requires: "(E)ach 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."

International requested in the District Court case that the Commission should be ordered to disclose all staff memoranda because it claimed the Commission's action in four other cases favored the legal position taken by International.

The Commission took the position that it had the right to reject this request pursuant to FIA sec. 552(b) (5), which provides: "This section does not apply to matters that are . . . (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."

**HELD:** The Commission's decision and the judgment of the District Court are affirmed.

The appellants requested discovery must be denied under the fifth exception of the FIA because it seeks the disclosure of items used in the FPC's deliberation processes. To allow disclosure of these documents would interfere with two important policy considerations on which sec. 552(b) (5) is based: encouraging full and candid intra-agency discussion; and shielding from disclosure the mental processes of executive and administrative officers.

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### *Irons v. Schuyler*

**321 F. Supp. 628 (D.C.C. 1970), aff'd. 465 F. 2d 608 (D.C. Cir. 1972)**

*Agency:*

Patent Office.

*Record(s) involved:*

All unpublished manuscript decisions of the Patent Office, and all available indices thereof.

*Sections of the Act:*

Sec. 552(2) (3)—Identifiable records.

*Judgment:*

For defendant (Agency) as to the decisions, remanded for consideration as to the available indices.

Action to compel the Patent Office to make available all of its unpublished manuscript decisions and a current index providing identifying information for the public as to the unpublished manuscript decisions, pursuant to secs. 552(a) (2), 552(a) (2) (A) and 552(a) (3) of the Freedom of Information Act.

**HELD:** *Defendant's motion to dismiss granted.*

The request in the instant case "for all unpublished manuscript decisions" is not a reasonable request for identifiable records, but rather a broad, sweeping, indiscriminate request for production lacking any specificity. It may be true that some of these opinions could be made available under the provisions of the Act if a specific request for an identifiable opinion were made, but a request for all is not specific enough to decide if any particular decision or decisions can be made available.

The order on appeal dismissing the complaint insofar as the request for all unpublished manuscript decisions is concerned, is affirmed, but action is remanded where dismissal did not refer to the request "such indices as are available", and it appeared that indices were available.

*Quote from case on intent and scope of the act:* "This court is not required to examine every manuscript decision of the past 100 or more years to decide in each case if there is trade secret or other material which should be excluded. The legislative history of the Act indicates that it was not the intent of Congress to add materially to the burden of overworked courts."

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### *LaMorte v. Mansfield*

**438 F. 2d 448 (2d Cir. 1971)**

*Agency:*

Securities and Exchange Commission.

*Record(s) involved:*

Transcript of testimony given by petitioner in 1967 in another matter.

*Section of the Act:*

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

Petition denied.

Willard J. LaMorte, President and director of Shattuck Denn Mining Corporation, is a defendant in actions now pending in the District Court, which were brought by Alan Zients and other stockholders for alleged violations of the Federal securities laws. In the course of taking LaMorte's deposition prior to trial, plaintiff's attorneys inquired whether LaMorte possessed a copy of the transcript of testimony he had given in 1967, under subpoena, in a nonpublic investigation being conducted by the Securities and Exchange Commission. Although LaMorte's counsel had obtained, with the SEC's consent, copies of the transcript, he refused to disclose their contents to the plaintiffs.

The lower court ordered that defendant LaMorte turn over his copies of the transcript to plaintiffs and any co-defendant who requested them. LaMorte then petitioned the U.S. Court of Appeals for a writ of mandamus to require the judge to vacate this order as beyond his power and as an abuse of discretion. Petitioner (appellant) replies principally on federal statutes and SEC regulations designed to preserve the secrecy of administrative investigations when this is necessary to proper discharge of the agency's functions. The thrust of which is that by availing himself of the opportunity, provided both by statute, 5 U.S.C. sec. 555 (c), and regulation, 17 C.F.R. sec. 203.6, to obtain under some circumstances a transcript of his testimony before the SEC in a nonpublic investigation, he did not thereby forfeit his alleged privilege to maintain the confidentiality of this testimony.

HELD: *Petition denied.*

The purpose of sec. 555 (c) was to facilitate access by a witness to his own testimony; the objectives of the Information Act was to promote general access to agency records. To the extent that a privilege exists, it is the agency's, not the witness'. The agency is free to withdraw the veil of secrecy, and once the witness has been allowed to obtain the transcript of his testimony, it is no more privileged or confidential in his hands—absent any restriction placed by the agency on disclosure of its contents—than any other record of a previous statement would be.

### ***Legal Aid Society of Alameda County v. Shultz***

349 F. Supp. 771 (N.D. Cal. 1972)

*Agency:*

Department of Treasury.

*Record(s) involved:*

Records relate to Treasury Department's enforcement of Executive Order No. 11246, 3 C.F.R. 339.

*Sections of the Act:*

- Sec. 552 (b) (3)—Exemption by statute.
- Sec. 552 (b) (4)—Exemption for information given in confidence.
- Sec. 552 (b) (7)—Exemption for investigatory files.
- Sec. 552 (a) (3)—Identifiable records.

*Judgment:*

For petitioner.

This action was brought pursuant to the Freedom of Information Act to force the Department of Treasury to make available various records relating to the Department's enforcement of an executive order which mandates that the federal government's economic power as a consumer be affirmatively used to prevent racial discrimination in employment.

The Department urges that the documents plaintiffs requested are within at least one of three exceptions of sec. 552 (b) : (3), (4), and (7).

HELD: *Order for plaintiff.*

" . . . [T]he prohibition of section 709 (e) [Civil Rights Act of 1964] upon which the defendant relies is inapplicable; . . . [this] provision cannot be read to forbid the disclosure by the Department of the Treasury of information which the Department requires contractors to reveal under Executive Order No. 11246 . . ." 5 U.S.C. sec. 552 (b) (3).

Those portions of documents which are exempt from disclosure pursuant to (b) (4) of the Act does not permit withholding of nonexempt portions. "In that event, 'suitable deletions' may be made . . ." 5 U.S.C. sec. 552 (b) (4).

The exception of sec. 552(b)(7) is inapplicable because the Department of Treasury has failed to carry the burden of proving that the compliance reviews are "investigatory files compiled for law enforcement purposes." 5 U.S.C. sec. 552(b)(7).

*Quote from case on intent and scope of the Act:* "In requiring that those seeking documents request 'identifiable records', Congress was not creating a new loophole that would allow agencies to continue to escape their responsibility to disclose information."

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### ***Long v. United States Internal Revenue Service***

**339 F. Supp. 1266 (W.D. Wash. 1971)**

***Agency:***

Internal Revenue Service.

***Record(s) involved:***

All files of IRS relating to the business activities of Long and his corporations, and IRS manual and code books.

***Sections of the Act:***

Sec. 552(b)(2)—Exemption for personnel rules.

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b)(7)—Exemption for investigatory files.

***Judgment:***

Partially favorable to petitioner.

Long filed this complaint pursuant to 5 U.S.C., sec. 552, to compel the production of all files of the Internal Revenue Service relating to the business activities of Long and his corporations, and an IRS manual and certain "code books."

Long's sole purpose in seeking IRS files is to obtain under the Freedom of Information Act, matters relating to current proceedings before the Tax Court.

The IRS filed a motion to dismiss the cause.

**HELD:** "The defendant's motion is granted with respect to information concerning the files of the Internal Revenue Service. With respect to plaintiff's request to see the manual and code books, however, the motion is denied."

Relative to the request to see the investigatory files relating to Long and his affiliates, the statute provides that request for information must be "identifiable" and Long's request is much too vague. 5 U.S.C.A. sec. 552(a)(3).

"If the manual and code books are 'instructions to staff that affect a member of the public' [sec. 552(a)(2)(C)] and are neither 'related solely to the internal . . . practices of' the IRS [sec. 552(b)(2)] nor 'intra-agency memorandums' [sec. 552(b)(5)], then Long may properly sue to gain access to them.

*Quote from case on intent and scope of the Act:* "The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any laws including 'files prepared in connection with federal government litigation and adjudicative proceedings'."

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### ***Long v. Internal Revenue Service***

**349 F. Supp. 871 (W.D. Wash. 1972)**

***Agency:***

Internal Revenue Service.

***Records(s) involved:***

Closing Agreement Handbook, Internal Revenue Manual, and Management Information Report, Source of Returns-Income Taxes.

***Sections of the Act:***

Sec. 552(a)(3)—Court review.

Sec. 552(b)(2)—Exemption for internal personnel rules and practices

Sec. 552(b)(5)—Exemption for inter- or intra-agency memoranda.

*Judgment:*

In favor of plaintiff.

Plaintiff brought action in District Court to compel Internal Revenue Service to disclose its Closing Agreement Handbook, Internal Revenue Manual and Management Information Report, Source of Returns-Income Taxes. Government claims reports are not staff manuals that affect a member of the public which would be disclosable. It argues that they are exempt as materials related solely to the internal personnel rules and practices of the agency under section 552(b) (2) and as intra-agency memorandum under section 552(b) (5)

**HELD:** *Government's motion for summary judgment denied.*

Factual material does not come under exemption 5 unless it is inextricably intertwined with the policy-making process. Material at issue does not relate solely to internal personnel functions. The court ruled that the material was entirely factual and was not inextricably intertwined with the policy-making process. Disclosure of documents rests on equitable determination of whether benefits to public from disclosure outweigh effects of nondisclosure. The government failed to establish exemption of the documents. Prejudice to the Government from disclosure is out-weighed by public's right to know.

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***M. A. Schapiro & Company v. Securities and Exchange Commission***

**339 F. Supp. 467 (D.D.C. 1972)**

*Agency:*

Securities and Exchange Commission.

*Record(s) involved:*

The Securities and Exchange Commission's Staff Study on off-board trading problem raised by the New York Stock Exchange's original Rule 394; and all transcripts made and documents received by the Securities and Exchange Commission in the course of that investigation.

*Sections of the Act:*

Sec. 552(b) (3)—Exemption by statute.

Sec. 552(b) (4)—Exemption for information given in confidence.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For petitioner.

M.A. Schapiro & Co., Inc., an underwriter and broker-dealer in bank securities, brought this suit under the FOI Act for the production of the Securities and Exchange Commission's Staff Study on the off-board trading problem raised by the New York Stock Exchange's original Rule 394; and all transcripts made and documents received by the Securities and Exchange Commission in the course of that investigation.

The defendants allege that this information is exempt from disclosure under 5 U.S.C. secs. 552(b) (3), (b) (4), (b) (5) and (b) (7).

**HELD:** There is nothing in sec. 1905 of Title 18 that prevents the operation of the Freedom of Information Act. The provision for documents specifically exempted from disclosure by statute [5 U.S.C. sec. 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 requested items do not fall within the exemption for "trade secrets" and commercial or financial information obtained from a person and privileged or confidential. [5 U.S.C. sec. 552(b) (4)]. This exemption serves the function of protecting privacy and the competitive position of citizens who offer information to assist government policy-makers. The statutory scheme, however, does not permit a bare claim of confidentiality to immunize agency files from scrutiny. The Court has the responsibility to determine the validity and extent of the claim of confidentiality, insuring the fact that the exemption is strictly construed in light of its legislative intent.

The documents involved are not inter-agency or intra-agency memoranda or letters. [5 U.S.C. sec. 552(b) (5)]. None of these documents express an exchange

of ideas between agencies or their respective staff members. There is no administrative policy-making process exhibited in any of the transcripts or documents presented.

The documents were not exempt from disclosure on the ground that they were investigatory files compiled for law enforcement purposes [5 U.S.C. sec. 552(b) (7)] since the agency failed to proffer any facts which would show it contemplated within the reasonably near future, a law enforcement proceeding based upon the six-year-old materials.

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***Martin v. Neuschel***

**396 F. 2d 759 (3d Cir. 1968)**

*Agency:*

Selective Service Commission.

*Record(s) involved:*

Home addresses of members of a certain local selective service board.

*Sections of the Act:*

None specified in opinion.

*Judgment:*

For defendant on procedural point.

To support an allegation that a local draft board was illegally constituted because of the residency of at least one of its members outside of the county, the plaintiff sought from defendant, clerk of the draft board, the home address of each member of the board. The right to the demanded information was predicated on the Freedom of Information Act. The defendant's motion to dismiss the complaint included a specific request for 60 days in which to answer the complaint if the motion was denied. The lower court did not grant or deny the motion, but on its own motion entered a final order granting the relief sought in the complaint.

**HELD:** *Judgment vacated and cause remanded.*

Apparently, the court was perturbed that a public agency exercising great power over an individual should withhold from him simple factual information which would enable him to know whether the agency is so constituted as to make its acts lawful. However, the government and its officers, as well as private citizens, are entitled to due and regular process in the pleading, hearing, consideration and disposition of litigated claims. The fact that a court doubts that a public officer can justify acts complained of does not warrant a denial of the right to plead whatever defense he may and to have the merits of the controversy decided in regular course.

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***Miller v. Smith***

**292 F. Supp. 55 (S.D.N.Y. 1968)**

*Agency:*

United States Coast Guard.

*Record(s) involved:*

Memoranda prepared by members of the staff of the Commandant relative to the suspension of plaintiff's license.

*Section of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For defendant (Agency).

Plaintiff was charged with negligence in connection with a collision between two vessels (on one of which plaintiff was acting as pilot) in New York Harbor. The Examiner found that plaintiff was guilty of negligence and ordered that his license be suspended for two months. On appeal, the Commandant appointed from his staff three members to hear oral argument for the plaintiff.

Two of the members made and signed a memorandum . . . recommending that the Examiner be upheld. The third member made and signed a memorandum recommending that the Examiner be reversed. It is these two memorandums of members of the Board which plaintiff demands to see.

HELD: It seems perfectly clear that the public information section of the Act does not give plaintiff any right to the memoranda of the Board. They are plainly "intra-agency memorandums" and, . . . would not be available in ordinary litigation. 5 U.S.C. sec. 552(b) (5). It would inhibit the free expression and interchange of views within the Commandant's staff if staff memorandums were available to the public. "Here the agency is sole, the Commandant himself. His decision and order must be available, but not staff memoranda such as the opinions of the members of the Permanent Board to Hear Oral Argument."

## *Mink v. Environmental Protection Agency*

410 U.S. 73 (1973)

*Agency:*

Environmental Protection Agency.

*Record(s) involved:*

Documents relative to an underground nuclear test explosion.

*Sections of the Act:*

Sec. 552(b) (1)—Exemption for information withheld by Executive order.

Sec. 552(b) (5)—Exception for inter- and intra-agency memoranda.

*Judgment:*

For defendants (Agency).

This action began with an article that appeared in a Washington, D.C. newspaper indicating that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for the coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Subsequently, Congresswoman Patsy Mink sent a telegram to the President urgently requesting the "immediate release of the recommendations and reports by inter-departmental committee . . ." When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.

Petitioners immediately moved for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsection (b) (1) and (b) (5) of the Act.

The District Court entered summary judgment for defendants, and plaintiffs appealed.

The Court of Appeals reversed the Summary judgment which denied all relief to the plaintiffs and remanded the case for an *in camera* inspection of documents by the District Court.

HELD: *Reversed and Remanded by the Supreme Court.*

Mere classification as "Top Secret" or "Secret", pursuant to Executive Order 10501, exempts from compelled disclosure, under the Freedom of Information Act 5 U.S.C. 552(b) (1), six of the nine requested documents contained in the Under Secretary Committee's report.

5 U.S.C. 552(b) (1), precludes U.S. District Court's *in camera* inspection of the contested documents for purposes of separating out for disclosure the "non-secret" components.

Disclosure of the remaining three documents conceded to be "unclassified", although generally exempt from compelled disclosure under intra- or inter-agency exemption, 5 U.S.C. 552(b) (5), must, absent proof that only advisory material is involved, be subjected to *in camera* inspection for separation and disclosure of clearly factual matters.

*Quote from case on intent and scope of Act:* "Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."

**Misegades v. Schuyler**

328 F. Supp. 619 (E.D. Virginia 1971)

**Agency:**

Patent Office.

**Record(s) involved:**

Patent Office form used for pending patent application.

**Sections of the Act:**

Sec. 552 (b) (3)—Exemption for material specifically exempted by statute.  
 Sec. 552 (b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552 (b) (5)—Exemption for inter- or intra-agency memoranda.

**Judgment:**

In favor of defendants.

Plaintiff brought action to compel disclosure of Patent Form used in processing patent application. The form also cites other patents for the purpose of narrowing the claims which the inventor asserts for his invention. Plaintiff did not represent patent application and did not disclose the nature of his interest in the material. The Government asserted that the material was exempted under Sec. 552 (b) (3), (4), and (5) and by 35 U.S.C. Sec. 122 which provides that applications for patents and information concerning same be kept in confidence by the Patent Office. The regulations of the Patent Office also provide that patent applications be preserved in secrecy. The Court held in favor of defendants ruling that the material at issue was confidential under 35 U.S.C. Sec. 122 and the Patent Office regulations. The court ruled on this basis alone and did not address itself directly to the F.O.I.A. exemptions claimed by Defendants.

**Moss v. Laird**

— F. Supp. — (D.D.C. 1971) Civil Action No. 1254-71

**Agency:**

Department of Defense.

**Record(s) involved:**

Portions of the Pentagon Papers.

**Sections of the Act:**

Sec. 552 (b) (1)—Exemption for information withheld by Executive order.

**Judgment:**

For defendant (Agency).

Two Congressmen and the Director of the Freedom of Information Center have brought this action against the Department of Defense and the Secretary seeking access to portions of the Pentagon Papers under the Freedom of Information Act, 5 U.S.C., sec. 552.

The Government contends that if the papers are disclosed, it could result in serious damage to the nation by jeopardizing the international relations of the United States and cause the compromise of intelligence operations vital to the national defense and thereby cause exceptionally grave damage to the nation. There was nothing to suggest that the administrative decision was arbitrary or capricious.

Plaintiffs nonetheless urge that the Court personally review, *in camera*, the withheld documents and make its own independent *de novo* determination.

**HELD:** *Summary judgment granted for defendants.*

The Freedom of Information Act exempts from public inspection matters "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy."

The Act was not designed to open all Government files indiscriminately to public inspection. Obviously, documents involving such matters as military plans, and foreign negotiations are peculiarly the type of documents entitled to confidentiality.

Under the circumstances here presented, no *in camera* inspection is necessary.

***National Labor Relations Board v. Clement Brothers Company, Inc.***

407 F. 2d 1027 (5th Cir. 1969)

***Agency:***

National Labor Relations Board.

***Record(s) involved:***

Prehearing statements of nonwitnesses.

***Section of the Act:***

Sec. 552(b) (7)—Exemption for investigatory files.

***Judgment:***

For defendant (Agency-Board).

Action by NLRB against defendant (Company) for rendering unlawful assistance to the International Union of District 50 during a membership campaign when the Union did not represent an uncoerced majority of the Company's employees.

Throughout the proceedings against them, the Company requested an opportunity to examine all prehearing statements taken by the Board agents in the course of investigating the unfair labor practice charges. The Board made available the prehearing statements of witnesses but refused to disclose those of non-witnesses. After the Board's initial refusal, the Company filed suit seeking the requested statements under the authority of Section 3 of the Public Information Act, 5 U.S.C. sec. 552(a) (3). The District Court ruled against the Company on the basis that the requested statements were within exemption 7.

**HELD:** *For defendant (Agency-Board).*

Although the decision of the District Court was not appealed, the Court of Appeals concurred stating: "It would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so. . . . In order to assure vindication of employee rights under the Act, it is essential that the Board be able to conduct effective investigations and secure supporting statements from employees. We feel that preserving the confidentiality of employee statements is conducive to this end."

***National Cable Television Association Inc. v. Federal Communications Commission***

479 F.2d 183 (D.C. Cir. 1973)

***Agency:***

Federal Communications Commission.

***Record(s) involved:***

Documents related to proposed rulemaking in F.C.C.

***Sections of the Act:***

Sec. 552(a) (3)—Identifiable records.

Sec. 552(b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

***Judgment:***

Reversed and remanded for further consideration.

Plaintiff brought action to compel F.C.C. to disclose documents relating to costs, facts, reasons behind F.C.C.'s proposed rule-making to increase license fee schedules. N.C.T.A. claimed a need for the information in order to submit commentary at the rule-making hearing on the proposal. District Court granted summary judgment for the Commission ruling that the records requested were not "identifiable" within the meaning of Sec. 552(a) (3). Plaintiffs appealed.

**HELD:** *Reversed and remanded for further consideration.*

Sec. 552(a) (3)—Identifiable records.

F.C.C. refused to disclose documents requested because to do so F.C.C. would have to retrace steps taken in rule-making in order to discover the materials.

District Court upheld this refusal. Circuit Court reversed. F.O.I.A. only requires that person seeking records provide sufficient information to permit the agency to identify the records. Requirement that records be identifiable should not be used as device to withhold records. Once rule-making proceedings have taken place, the agency has by definition already identified its supporting documents. N.C.T.A. phrased its request as specifically as the Commission's public notices permitted. On remand, Commission should be required to identify records at least by classification and then should be required to establish whether any of the materials fall under the exemption in the Act. The Court perceived two exemptions which the Commission might assert on remand but ruled that the record before the Court did not justify nondisclosure at this stage.

Sec. 552(6)(5): In order to claim exemption under this section, the Commission would have to establish that the factual matter was so intertwined with policy-making processes that it would violate the purpose of the exemption to disclose it. District Court should inspect the material in camera to determine this.

Sec. 552(b)(4): Information could only be withheld under this exemption if the court was unable to render the information sufficiently anonymous by deleting of filing party's name to comply with the purpose of the exemption.

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### *National Parks and Conservation Association v. Morton*

351 F. Supp. 404 (D.D.C. 1972)

*Agency:*

Department of the Interior.

*Record(s) involved:*

Documents containing detailed financial data of various concessioners within the national parks, including sales statistics, inventories, holdings, expenses, statements of profits and gross receipts, securities, liabilities, and salaries and bonuses by position.

*Section of the Act:*

Sec. 552(b)(4)—Exemption for information given in confidence.

*Judgment:*

For defendant (Agency).

Plaintiff, a nonprofit educational and scientific organization, requested the Director of the National Service to disclose specified documents concerning its concession operations. After revealing substantially all the information that was obtainable without extensive research, the Park Service denied that part of the plaintiff's request which sought the results of audits upon the books of several companies operating concessions in the national parks, the annual financial statements filed with the Park Service by these concessioners and other financial information.

**Held:** *The requested materials were "confidential" within exemption (b)(4) of the Information Act and therefore not subject to disclosure.*

In situations particularly where the persons involved, as here, had denied permission to the National Park service to release the information, the "Court agrees that the interest and privacy of the person who submit the information should receive some weight in each determination as to the coverage and application of subsection (b)(4), [h]owever, the controlling test, as outlined in the legislative history . . . is whether the documents requested could be fairly characterized as the type of information that would not generally be made available for public perusal."

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### *Nichols v. United States*

325 F. Supp. 130 (D. Kan. 1971)

*Agencies:*

- (a) National Archives and Record Service.
- (b) General Services Administration.
- (c) Secretary of the Navy.

*Record(s) involved:*

Various materials relating to the assassination of President Kennedy, namely, rifle belonging to Lee Harvey Oswald, coat and shirt worn by

President Kennedy at moment of assassination, various bullets and fragments, and radiologist's study of X-ray films taken at autopsy.

*Section of the Act:*

Sec. 552(a) (3)—Availability of identifiable records.

*Judgment:*

For defendants (Agencies).

Plaintiff, a duly licensed physician in Kansas wished to study certain items of evidence, in custody or in possession of the defendants, which will afford him an opportunity to resolve conflicting opinions, conclusions and uncertainties concerning the death of the late President John F. Kennedy. In order to complete his study, plaintiff specifically sought to inspect the rifle belonging to Lee Harvey Oswald, the coat and shirt worn by President Kennedy at moment of his assassination, various bullets and fragments, and the written diagnosis of findings made by the radiologist from his study of X-ray films taken at the autopsy of the late President.

Defendants question the Court's jurisdiction over the subject matter because plaintiff's demands do not constitute requests for "identifiable records."

**HELD:** *Defendants' motion for summary judgment granted.*

A record is intended to serve as evidence of something written, said or done and is not kept to gratify the curious or suspicious.

Items which included the rifle belonging to Lee Harvey Oswald, the coat and shirt worn by President Kennedy at moment of his assassination, and various bullets and fragments are not classified as "records" within the Federal Public Records Act (5 U.S.C. sec. 552) which requires government agencies to make available various identifiable records on request.

The diagnosis and findings of the radiologist is a record, but since these items had been delivered to agents of the United States Secret Service, the court cannot require their production, in that they were not in custody or control of an agency.

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***Petkas v. Staats***

**364 F. Supp. 680 (D.D.C. 1973)**

*Agency:*

Cost-Accounting Standards Board.

*Record(s) involved:*

Statements filed with Board by Defense Contractors.

*Sections of the Act:*

Sec. 552(b) (4)—Exemption for trade secrets and confidential commercial or financial information.

*Judgment:*

In favor of Defendant.

Plaintiff, attorney for Corporate Accountability Research Group, filed action in District Court to compel disclosure by Cost-Accounting Standards Board of certain Disclosure Statements containing cost-accounting principles and procedures filed by Lockheed Aircraft Corporation, ITT and General Motors Corp. and their subdivisions.

**HELD:** *District Court granted Defendant's motion to dismiss.*

Government must prove all elements of Exemption 4—that the information is either a trade secret or commercial or financial, that it was obtained from a person and that it is privileged or confidential. Court relied on in camera inspection to hold that material fell under exemption 4. Here, procedural measures enumerated in *Vaughn v. Rosen*, (— F.2d — Civil Action No. (73-1039), not necessary because plaintiff was familiar with the form used by companies to submit information and therefore was able to characterize it without the aid of exhaustive court inspection. Further, Disclosure Statements were not diverse; they were all subject to the same exemption.

***Philadelphia Newspapers Inc. v. Department of Housing and Urban Development***

343 F. Supp. 1176 (E.D. Pennsylvania 1972)

*Agency:*

Department of Housing and Urban Development.

*Record(s) involved:*

Names of certain appraisers who allegedly appraised dilapidated houses far in excess of their value.

*Sections of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.  
Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

In favor of plaintiffs.

Plaintiffs (newspaper) brought action in District Court to compel H.U.D. to release names of fee appraisers who had appraised properties (allegedly far in excess of their value). The Government argued that the material was exempt as inter- or intra-agency memoranda under § 552(b) (5) and as investigatory files under § 552(b) (7) (because the material had been included in Grand Jury binders).

**HELD:** *Plaintiff's motion for summary judgment granted.*

Materials were not independently privileged and would not be deemed privileged merely by their inclusion in binders before the Grand Jury. Material is purely factual and not inextricably intertwined with the policy-making process and therefore does not fall under exemption (b) (5). The Court rejects the Government's claim of exemption under § 552(b) (7). The Government claimed that the material was exempt because it was included in Grand Jury investigatory binders. The court ruled that this fact did not exempt the material because the material was not privileged before being included in the binders. Material not independently privileged cannot become privileged by including it with other, exempted material. In the court's estimation, disclosure would not prejudice or sensationalize the climate of any proceedings that might be brought against the fee assessors.

***Polymers, Inc. v. National Labor Relations Board***

414 F. 2d 999 (2d Cir. 1969), cert. den. 396 U.S. 1010 (1970)

*Agency:*

National Labor Relations Board.

*Record(s) involved:*

Board document entitled "A Guide to the Conduct of Elections"

*Sections of the Act:*

Sec. 552(b) (2)—Exemption for internal personnel rules.  
Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For defendant (Agency).

In action involving a petition by an employer to review, and a cross-petition by the NLRB to enforce, an order of the Board that a union was duly certified as collective bargaining representative and that the employers refusal to bargain with the union constituted an unfair labor practice, one subordinate question was whether the Board was justified in refusing the company's request to inspect a Board document entitled "A Guide to the Conduct of Elections."

**HELD:** Under the circumstances of this case the Board was justified in refusing to produce the Guide.

The Freedom of Information Act requires an agency to make available "administrative staff manuals and instructions to staff that affect a member of the public" (5 U.S.C. sec. 552(a) (2) (C)). However, this provision is subject to certain limitations, e.g., 5 U.S.C. sec. 552(b) (2) excepts from the operation of the

statute matters that are "related solely to the internal personnel rules and practices of an agency." The House Report interpreted this exception to cover operating rules, guidelines and manuals of procedure for government investigators or examiners.

This Guide is said to be an internal advisory document for the use of Board personnel and plays no significant role in the Board's adjudication of election disputes. As such it appears to fall within the further exception specified in 5 U.S.C. sec. 552(b) (5) as an "intra-agency memorandum."

"While the interest of the Board in refusing to produce the Guide is not clear, its relevance to the instant controversy is even less clear. We do not hold that under no circumstances would the Board be required to produce the Guide; but in the context of the instant case we will not disturb the refusal of the Board to produce the Guide."

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***Reinoehl v. Hershey***

426 F. 2d 815 (9th Cir. 1970)

*Agency:*

Selective Service System.

*Record(s) involved:*

Copy of Selective Service file.

*Section of the Act:*

Sec. 552 (a) (3)—fee.

*Judgment:*

For defendant (Agency).

Action to have declared invalid a Selective Service System Regulation (32 CFR sec. 1606.57), which provides that before indictment or a habeas corpus proceeding, a registrant or his representative may review the file at the draft board office, and receive a copy by paying one dollar per page, or \$5.00 per hour for an employee to monitor the file while the registrant copies the file himself, and to compel issuance without charge of a copy of the Selective Service file. The district court dismissed the complaint.

**HELD:** *Affirmed.*

31 U.S.C. sec. 483a authorizes such a charge and 5 U.S.C. sec. 552 does not change this result.

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***Richardson v. United States***

465 F. 2d 844 (3rd Cir. 1972)

*Agency:*

Department of Treasury.

*Record(s) involved:*

An accounting of the receipts and expenditures of the CIA and to enjoin any further publication of its consolidated statement titled "Combined Statement of Receipts, Expenditures and Balances of the United States Government," which did not reflect them.

*Section of the Act:*

Sec. 552(b) (3)—Exemption by statute.

*Judgment:*

For petitioner but not on the basis of the FOI Act.

Action by taxpayer seeking writ of mandamus to compel Secretary of Treasury to publish an accounting of the receipts and expenditures of the CIA and to enjoin any further publication of Government's consolidated statement which did not reflect them.

The Central Intelligence Agency Act of 1949, 63 Stat. 208, U.S.C. secs. 403a, 403f(a) and 403g (1970) established a unique procedure for funding the CIA. This procedure creates a two-step system for disbursement of the Treasury's monies to the CIA. First, Congress appropriates money to some other agency, and then that agency transfers the funds to the CIA. The only accurate account-

ing for the funds is the certificate rendered by the Director of the CIA, but it does not appear that this certificate or its contents are made available to the public. Presumably the money actually spent is reflected in the Treasury Department's annual statement as a disbursement by the original agency to which Congress made the appropriation. The Government argues that the Congress has, by the CIA Act, relieved the Secretary of the Treasury of the obligation to publish a statement pertaining to funds received and expended by the CIA.

The United States District Court for the Western District of Pennsylvania, Joseph P. Wilson, Jr., denied plaintiff's application for a three-judge court and dismissed the complaint on grounds of standing and justiciability. On appeal, appellant alleges *inter alia*, jurisdiction based upon 5 U.S.C. sec. 552(a) (3).

**HELD:** *Order of the District Court vacated and remanded.*

The Freedom of Information Act (5 U.S.C. sec. 552(a) (3)) does not provide a ground for jurisdiction because it does not apply to "matters that are . . . specifically exempted from disclosure by statute. . . ." 5 U.S.C. sec. 552(b) (3). The mandamus statute, 28 U.S.C. 1361, is appellant's only basis for jurisdiction.

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### *Robertson v. Shaffer*

#### Civil No. 1970-71 (D.D.C. 1972) (unreported)

*Agency:*

Federal Aviation Administration.

*Records involved:*

Mechanical reliability reports and system worthiness reports.

*Sections of the Act:*

Sec. 552(b) (1)—Exemption for information specifically exempted by statute.

Sec. 552(b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For plaintiffs.

Plaintiff requested safety reports from the FAA, including (1) "mechanical reliability reports" relating to mechanical malfunctions reported by airlines to the agency, which reports were printed by the agency and circulated to the airline industry; and (2) "system worthiness analysis program" reports, which are reports of inspections of airline maintenance and operations functions by FAA inspectors.

On cross motions for summary judgment, the court ordered that all records requested be produced by the agency.

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### *Robles, Trujillo, Trujillo v. E.P.A.*

#### Civ. A. No. 72-2470 (4 Cir. 1973)

*Agency:*

Environmental Protection Agency.

*Record(s) involved:*

Results of survey conducted by E.P.A. to measure radiation levels in homes in area where uranium tailings had been used as clean fill dirt for construction of buildings.

*Sections of the Act:*

Sec. 552(b) (6)—Exemption for personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of privacy.

*Judgment:*

In favor of plaintiffs.

Plaintiffs filed action in District Court to compel disclosure of survey report made by E.P.A. of monitoring it conducted of radiation levels in homes in areas

where uranium tailings had been used as clean fill dirt in construction. Survey involved the placing of air samplers in homes and some homeowners were promised that the results would not be disclosed to anyone other than the owner or occupier and federal officials working on the problem. Government claimed in District Court that material was exempt under section 552(b)(4) and section 552(b)(6). District Court ruled that the material did not fall under section 552(b)(4) but was exempt under section 552(b)(6). Plaintiffs appealed.

**Held:** *Reversed. District Court is ordered to grant disclosure to plaintiffs.*

Because of the District Court's ruling, on plaintiffs' appeal, Defendants claimed exemption entirely on section 552(b)(6) and therefore the determination of whether the District Court's ruling as to that exemption was correct is the sole issue before the Court. Results of survey were not personnel or medical files but the basis of the Government's claim rests on the remainder of the exemption which protects "similar files" the disclosure of which would be a clear invasion of privacy. "Similar" means of the same confidentiality as medical or personnel files containing "intimate details" of a "highly personal" nature. Material at issue involved effect of radiation levels only on health of specific occupants and therefore was of a "highly personal" nature. However, in addition, confidentiality must be proven. Promise to homeowner of confidentiality is not by itself sufficient grounds for claiming exemption. Agency argued that plaintiffs' need for the information was negligible.

Court rejects this factor as being irrelevant to a claim for material under the F.O.I.A. Court also rejects the argument that disclosure would do more harm than good. Such a balancing test is used only in the exercise of the court's equity power and the weight of authority has held that the F.O.I.A. precludes the Court from exercising equity powers in disposing of actions under the Act. The Court also rejects the argument that material should not be disclosed because it is too complex for the general public to understand. The court finds no reasons for holding that disclosure of the material would constitute a clearly unwarranted invasion of privacy.

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### **Rodriguez v. Swank**

**318 F. Supp. 289 (N.D. Ill. 1970)**

*Agency:*

Illinois Department of Public Aid (The federal regulations with respect to the payment of State AFDC benefits were promulgated by the Department of Hew).

*Records(s) involved:*

None.

*Section of the Act:*

Sec. 552(a)(1)(D)—Materials published: substantive rules, policies, and interpretations.

*Judgment:*

For petitioner.

Action challenging the validity of a statewide regulation relating to the payment of benefits under the Illinois aid to families with dependent children program. The complaint charges that defendants have failed to act promptly, and pay retroactive benefits, with respect to all members of the class, as prescribed by the regulations found in Part IV of the HEW Handbook of Public Assistance Administration. The defendants who are the Directors of the Illinois and Cook County Departments of Public Aid and the Cook County Comptroller contend *inter alia*, that the federal regulations relied upon by plaintiffs were invalidly promulgated since no notice of the proposed rule making was given when the regulations were issued.

**Held:** *Defendant's motions to dismiss is denied. Plaintiff's complaint for a class suit should be maintained.*

The requirement of notice in the Administrative Procedure Act, 5 U.S.C. sec. 553(b), is inapplicable when the regulations concern matters relating to grants, as do the instant ones. See 5 U.S.C. sec. 553(a)(2). And if it is defendant's claim that the regulations were not published as required by 5 U.S.C. sec. 552(a)(1)(D), this fact cannot avail him for he concedes in his brief that he had actual notice thereof. The regulations are therefore binding pursuant to the terms of sec. 552(a)(1):

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.

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***Sears v. Gottschalk***

**357 F. Supp. 1327 (E.D. Va. 1973)**

***Agency:***

Patent Department.

***Record(s) involved:***

All existing abandoned United States patent applications.

***Sections of the Act:***

Sec. 552 (a) (3)—Disclosure of identifiable records.

Sec. 552 (b) (3)—Exemption for material specifically exempted by statute.

Sec. 552 (b) (4)—Exemption for trade secrets and confidential commercial or financial information.

***Judgment:***

In favor of defendants.

Plaintiff brought action in District Court to compel Patent Commissioner to disclose all existing abandoned U.S. patent applications. The Court denied Plaintiff's request. Plaintiff appealed.

**HELD: *Affirmed.***

Plaintiff's request for material was not specific enough to meet requirements for "identifiable records" under sec. 552(a) (3). And, even if it was, the material requested is exempt under sec. 552 (b) (3) and (4).

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***Sears, Roebuck and Co. v. National Labor Relations Board***

**346 F. Supp. 751 (D.D.C. 1972)**

***Agency:***

National Labor Relations Board.

***Record(s) involved:***

Advice and Appeals memoranda issued by the General Counsel of the NLRB.

***Section of the Act:***

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

***Judgment:***

For petitioner.

Plaintiff, Sears, Roebuck and Company brought an unfair labor practice charge against the Retail Clerks International Union and now seeks to have the NLRB's Regional Director issue a complaint against the Union.

To promote uniformity in the administration of the Act relative to the issuance of complaints, the Regional Directors submit a description of the request to the General Counsel's Office in Washington for "Advice" as to disposition. When a Regional Director fails to issue a complaint pursuant to the recommendation of the Advice Branch, the charging party may request the Office of the General Counsel to reconsider the decision by seeking relief from the Office of Appeals. The Office of Appeals prepares and submits to the Regional Director a memorandum—the "agenda minute"—which provides an analysis of the appeal decision and it is access to this memoranda and other materials incorporated by reference therein that plaintiff seeks, pursuant to the Freedom of Information Act.

**HELD: *Judgment for plaintiff.***

The action of the General Counsel's Office on appeals following the refusal of Regional Directors to issue complaints in cases still pending were "final opinions" of the staff having effect upon a member of the public (within the meaning of the Act, 5 U.S.C. sec. 552(a) (2) (C)) relative to the disposition of a charge and was therefore outside of the Act's sec. (b) (5) exemption.

The documents incorporated by reference in the Advice and Appeals memoranda, even though possibly qualified for a sec. (b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation.

**Sears, Roebuck and Co. v. National Labor Relations Board**

473 F.2d 91 (D.C. Cir. 1972)

*Agency:*

National Labor Relations Board.

*Record(s) involved:*

Advice and Appeals memoranda issued to guide NLRB's Regional Directors in their decisions as to when to issue complaints.

*Sections of the Act:*

Section 552 (a) (3)—Court review.

*Judgment:*

In favor of defendants.

Plaintiffs sought Advice and Appeals memoranda (issued to guide NLRB's Regional Directors in their decisions to issue complaints) to aid plaintiffs' participation in an unfair labor practice proceeding against the Retail Clerk's International Union. NLRB refused to disclose the memoranda to plaintiffs and plaintiffs brought an action against defendants in District Court. The District Court enjoined Defendants from going forward with the unfair labor practice proceedings until disputes over the material requested by plaintiffs could be resolved. NLRB appealed from the injunction.

**HELD:** *Reversed.*

District Court was correct in its premise that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim. However, bare existence of jurisdiction does not mean that plaintiffs are entitled to relief by the District Court. To get relief plaintiffs must make a "cogent" showing of irreparable harm. Plaintiffs may have a right under the Freedom of Information Act to obtain the documents but this is not the issue before the Court. Those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. The memoranda may be of some value in prosecuting a complaint but they were not designed to serve that function. The Board will have access to the memoranda during its adjudication of the complaint and there is no reason to believe that the Board will not prosecute the complaint diligently and in good faith. Whatever benefits can be derived from the documents can be developed in the proceedings by the Board. Therefore the Plaintiffs failed to make the requisite showing of irreparable harm to justify judicial interruption of an administrative proceeding.

**Sears Roebuck and Co. v. National Labor Relations Board**

435 F. 210 (6th Cir. 1970)

*Agency:*

National Labor Relations Board.

*Record(s) involved:*

Information requested was not specified in the opinion.

*Section of the Act:*

Sec. 552 (a) (3)—Court review.

*Judgment:*

In favor of defendants.

Plaintiffs brought action in court for 1) declaratory judgment finding plaintiff-employer's right to review was prejudiced in unfair labor practice proceeding because of information withheld by N.L.R.B. and 2) to have further proceedings of the Board enjoined pending final decision on court review of agency withholding of requested information. District Court dismissed the complaint for lack of jurisdiction. Plaintiffs appealed.

**HELD:** *Affirmed.*

Federal District Court did not have jurisdiction in this case. F.O.I.A. does not confer jurisdiction on District Court to enjoin agency proceedings pending a decision on whether the agency was correct in withholding information requested under F.O.I.A. sec. 552 (a) (3) only confers jurisdiction on the District Court to enjoin agencies from withholding records and to order the production of records. Further, N.L.R.B. 29 U.S.C.A. sec. 106-10 (c) and (f) provide the sole method of review of Board decisions and does not confer on the District Court

the power to enjoin or to review decisions of the N.L.R.B. Therefore, the Federal District Court has no jurisdiction to grant plaintiffs' request for declaratory judgment and the enjoining of further N.L.R.B. proceedings pending final decision on their complaint seeking disclosure under the Freedom of Information Act.

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***Shakespeare Co. v. United States***

389 F. 2d 772 (Ct. Cl. 1968), cert. den. 400 U.S. 820 (1970)

***Agency:***

Internal Revenue Service.

***Record(s) involved:***

Private and letter rulings relative to constructive sales prices resulting from sales to wholesale distributors and determinations of existence of wholesale distributors.

***Sections of the Act:***

Sec. 552(a) (3)—Identifiable records (implied but not specifically referred to by section).

***Judgment:***

For defendant (Agency).

In a suit brought by a manufacturer to contest computation of manufacturer's excise tax, the manufacturer attempted to get copies of all private rulings and letter rulings issued by the Internal Revenue Service since August, 1954, under certain provisions of the Internal Revenue Code. On the Government's motion to quash, or in the alternative, to modify, the trial commissioner ordered that, *inter alia*, all letter rulings in the precedent file since 1954, classified and digested under Section 4216(b) (2) of the Code be made available for inspection and copying. It had been maintained by the Government that it would take approximately 2 weeks for a tax law specialist in the Internal Revenue Service to search and identify the documents in the precedent file. The production of these documents was the subject of review in the Court of Claims. The plaintiff maintained its right to the documents by the subpoena and also the Freedom of Information Act.

**HELD:** *Reversed; Government's motion to quash granted.*

A subpoena *duces tecum* will be granted when a party has sufficiently identified the documents sought and has shown "good cause" for production. The rulings here must be identified with sufficient particularity so that their extraction from the files may reasonably be made by the employee responsible for them. "In other words, something more than a fishing expedition must be shown."

There is nothing shown in the record here to indicate that the documents sought are material to the issues.

There is nothing in the Freedom of Information Act which would entitle this plaintiff to engage in a hunt for something which might aid in it this action. Even if inspection could be had under the Act, the same rules as to identification of the particular documents sought should be adhered to.

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***Skolnick v. Campbell***

454 F.2d 531 (7 Cir. 1971)

***Agency:***

National Commission on Causes and Prevention of Violence.

***Record(s) involved:***

Report regarding disorders surrounding Democratic Convention in 1968.

***Sections of the Act:***

Sec. 552(a) (3)—Court review.

***Judgment:***

In favor of defendants.

Plaintiffs brought action in District Court to compel disclosure of official staff report of Commission on Causes and Prevention of Violence regarding disorders surrounding Democratic National Convention of 1968. District Court ruled that

suit under public information section of the Administrative Procedure Act against Commission on Causes and Prevention of Violence abated when the Commission dissolved without a successor. Plaintiffs appealed.

**HELD:** *Affirmed.*

Without the appointment of a successor to assume the duties of the Commission, there is no officer or authority to grant the relief requested under the Public Information section.

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***Skolnick v. Kerner***

**435 F.2d 694 (7 Cir. 1970)**

*Agency:*

National Advisory Commission on Civil Disorders.

*Record(s) involved:*

Report, "The Fruits of Racism", submitted to Commission in course of its investigations.

*Sections of the Act:*

Sec. 552(a) (3)—Court review.

*Judgment:*

In favor of defendants.

Plaintiffs brought action in District Court to compel disclosure by Commissioner of the President's National Advisory Commission on Civil Disorders to disclose a report, "The Fruits of Racism", submitted to the Commission in the process of its investigation. District Court dismissed the action ruling that the action was not justiciable in court because, between the time when the complaint was filed and the time when the Court ruled, the Commission filed its report and was dissolved, thus abating any suit that was pending against it.

**HELD:** *District Court granted Defendant's motion to dismiss.*

A pending suit, even if properly instituted against an existing governmental agency, abates when the agency dissolves without a successor assuming its powers and functions.

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**<sup>1</sup> *Skolnick v. Parsons***

**397 F. 2d 523 (7th Cir. 1968)**

*Agency:*

President's Commission on Law Enforcement and Administration of Justice.

*Record(s) involved:*

Report of faculty member of the Notre Dame Law School.

*Sections of the Act:*

<sup>2</sup> Sec. 552(b) (5)—Exemption for inter- or intra-agency memoranda.

<sup>2</sup> Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

Action under the mandamus provisions of 28 U.S.C. sec. 1361 to compel President's Commission on Law Enforcement and Administration of Justice and one of its members to release a certain report submitted to them. The Executive Committee of the District Court dismissed the complaint *sua sponte*.

**HELD:** *Affirmed.*

By virtue of the 1967 Public Information amendment to the Administrative Procedure Act, the complaint, by interpreting the allegations of suppression of the report as equivalent to a "request", does state a cause of action justiciable in the district court. The plaintiff does have standing under this statute because the records are to be made available "to any person". However, since the Commission terminated before the complaint was filed, the court is without jurisdiction.

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<sup>1</sup> A similar issue was raised in *Skolnick v. Kerner*, 435 F. 2d 694 (7th Cir. 1970) and was decided accordingly.

<sup>2</sup> Since the District Court was not given an opportunity to construe the exceptions, the Court of Appeals did not pass on their applicability.

*Soucie v. David*

448 F. 2d 1067 (D.C. Cir. 1971)

*Agency:*

Office of Science and Technology.

*Record(s) involved:*

Garwin Report (which evaluates the Federal Government's program for development of the SST).

*Sections of the Act:*

Sec. 552(a) (3)—Whether OST is an agency for the purposes of the Act.

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (4)—Exemption for trade secrets and confidential commercial or financial information.

Sec. 552(b) (1)—Exemption for information specifically required by Executive order to be kept secret.

*Judgment:*

For plaintiffs.

Action under the Freedom of Information Act to compel the Director of the Office of Science and Technology (OST) to release to plaintiffs a document, known as the Garwin Report, which evaluates the Federal Government's program for development of a supersonic transport aircraft. OST had indicated that it would not release the Report to members of the public because it was a Presidential document over which the OST had no control and was "in the nature of inter- and intra-agency memoranda which contained opinions, conclusions and recommendations prepared for the advice of the President." The District Court dismissed the complaint stating that the Report is a Presidential document, and consequently, that the court has neither authority to compel its release nor jurisdiction over a suit to obtain relief. At the hearing, the basis of the ruling was given to the effect that the OST was not an "agency" for the purposes of the Freedom of Information Act, but rather a part of the Office of the President, and that the Report is protected from compulsory disclosure by the doctrine of executive privilege.

HELD: *Revised and remanded.*

The statutory definition of "agency" is not entirely clear, but the Administrative Procedure Act apparently confers agency status on any administrative unit with substantial independent authority in the exercise of specific functions. By virtue of its independent function of evaluating Federal programs, the OST must be regarded as an agency subject to the Administrative Procedure Act and the Freedom of Information Act. Therefore, the Report is a record of that agency.

Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. However, there may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but there is no such circumstance here.

The exemption protecting inter-agency and intra-agency memorandums or letters was intended to encourage the free exchange of ideas during the process of deliberation and policy-making. It has been held to protect internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports. "Factual information may be protected only if it is inextricably intertwined with policy-making process. Thus, for example, the exemption might include a factual report prepared in response to specific questions of an executive officer, because its disclosure would expose his deliberative processes to undue public scrutiny. But courts must beware of the inevitable temptation if a government litigant to give [this exemption] an expansive interpretation in relation to the particular records at issue."

The exemption protecting trade secrets and commercial or financial information obtained from a person as privileged or confidential is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.

To expedite the proceedings, the district court can most effectively undertake a determination whether the Report is protected by any statutory exemption by

an *in camera* inspection of same. "Even if the Government asserts that public disclosure would be harmful to the national defense or foreign policy, *in camera* inspection may be necessary. In such a case, however, the court need not inspect the Report if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified."

*Quote from case on intent and scope of the Act:* "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.

"The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effects on our lives."

## ***Sterling Drug, Inc., Appellant v. Federal Trade Commission***

450 F. 2d 698 (D.C. Cir. 1971)

### *Agency:*

Federal Trade Commission.

### *Record(s) involved:*

Documents relative to the FTC approval of the Miles-S.O.S. merger.

### *Sections of the Act:*

Sec. 552(b)(4)—Exemption for trade secrets and confidential information.

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

### *Judgment:*

Partially favorable to plaintiff.

Shortly after issuing a complaint charging that the acquisition by Sterling Drug of Lehn & Fink violated Section 7 of the Clayton Act, 15 U.S.C. sec. 18 (1964), the FTC approved without opinion a divestiture plan in another case calling for the sale of the S.O.S. Company to Miles. In the proceedings before the Commission, Sterling has taken the position that the approval of the Miles-S.O.S. merger demonstrates that its acquisition of Lehn & Fink did not violate the Clayton Act. Sterling seeks disclosure of certain documents in order to show that both mergers involve factors which require application of the same policy and result. Sterling contends that the documents are subject to disclosure under the Freedom of Information Act, 5 U.S.C. sec. 552 (Supp. IV 1969). The Commission refused disclosure on the grounds that the documents fall within the Act's exemptions for intra-agency memoranda, or confidential financial information, 5 U.S.C. sec. 552(b)(4) and (5). The District Court upheld the Commission order denying the request.

**HELD:** *Remanded with directions.*

The Court of Appeals divided the Commission memoranda into three categories stating: (1) The documents prepared by the Commission staff should not be disclosed because the probable effect of a decision requiring disclosure of the staff memoranda would thus be to inhibit "a full and frank exchange of opinions" at least in that class of cases where opinions are not, and as practical matter cannot be, issued. (2) Since different commissioners may have approved the merger for different reasons, the two memoranda at issue may provide only the individual Commissioner's reasons for approving the decision, not the reasons of the commission as a whole. Both memoranda contain comparisons of the Miles-S.O.S. and Sterling-Lehn & Fink cases, and it may well be that in making their comparisons the Commissioners emphasized certain principles underlying the earlier decision while neglecting others. In sum, it is questionable whether the memoranda prepared by the individual Commissioners accurately reflect the grounds for the Commission's decision in Miles-S.O.S. (3) The memoranda issued by the Commission should be disclosed. The policy of

promoting the free flow of ideas within the agency does not apply here . . . These are not the ideas and theories which go into the making of the law, they are the law itself, and as such should be made available to the public. Thus, to prevent the development of secret law within the Commission, we must require it to disclose orders and interpretations which it actually applies in cases before it. On remand, the District Court judge should re-examine the memoranda issued by the Commission to determine whether they do in fact contain such material. If they do, this material must be made available to Sterling.

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***Stern v. Richardson***

**Civ. A. No. 179-73 (D.D.C. 1973)**

*Agency:*

Federal Bureau of Investigation.

*Record(s) involved:*

Documents related to counter-intelligence program of the F.B.I. entitled "Cointelpro-New Left".

*Sections of the Act:*

Sec. 552(a) (3)—court review.

Sec. 552(a) (2)—Exemption for internal personnel rules and practices of and agency.

Sec. 552(b) (5)—Exemption of inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

In favor of plaintiff.

Plaintiff, a broadcast journalist, brought this action in District Court to compel disclosure of F.B.I. documents which a) authorized the establishment and maintenance of the Cointelpro program, b) terminated such program, and c) ordered or authorized any change in the purpose, nature or scope of the program. Justice Department admitted that the program existed but refused to disclose the material. The court inspected the material in camera. Government and Plaintiff brought cross-motions for summary judgment.

*Helds Summary judgment in favor of plaintiff-broadcaster.*

Exemptions are to be narrowly construed and the agency has the burden of justifying nondisclosure under the Act.

Sec. 552(b) (2) : Court adopted Senate's interpretation of exemption as going only to "employer-employee type concerns" as carrying the weight of authority. Inspection revealed that the materials in question did not fall under this classification and therefore were not exempt under sec. 552(b) (2).

Sec. 552(b) (5) : Exemption protects only internal communications consisting of advice and opinions made the policy-making process but not purely factual or investigative reports. On inspection, the Court found that the documents did not fall under this exemption.

Sec. 552(b) (7) : This exemption is only operative if disclosure would jeopardize any future law enforcement proceedings or if material related to any on-going investigation. On inspection, the Court found that the material bore no relation to law enforcement proceedings. The documents only contained broad generalities describing the project's purpose and scope.

Plaintiff's motion for summary judgment granted.

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***Stokes v. Brennan***

**476 F.2d 699 (5 Cir. 1973)**

*Agency:*

Department of Labor.

*Record(s) involved:*

Materials used in training inspectors of Occupational Safety and Health Administration.

*Sections of the Act:*

Sec. 552(a)(2)(C)—Disclosure of Administrative staff manuals and instructions to staff that affect a member of the public.

Sec. 552(b)(2)—Exemption for internal personnel files, rules and practices.

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b)(7)—Exemption for law enforcement materials.

*Judgment:*

In favor of plaintiff.

Plaintiff brought action in District Court to compel the Department of Labor to produce for inspection: instruction and student manuals, training films, and other visual aids and materials used in training inspectors of the Occupational Safety and Health Administration. District Court ordered disclosure and Defendants appealed.

**HELD:** *Affirmed.*

Materials were administrative in nature and did not fall within exceptions for law enforcement materials, internal personnel rules and practices, or intra-agency or inter-agency memorandums.

Sec. 552(b)(7): Exemption only protects information which, if known to the public, would significantly impede the enforcement process. After in camera inspection, the court found that the training materials did not fall under this exemption.

Sec. 552(b)(2): This exemption was interpreted differently by the Senate and the House. The weight of authority favors the Senate interpretation which states that only matters related solely to internal personnel rules and practices (e.g. lunch hours, regulations on use of parking facilities, etc.) are protected. Though the training manual does include some of the material which falls within the description, the manual is not solely or even primarily composed of that type of material and therefore is not exempt under this subsection of the Act.

Sec. 552(b)(5): Agencies cannot withhold material under this sub-section merely by casting it in the form of an internal memorandum. Substance, not form, determines its availability to the public. Exemption only applies to advice, recommendations, and opinions made in the policy-making process, not purely factual or investigatory reports. Factual information can only be protected if inextricably intertwined with policy-making processes. Manuals are reference and educational tools, not policy-making memoranda. Therefore they do not fall under this exemption.

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### *Stretch v. Weinberger*

359 F. Supp. 702 (D. New Jersey 1973)

*Agency:*

Department of Health Education and Welfare.

*Record(s) involved:*

Extended Care Facility Survey Reports.

*Sections of the Act:*

Sec. 552(a)(3)—Disclosure of identifiable records.

Sec. 552(b)(3)—Exemption for material specifically exempted by statute.

*Judgment:*

In favor of plaintiffs.

Plaintiffs brought action in District Court to compel disclosure of extended care facility reports prepared by state agency and used by HEW in determining whether facilities qualified for reimbursement under Medicare program. Government claimed that the reports were exempt under Sec. 552(b)(3) because of the provision under 42 U.S.C. Sec. 1306(a) which vests in the HEW Secretary wide discretion to prevent disclosure of "any file, record, report or other paper, or any information, obtained at any time by any officer or employee of the Department".

**HELD:** *Plaintiff's motion for summary judgment granted.*

Exemptions under the F.O.I.A. should be narrowly construed. Exemption (3) requires that the material be "specifically" exempted by statute. Court ruled that the provision giving the HEW Secretary "wide discretion" to prevent disclosure is not a sufficiently specific statutory exemption to bring material under that provision, within exemption (3). Plaintiff is therefore entitled to access to the reports.

**Talbott Construction Company v. United States****49 F.R.D. 68 (E.D. Ky. 1969)***Agency:*

Internal Revenue Service.

*Record(s) involved:*

Documents referred to reports prepared by IRS in connection with the disallowance of the plaintiff's claim for certain Federal Income Tax refunds.

*Section of the Act:*

Sec. 552(b)(5)—Exemption for inter- and intra-agency memoranda.

In a suit to recover a tax refund, the plaintiff moved for the production of certain intra-agency documents of the Internal Revenue Service.

HELD: "It is clear that if the documents sought by the plaintiff are policy and theory oriented, they are privileged under 5 U.S.C. sec. 552(b)(5). If they contain factual data they are subject to production. . . . Since the facts upon which the defendant based its decision of not allowing the interest deduction are exclusively in plaintiff's control, any difference in opinion would be the result of theory or policy differences. Plaintiff has, therefore, failed to show that the documents are not privileged under 5 U.S.C. sec. 552(b)(5). If the documents are factual, plaintiff has failed to show good cause for their production."

**Tax Analysts and Advocates v. Internal Revenue Service****362 F. Supp. 1298 (D.D.C. 1973)***Agency:*

Internal Revenue Service.

*Record(s) involved:*

I.R.S. letter rulings, technical advice memoranda and communications and indices relating thereto.

*Sections of the Act:*

Sec. 522. (a) (1) (D)—Agency publication in Federal Register.

Sec. 552. (a) (2) (B)—Requirement that agencies make interpretations and identifiable records available to the public.

Sec. 552. (b) (4)—Exemption for trade secrets and confidential commercial and financial information.

Sec. 552. (b) (3)—Exemption for material specifically exempted by statute.

Sec. 552. (b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

In favor of plaintiffs.

Plaintiffs filed action in District Court to compel disclosure of certain unpublished letter rulings issued to producers on minerals other than oil and gas between July 26, 1968 and Oct. 1, 1971 in which determinations were made of the processes to be treated as "mining" under sec. 613(c) of the I.R.S. Code, 26 U.S.C. sec. 613(c), when computing gross income from property for percentage depletion purposes. Plaintiffs also seek those portions of technical advice memoranda on this subject issued to taxpayers during the same period and so much of IRS letter ruling index system as is needed to ascertain whether additional unpublished rulings in point exist, and all communications to and from IRS with regard to rulings and memoranda from outside the Executive branch of the Government. Letter rulings involve a written statement issued to a taxpayer in which interpretations of tax laws are made and applied to a specific set of facts. A technical advice memorandum is comparable to a letter ruling except that it is issued to a District Director of I.R.S., not a named taxpayer.

Rulings and technical advice memoranda are statements of policy and interpretation which are specifically required to be disclosed under the Act. Interpretations need not be binding precedents within an agency to be disclosable under the Act. Reading together § 552(a)(1)(D) requiring publication in the Federal Register of all interpretations and policies of general applicability and § 552(a)(2)(B) requiring an agency to make available statements not published in the Federal Register, the Act dictates that statements that are not of general applicability are to be made available to the public although they do not

need to be published. Since the material falls under § 552(a) (2) as statements of interpretation and policy adopted by an agency, that subsection requires a current public index of the material.

The court ruled on the Government's claim to the following exemptions:

Sec. 552(b) (4) : To fall under this exemption all elements must be shown: (1) that the material contains trade secrets and confidential commercial or financial information, (2) that it was obtained from a person, and (3) that it is independently privileged and confidential. Government has failed to show that the material is independently confidential and not susceptible to being made anonymous. Therefore the material is not exempt under this subsection.

Sec. 552(b) (3) : Government claims this exemption for material specifically exempted by statute by citing 26 U.S.C. § 610(a) (1) which provides for confidentiality of tax returns. However, this court finds materials involved are not tax returns, so are not exempt under this subsection.

Sec. 552(b) (5) : Government claims that (1) correspondence related to rulings, (2) index digest card summaries of rulings, and (3) memoranda of conferences and telephone calls relating to rulings are all exempt as intraagency memoranda. Agency must justify its claim to this exemption by more than conclusory assertions. Court ordered *de novo* review of all material except the index-digest in order to ascertain whether any of it falls under exemption (b) (5). The index digest merely summarizes rulings court has already held to be disclosable; therefore, the digests are also disclosable under the Act.

Plaintiffs motion for summary judgment granted. Defendants must disclose all material to plaintiffs except for material which Defendants submit with statement of justification to Court for *in camera* inspection within 30 days and which the Court deems to fall under any of the exemption under the Act.

## ***Tennessean Newspapers, Inc. v. Federal Housing Administration***

464 F. 2d 657 (6th Cir. 1972)

### ***Agency:***

Federal Housing Administration.

### ***Record(s) involved:***

Copy of home appraisal.

### ***Sections of the Act:***

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(a) (3)—Court review.

### ***Judgment:***

For petitioner.

Action arises out of the interest the Nashville Tennessean took in publicizing the problems of a blind man who bought a house under a financing scheme which involved the Federal Housing Administration insuring the mortgage. The FHA had appraised the house at a value of \$10,850. Subsequently, the homeowner discovered various defects in the house which made such an evaluation dubious. The homeowner tried to get a copy of the original appraisal and the FHA refused to release it. Ultimately the FHA gave the homeowner an illegible copy of the appraisal after the Nashville Tennessean ran a series of articles criticizing the FHA for their handling of the case. A legible copy of the appraisal was made available after the Newspaper filed suit under the Freedom of Information Act, but the name of the appraiser was deleted.

FHA relies upon Section 552(a) (3) as conveying *de novo* hearing rights upon the District Court and, hence, allowing it to employ equitable considerations in its grant or denial of disclosure.

The District Court entered an ordered requiring the FHA to make the appraisal available under the terms of the Act, but held on equitable grounds that the FHA did not need to make the name of the appraiser available.

**HELD:** *Judgment for plaintiff.*

Of the exceptions to the statutory disclosure requirement, the most important for purposes of this appeal appears to be 5 U.S.C. sec. 552(b) (5) and to this extent, ". . . Fed. R. Civ. R. 26(b) is sufficiently broad to entitle discovery of the records in dispute, especially insofar as they are factual material rather than documents which comprise the administrative reasoning process of government."

"The appraisal in this case in an analysis of facts involving a professional opinion. The name of the author is a relevant and necessary part of the opinion. One of the reasons for . . . the Freedom of Information Act is to promote honesty of government by seeing to it that public business functions under the hard light of full public scrutiny." The grant of *de novo* review powers to the District Court by the Freedom of Information Act does not give the Court discretionary power to vary the standards established by the law itself.

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***Therault v. United States***

— F. Supp. — (C.D. Cal. 1972), Civil No. 71-2384-AAH

*Agency:*

Aircraft Accident Safety Board.

*Record(s) involved:*

Certain portions of an accident report.

*Sections of the Act:*

None cited in order of the court.

*Judgment:*

For plaintiff.

[No brief is supplied to this case because there was no opinion by the court. The above information was gleaned from the order of the court.]

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***Tietze v. Richardson***

342 F. Supp. 610 (S.D. Texas 1972)

*Agency:*

Department of Health, Education and Welfare.

*Record(s) involved:*

Standards by which entitlement to disability benefits are measured, and the operating guides of the Secretary of Health, Education and Welfare.

*Sections of the Act:*

Sec. 552(a) (1)—Publication in Federal Register.

Sec. 552(a) (2) (C)—Material to be made available for public inspection and copying.

Sec. 552(b) (2)—Exemption for material related solely to the internal personnel rules and practices of an agency.

*Judgment:*

In favor of defendants.

Plaintiffs brought action in District Court to review a final decision of the Secretary of Health, Education and Welfare, denying claimant's entitlement to a period of disability insurance benefits. Part of plaintiff's case was a claim that he was denied due process because the standards by which entitlement to disability benefits are measured and the operating guides of the Secretary are not made available for public inspection in contravention of the Freedom of Information Act. Plaintiff first argued that since the material contained in the Administrative Claims Manual was not made public until the F.O.I.A., requiring disclosure, was enacted in 1967, the claims filed by plaintiff and decided by the Secretary prior to 1967 were not drawn with the benefit of the "rules governing qualifications for benefits" allegedly contained in the Manual. The Court rejects this argument, ruling that the F.O.I.A. was not meant to apply retroactively.

Secondly, plaintiff attacks the continued withholding of "additional portions of the Claims Manual". The Court finds that this material, referred to as "supplementary claims guidelines", is exempt under sec. 552(b) (2) as relating solely to the internal personnel rules and practices of an agency and further cites the hearing examiner's statement that none of the rules contained in these additional portions of the Claims Manual were applied in the adjudication of plaintiff's claim. The Court of Appeals finds no denial of plaintiff's right to due process and grants defendant's motion for summary judgment.

*Tuchinsky v. Selective Service System*

294 F. Supp. 803 (N.D. Ill. 1969), aff'd 418 F. 2d 155 (7th Cir. 1969)

*Agency:*

The Selective Service System of the United States.

*Record(s) involved:*

- (a) Names, home addresses, occupations, dates of birth and appointments of all local board members, government appeal agents and associates, medical advisors, registrant advisors, and members of advisory bodies in Illinois.
- (b) Current state memoranda on occupational deferments and related material.

*Section of the Act:*

Sec. 552 (b) (6)—Exemption for personnel, medical and similar files.

*Judgment:*

For petitioner (in part).

Action brought in the United States District Court by a draft counselor under the Public Information Act against the Illinois State Director of the Selective Service System to have certain personnel information as to members of the Selective Service System and appeal board made available to him. The plaintiff also desires copies of current Illinois State memoranda on deferments, exemptions, and associated procedures.

**HELD:** As to the State memoranda, the defendant's motion to dismiss is granted since the issue was mooted by the defendant's agreement to permit inspection and copying provided the plaintiff pay the reasonable expense.

In view of the violence that has been directed at Local Board officers and members, plaintiff would be entitled to only the names of the local Selective Service Board officials, but not personal information in regard to such things as their home addresses, occupations, races, dates of appointment, military affiliations, and citizenships, under the Public Information Act, 5 U.S.C. sec. 552 (b) (6); such information being available only if the local board chairman, after consultation with the persons involved consents and it is determined that such disclosure would not harm the person and would not be an unwarranted invasion of that person's personal privacy. However, this aspect of plaintiff's complaint was dismissed because he had not appropriately exhausted his administrative remedies by requesting this information from any of the local boards.

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*Vaughn v. Rosen*

Civ. A. No. 73-1039 (D.C. Cir. 1973)

*Agency:*

Civil Service Commission.

*Record(s) involved:*

Civil Service reports evaluating certain agencies' personnel management programs.

*Sections of the Act:*

Sec. 552 (b) (2)—Exemption for internal personnel files, rules and practices.

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552 (b) (6)—Exemption for personal and medical files.

*Judgment:*

Reversed and remanded for further consideration.

Plaintiffs sought disclosure of reports evaluating certain agencies' personnel management programs. Civil Service Commissioner denied access to the reports and plaintiffs filed action in District Court seeking injunctive relief and an order requiring disclosure. District Court Defendants' motion for summary judgment and plaintiffs appealed.

**Held:** On remand. Government directed to justify its refusal in less conclusory terms and to index the material in order to assist the court in its review. Trial Court may, if necessary, appoint a special master to evaluate the information.

Exemptions must be construed narrowly. The burden is on the Government to prove that the material falls under any of the exemptions in the Act. The government is in a better position to prove that the material falls under an exemption than the plaintiff is in proving that it does not because plaintiff has never seen the material. Where there is a dispute as to the nature of the information, the Court points out difficulties in carrying out its own inspection to resolve the dispute where the material is voluminous. There is no incentive under the F.O.I.A. for an agency to voluntarily disclose information. Since the burden of determining a government claim of exemption falls on the courts, there is an impetus for agencies to automatically claim the broadest possible grounds for exemption for the greatest amount of information so that the efficiency of court review will be decreased. To remedy the situation courts should:

(1) No longer accept conclusory allegations of exemption but rather require detailed analysis of the material.

(2) Require specificity as to which portions of large documents are disclosable and which are exempt. Agencies could develop a system of indexing that would correlate with the government's statement justifying refusal thus reducing the court's workload.

(3) Where review of material is too burdensome, trial judge should designate a special master to inspect and evaluate the material and report back to the court.

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### *Verrazzano Trading Corp. v. United States*

349 F. Supp. 1401 (Cust. Ct. 1972)

*Agency:*

Bureau of Customs.

*Record(s) involved:*

Copy of work notes, written data and computations of the Bureau's laboratory report relative to the classification of imported fabrics.

*Section of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

*Judgment:*

For petitioner.

Methods of testing used by government chemists in analyzing samples of imported merchandise and their accuracy provided one of the major issues in this action. Consequently, plaintiff, during the course of litigation, motioned for an order to compel the defendant to produce for inspection and copying certain work notes and computations pertaining to a laboratory report of the Bureau of Customs. Defendant opposes the motion, claiming that the materials are "privileged from disclosure" by sec. 552(b) (5) of the Freedom of Information Act.

*HELD: Motion by plaintiff requesting disclosure granted.*

"[T]he work notes, data, and computations requested here constitute internal drafts prepared by agency personnel for their own use and thus are in the nature of the intra-agency memoranda. However, in the absence of proof to the contrary by the government—which under the Information Act has the burden of sustaining its action—the requested materials . . . must be considered as purely objective, factual and scientific in nature and [unrelated to] policy or decision-making recommendations" and thus outside the scope of the claimed exemption, 5 U.S.C. sec. 552(b) (5).

"[T]he Freedom of Information Act was enacted to provide the public with the right to obtain information from administrative agencies in the executive branch of the government; it was not enacted to provide discovery procedures for obtaining information during litigation. Put otherwise, the fact that sec. 552(b) of the Information Act provides specified exemptions from the Act's public information requirements does not in and of itself create a judiciary discovery privilege with respect to such exemptions."

**Weckslar v. Shultz****324 F. Supp. 1084 (D.D.C. 1971)***Agency:*

Department of Labor.

*Record(s) involved:*

Records designated as forms "CA 15" and "CA 16", and Deer Park report.

*Sections of the Act:*

Sec. 552(b) (4)—Exemption for information given in confidence.

Sec. 552(b) (5)—Exemption of inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For plaintiffs relative to "CA 15" and "CA 16" records. For defendant (Agency) relative to Deer Park report.

Action by plaintiff for the disclosure of documents (CA 15's and CA 16's) which were prepared by inspectors employed by defendants in connection with their inspection of plants pursuant to the Walsh-Healy Public Contracts Act and those concerning an explosion and fire which occurred at a refinery.

*HELD: For plaintiffs.*

"Defendants have failed to meet the burden of showing that the records [CA 15's and CA 16's] sought are exempt under any of the exemptions in 5 U.S.C. sec. 552(b)."

"Nothing in the records sought is a trade secret or commercial or financial information within the meaning of 5 U.S.C. sec. 552(b) (4), or is an internal memorandum within the meaning of 5 U.S.C. sec. 552(b) (5) or is an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. sec. 552(b) (7)."

The intervenor's request for the investigatory report relative to the explosion and fire at the Deer Park, Texas refinery is exempt from disclosure by 5 U.S.C. sec. 552(b) (4).

**Weisburg v. Department of Justice****Civ. A. No. 71-1026 (D.C. Cir. 1973)***Agency:*

Department of Justice.

*Record(s) involved:*

Spectrographic Analysis conducted on bullet evidence involved in assassination of President Kennedy.

*Sections of the Act:*

Sec. 552 (b) (7)—Exemption for investigatory files compiled for law enforcement purposes.

*Judgment:*

In favor of Defendants.

Plaintiff filed action in District Court to compel disclosure of spectrographic analysis of bullet evidence involved in assassination of President Kennedy. District Court granted Government's motion to dismiss. Appeals Court remanded. In rehearing en banc:

*HELD: Court vacated divided opinions of Appeals Court, affirmed District Court's ruling.*

Once it has been established, as it has been here, that the material at issue is 1) investigatory in nature, and 2) was compiled for law enforcement purposes, such material is exempt under § 552 (b) (7). Even where the investigation has already been concluded, if material is disclosed, the agency's investigatory techniques and procedures would be revealed so that future law enforcement efforts by the agency could be hindered.

**Wellford v. Hardin**

444 F.2d 21 (4 Cir. 1971)

*Agency:*

Department of Agriculture.

*Record(s) involved:*

Letters of warning sent to meat and poultry processors and information with respect to administrative detention of meat and poultry products.

*Sections of the Act:*

Sec. 552 (b) (7)—Exemption for investigatory files.

*Judgment:*

In favor of plaintiff.

Court noted legislative history in District Court to compel disclosure of 1) Letters of warning sent to meat and poultry processors, 2) information with respect to the administrative detention of meat and poultry products, 3) name of each processor whose product has been detained since Jan. 1, 1965. Government claimed exemption under sec. 552 (b) (7) for investigatory files compiled for law enforcement purposes. District Court held in favor of plaintiff. Defendant appealed.

**HELD:** *Affirmed.*

Court noted legislative history of this exemption reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding. Material at issue was already in the hands of the parties against whom the law was being enforced and the party requesting the information was not a party facing an enforcement proceeding to which the material was germane. A company subject to a warning letter or detention action suffers loss of privacy if that fact is revealed but that is out-balanced by the public's right under the F.O.I.A. to have access to information maintained by an execution agency.

Exemption should not be broadened to include administrative action, taken to enforce the law. It should be limited only to investigatory files compiled for law enforcement purposes.

**Williams v. Internal Revenue Service**

345 F. Supp. 591 (D. Del. 1972)

*Agency:*

Internal Revenue Service.

*Record(s) involved:*

File containing the schedules, work papers and background data utilized by the IRS agent in his effort "to determine the plaintiff's taxable income by the net worth method."

*Sections of the Act:*

Sec. 552(b) (5)—Exemption for inter- and intra-agency memoranda.

Sec. 552(b) (7)—Exemption for investigatory files.

*Judgment:*

For defendant (Agency).

Plaintiffs filed a petition with the Tax Court of the United States seeking a redetermination of certain deficiencies proposed by the Commissioner of Internal Revenue with respect to plaintiff's federal income taxes for the years 1957 through 1960 inclusive. In view thereof, plaintiff requested pursuant to the provisions of the Freedom of Information Act (5 U.S.C. sec. 552(a) (3)) IRS files which the agency denied on the grounds that the records were exempt from disclosure under the provisions of 5 U.S.C. sec. 552(b) (5) and (7). The affidavit of the internal revenue agent states that the files contain the schedules, work papers and background data prepared or utilized by him in his effort "to determine taxable income . . ."

Plaintiffs contend that the investigatory files exemption does not protect files compiled for law enforcement purposes if they would be available under the Federal Rules of Civil Procedure.

**HELD:** *Defendant's motion for summary judgment granted.*

"The discovery provisions of the Federal Rules of Civil Procedure give disclosure rights . . . only to parties to litigation pending in the United States Dis-

strict Court. At the time of the demand here, plaintiffs were not in this position and had no rights under the Federal Rules. Rather, they were parties to a proceeding before the Tax Court."

"... [T]he rights of specific persons under government investigation... seeking... files dealing with them were for good reasons not meant to be affected by [the] general public disclosure statute. The law with respect to access to them is to be determined by the law as it exists without reference to the Freedom of Information Act."

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***Wolfe v. Froehlke***

**358 F. Supp. 1318 (D.D.C. 1973)**

**Agency:**

Defense Department.

**Record(s) involved:**

Department of Defense file entitled "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul".

**Sections of the Act:**

Sec. 552 (b) (1)—Exemption for material specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy.

**Judgment:**

In favor of defendants.

Plaintiffs brought suit to compel disclosure of Department of Defense file entitled "Forcible Repatriation of Displaced Soviet Citizens—Operation Keelhaul" which was created in 1946 by Allied Force Headquarters. The file had been declassified by the U.S. Government but without the concurrence of the British Government. The British Government refused to concur because they had not completed declassification of World War II documents pre-dating the "Keelhaul" file and would not review that file until they completed reviewing files before "Keelhaul". The issue before the Court is whether continued withholding of the file is justified solely in the interests of foreign policy in light of the lack of concurrence by the British Government.

**Held:** *Defendant's motion for summary judgment granted.*

The defendant established that the President had classified the documents under executive order based on a determination that disclosure without the concurrence of the British Government would be prejudicial to the foreign relations of the United States. The Court ruled that the Government's showing was sufficient to establish exemption under sec. 552 (b) (1). It is not for the Court to decide whether disclosure would or would not be prejudicial to the foreign relations of the United States.

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***Wu v. National Endowment for the Humanities***

**460 F. 2d 1030 (5th Cir. 1972)**

**Agency:**

National Endowment for Humanities.

**Record(s) involved:**

Work product records of the Endowment's experts who evaluated the China history for which funds from the Endowment were sought.

**Section of the Act:**

Sec. 552 (b) (5)—Exemption for inter- and intra-agency memoranda.

**Judgment:**

For defendant.

Appellant, a college professor, applied to the Endowment, a federal agency, for a \$70,000 grant to produce a book on Chinese history. The Endowment, in its usual course, referred the application and accompanying proposal to outside experts who gave the Endowment their opinions. The experts recommended that the application be denied. Eventually, the Endowment did deny Professor Wu's

application, whereupon Professor Wu brought suit under the Freedom of Information Act to compel disclosure of the experts' refutations.

The District Court granted summary judgment for the Endowment, concluding that the records sought came within the purview of exemption (b) (5). (5 U.S.C. sec. 552(b) (5)).

HELD: *Affirmed.*

"To allow disclosure of these documents would interfere with two important policy considerations on which sec. 552(b) (5) is based: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental process of executive and administrative officers. . . ."

The memoranda at issue in the instant case are "internal working papers in which opinions are expressed" and are involved in the Endowment's "deliberative process." They are, therefore protected from disclosure by exemption (5).

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A LIST OF SUITS FILED UNDER 5 U.S.C. 552 THAT ARE BEING HANDLED BY THE CIVIL DIVISION AS OF JANUARY 1, 1974<sup>1</sup>

1. *Gilbert A. Cuneo and Herbert L. Fenster v. Robert S. McNamara and William B. Petty*, Civil Action No. 1826-67, D.D.C. (Defense Contract Audit Manual) (Status: Defendants' Motion for Summary Judgment granted, January 1972). (Remanded by Court of Appeals, September 1973) (Petition for rehearing denied by Court of Appeals, October, 1973).

2. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, Civil Action No. 1953-68, D.D.C. (Complaint alleges that the defendant Renegotiation Board refused to make available certain records for inspection and copying by plaintiff involving the adjudication of renegotiation cases for numerous listed companies) (Status: Government's motion to dismiss, or in the alternative for summary judgment granted November 4, 1968; March 1970, reversed and remanded by Court of Appeals; Opinion on remand filed April 26, 1971; July 3, 1973, Court of Appeals affirmed decision on remand) (Petition for rehearing denied by Court of Appeals).

3. *Edward Irons v. Schuyler*, D.D.C., Civil Action No. 75-70 (Plaintiff seeks "manuscript decisions" from Patent Office) (Status Order dated October 23, 1970, required Patent Office to maintain index of unpublished manuscript decisions and otherwise granted defendant's Motion to Dismiss) (Affirmed and remanded by Court of Appeals June 15, 1972) (Plaintiff's petition for a writ of certiorari denied by Supreme Court, December 18, 1972). Plaintiff has subsequently filed a motion to amend complaint in District Court).

4. *Laurent Alpert, et al. v. Farm Credit Administration*, D.D.C., Civil No. 446-70 (Plaintiffs seek certain Farm Credit Administration loan records) (Status: Defendant's Motion for summary judgment granted June 1972). (Plaintiffs have appealed).

5. *Bannercraft Corp. v. Renegotiation Board*, D.D.C., Civil Action No. 1340-70 (Suit to obtain various Renegotiation Board records) (Administrative proceeding enjoined until documents sought filed for *in camera* inspection, May 1970. (Affirmed by Court of Appeals, July 1972) (Petition for a writ of certiorari granted).

6. *National Cable Television Assn., Inc. v. FCC*, D.D.C., Civil Action No. 1331-70 (Suit to obtain records allegedly pertinent to pending rulemaking proceeding and to enjoin the proceeding (Status: Court of Appeals reversed District Court decision granting summary judgment for defendant, and remanded for further proceedings).

7. *Carolyn M. Morgan v. Food and Drug Administration, et al.*, D.D.C., Civil Action No. 1928-70 (Plaintiff seeks records of clinical and toxicological tests of various birth control pills) (Status: Defendants Motion for Summary judgment granted July 6, 1971). (Plaintiff has appealed).

8. *David B. Lilly Corp., et al. v. Renegotiation Board*, D.D.C., Civil Action No. 2055-70. (Suit to obtain records allegedly pertinent to pending administrative proceeding and to restrain the proceeding) (Status: Preliminary injunction restraining administrative proceedings entered August 1970) (Affirmed by Court of Appeals, July 1972). (Petition for a writ of certiorari granted).

9. *Harold Weisburg v. Department of Justice*, D.D.C., Civil Action No. 2301-70. (Suit to obtain spectrographic analysis constituting part of FBI investigation file

<sup>1</sup> Prepared by United States Department of Justice.

pertaining to assassination of President Kennedy) (Status: Defendant's Motion to Dismiss granted November 1970). (Affirmed by Court of Appeals *en banc*, October, 1973).

10. *Astro Communications Laboratory v. Renegotiation Board*, D.D.C., Civil Action No. 2403-70. (Suit to obtain many records and enjoin Renegotiation Board proceeding) (Status: Preliminary injunction restraining Renegotiation Board proceeding entered August 1970) (Affirmed by Court of Appeals and appeal dismissed July 1972) (Petition for a writ of certiorari granted).

11. *Harold Weisburg v. General Services Administration, et al.*, D.C. Civil No. 2549-70. (Suit allegedly under 5 U.S.C. 552 to order the National Archives to permit plaintiff to examine the clothing worn by President Kennedy at the time of his assassination, to permit plaintiff to photograph same, and to declare transfer agreement void) (Status: Dismissed, June 1971). (Plaintiff has appealed).

12. *Committee To Investigate Assassinations, Inc. v. U.S. Department of Justice*, D.D.C., Civil No. 3651-70. (Suit to obtain FBI file compiled as the result of its investigation of the assassination of Senator Robert F. Kennedy). (Status: Defendant's Motion for Summary Judgment granted July 29, 1971). (Affirmed by Court of Appeals *en banc*, October, 1973).

13. *Mary Helen Sears v. Schuyler*, E.D. Va., Civil No. 521-70-A. (Suit to obtain access to all abandoned U.S. patent applications) (Status: Decision favorable to defendant entered April 1973). (Plaintiff has appealed).

14. *American Manufacturing Company of Texas v. The Renegotiation Board*, D.D.C., Civil No. 1246-71. (Plaintiff seeks various Renegotiation Board records) (Status: June 23, 1971, preliminary injunction restraining administrative proceedings entered) (Affirmed by Court of Appeals, July, 1972 pursuant to agreement to be bound by result in *Bannercraft Corp. v. Renegotiation Board*).

15. *Ash Grove Cement Company v. Federal Trade Commission, et al.*, D.D.C., Civil No. 1298-71. (Plaintiff seeks a variety of documents allegedly pertinent to pending administrative proceedings before the Federal Trade Commission) (Status: Order partially favorable to defendant and partially ordering further proceedings entered October 24, 1973) (Plaintiff has appealed).

16. *Reuben E. Robertson III v. Shaffer, et al.*, D.D.C., Civil No. 1970-71. (Plaintiff seeks documents known as Mechanical Analysis Program Report and System Worthiness reports from Federal Aviation Administration) (Status: Order entered October 31, 1972 granting access to records involved "upon terms and conditions no more burdensome than those which are imposed upon persons connected with the airline industry") (Appeal pending).

17. *James Lafferty, et al. v. Rogers, et al.*, D. D.C. Civil No. 2033-71. (Plaintiffs seek studies concerning the circumstances surrounding American involvement in the Middle East including contingency plan for deployment of American armed services personnel). (Status: dismissed).

18. *Andre J. Theriault, et al. v. United States of America*, C.D. Cal., Civil No. 71-2384-AAM. (Plaintiffs seek Aircraft Accident Board Report prepared by Air Force) (Order favorable to plaintiffs entered July 1972) (On appeal).

19. *Center for National Policy Review on Race and Urban Issues, et al. v. Richardson*, D. D.C. Civil No. 2177-71. (Plaintiffs seek information relating to activities regarding racial segregation in northern public school systems) (Status: Memorandum Order generally favorable to plaintiffs filed December 8, 1972) (On appeal).

20. *Edward K. Devlin v. Department of Treasury, etc.*, D. D.C., Civil No. 205-72. (Plaintiff seeks customs' records on entry of certain whiskey into the United States) (Status: Defendant's Motion to dismiss or, in the alternative for Summary Judgment granted) (Appeal by plaintiff pending).

21. *John J. Wild v. United States Department of Health, Education and Welfare, et al.*, Minn., Civil No. 4-72 Civil 130. (Plaintiff seeks various Public Health records, including correspondence and evaluations) (Status: Answer filed and Defendants' Motion to dismiss or, in the alternative, for summary judgment pending).

22. *National Parks and Conservator Association et al. v. Morton et al.*, D. D.C. Civil No. 436-72. (Plaintiffs seek financial information submitted by applicants for concession in National Parks) (Status: Defendants' motion for summary judgment granted). (Notice of Appeal filed by plaintiffs).

23. *Lcs Aspin, et al. v. Department of Defense, et al.*, D. D.C., Civil No. 632-72. (Plaintiffs seeks a report allegedly entitled "Department of the Army Review of the Preliminary Investigation into the MyLai Incident.") (Status: Defendants' Motion for Summary Judgment granted, August 1972) (Affirmed by Court of Appeals, November, 1973).

24. *Michael T. Rose v. Department of the Air Force, et al.*, S.D. N.Y., Civil No. 72 Civ. 1605. (Plaintiff seeks 1) "case summaries of honor hearings maintained" by the Air Force Academy; 2) "case summaries of ethics hearings maintained in the Academy's Ethics Code Reading Files"; and 3) "a complete copy of a study of resignations from the Air Force by Academy graduates") (Status: Court rendered decision in December 1972 sustaining nondisclosure of case summaries and ordering disclosure of study of resignations) (Plaintiffs have appealed).

25. *Peter H. Schuck v. Butz*, D. D.C., Civil No. 956-72. (Plaintiff seeks "all credit reports and investigatory reports prepared by the office of the Inspector General" of the Department of Agriculture "concerning compliance by any USDA agency, or any recipient of USDA assistance, with the Civil Rights Act.") (Status: Defendant's motion to dismiss or, in the alternative for summary judgment pending) (on appeal after certain documents were ordered released in the course of District Court proceedings).

26. *Catherine Rabbitt v. Department of the Air Force*, S.D. N.Y., Civil No. 72 Civ. 2323. (Plaintiff seeks Aircraft Accident Report compiled by Air Force) (Status: Answer filed).

27. *Lee S. Kreindler v. Department of the Navy*, S.D. N.Y., Civil No. 72 Civ. 2053. (Plaintiff seeks Aircraft Accident Report and "JAG Manual Investigation Report") (Status: Answer filed).

28. *National Paint and Coatings Assn., Inc. v. Edwards*, D. D.C., (Civil No. 1129-72. (Plaintiff seeks all records "which relate in any way" to a Food and Drug Administration Order proposing to classify certain paints and other materials as banned hazardous substances) (Status: Dismissed by stipulation).

29. *David Comey, et al. v. Atomic Energy Commission, et al.*, N.D. Ill., Civil No. 72C 1744. (Plaintiffs seek 13 categories of records from the Atomic Energy Commission) (Status: Defendants' Motion for Summary Judgment granted in part and denied in part). (Court of Appeals has affirmed in part and reversed and remanded for further proceedings in part).

30. *Fred Bramblett v. William R. Desobry*, W.D. Ky., Civil No. 7333A. (Plaintiff seeks hearing examiner's report from commanding general of Fort Knox Military Reservation) (Status: Defendant's Motion for Summary Judgment pending).

31. *Butz Engineering Corp. v. United States Postal Service, et al.*, D. D.C. Civil Action No. 1566-72. (Plaintiff seeks "technical evaluation and all revisions thereof" allegedly prepared by Postal Service personnel pursuant to a specified contract) (Status: Plaintiff's motion for Summary Judgment granted).

32. *People of the State of California v. Richardson*, N.D. Cal., Civil Action No. C072-1514-AJZ. (Plaintiffs seek "Extended Care Facility Certification Reports on California nursing homes") (Status: Defendant's Motion for Summary Judgment granted, November 28, 1972). (Plaintiff has appealed).

33. *Max Serchuk v. Richardson, et al.*, S.D. Fla., Civil No. 72-1212. (Plaintiff seeks medicare Extended Care Facility Survey Reports from HEW) (Status: Order favorable to plaintiff entered November 1972) (On Appeal).

34. *Montrose Chemical Corp. of California v. Ruckelshaus*, D. D.C., Civil No. 1797-72. (Plaintiff seeks staff memoranda relating to DDT administrative hearings from the Environmental Protection Agency) (Status: Order favorable to plaintiff entered) (Notice of appeal filed).

35. *Robert P. Smith v. Department of Justice*, D. D.C., Civil No. 1840-72. (Plaintiff seeks FBI records relating to Lee Harvey Oswald and certain "FBI Laboratory examinations or other reports") (Status: Defendant's motion for summary judgment pending).

36. *Jeffrey Wheeler Hurt, et al. v. United States of America*, C.D. Cal., Civil No. 72-2126-CC. (Plaintiff seeks Aircraft Accident Investigation Report compiled by Air Force) (Status: Order favorable to Plaintiff entered, November 1972) (on appeal).

37. *Lee S. Kreindler v. Department of the Air Force, etc.*, S.D. N.Y., Civil No. 72 Civ. 4207. (Plaintiff seeks Aircraft Accident Investigation Report prepared by Air Force) (Status: Answer filed).

38. *Robert G. Vaughn v. Bernard Rosen*, D. D.C., Civil No. 1753-72. (Plaintiff seeks report known as Evaluation of Personnel Management and certain special studies, etc. from the Civil Service Commission for the 1969-1972, inclusive, fiscal years) (Status: Court of Appeals decision reversed district court decision favorable to defendant and remanded case for further proceedings, August 1973) (Petition for rehearing denied by Court of Appeals, October, 1973).

39. *Heidi Packer v. Kleindienst, et al.*, D. D.C., Civil No. 1988-72. (Plaintiff seeks copies of the audit report of the Massachusetts Committee on Law Enforcement and Administration of Criminal Justice for 1971; and the audit report of the Administration of Justice for 1971) (Status: Summary Judgment granted for defendants, July 13, 1973) (Plaintiff has appealed).

40. *Porter County Chapter of the Izaak Walton League of America, Inc., et al. v. United States Atomic Energy Commission*, N.D. Indiana, Civil No. 72 H 251. (Plaintiffs seek documents allegedly relating to AEC proceedings regarding granting of a permit for the construction of a nuclear power plant . . . on the shore of Lake Michigan in Porter County, Indiana) (Status: Defendants' Motion to Dismiss or in the Alternative for Summary Judgment pending).

41. *Peter J. Petkas v. Staats*, D. D.C., Civil No. 2238-72. (Plaintiff seeks documents "which disclose the current costs accounting practices of certain corporations which participate in government defense contracting.") (Status: Defendant's motion for summary judgment granted, August 23, 1973) (Plaintiff has appealed).

42. *Allen Weinstein v. Kleindienst, et al.*, D. D.C., Civil No. 2278-72. (Plaintiff seeks records allegedly in the custody of the FBI concerning its investigation of Alger Hiss and Whittaker Chambers during the period 1933 through 1952 inclusive) (Status: Defendants' motion to dismiss or, in the alternative, for summary judgment pending).

43. *Bertram D. Wolfe, et al. v. Froelke*, D. D.C., Civil No. 2277-72. (Plaintiffs seek a file entitled Forcible Repatriation of Displaced Soviet Citizens Operation Keelhaul). (Status: Defendant's motion for summary judgment granted June 1, 1973) (Plaintiffs have appealed).

44. *Malvin Schechter v. Richardson*, D. D.C., Civil No. 2319-72. (Plaintiff seeks Medicare Extended Care Facility reports regarding nursing homes) (Status: Defendant's Motion for Summary Judgment granted) (Plaintiff has appealed).

45. *Clarence Ditlow, et al. v. John Volpe, et al.*, D. D.C., Civil No. 2370-72. (Plaintiffs seek certain documents that relate to motor vehicle safety and the standards that are applied by defendants in enforcing the laws relative to motor vehicle safety from the Department of Transportation). (Status: Decision partially favorable to plaintiffs entered, June, 1973) (On appeal).

46. *Anchorage Building Trades Council v. Department of Housing and Urban Development*, D. Alaska, Case No. A-184-72 Civ. (Plaintiff seeks to examine certified payrolls on a construction project known as the Woodside East Project) (Status: Answer filed).

47. *Rural Housing Alliance v. United States Department of Agriculture, et al.*, D.D.C., Civil No. 2460-72. (Plaintiff seeks alleged report prepared by the Office of Inspector General, Department of Agriculture in response to allegations of administrative abuses committed by the Farmers Home Administration in Palm Beach and Martin Counties, Florida) (Status: Order partially favorable to plaintiff entered) (On Appeal).

48. *Frederick P. Schaffer v. William P. Rogers*, D.D.C. Civil No. 2520-72. (Plaintiff seeks investigation reports on conditions in prisoner-of-war camps in South Vietnam by the International Committee of the Red Cross from the Department of State) (Status: Defendant's motion for summary judgment granted, October, 1973).

49. *Center for Science in the Public Interest, et al. v. Ruckelshaus*, D.D.C., Civil No. 2567-72. (Plaintiffs seek documents regarding certain brands of gasoline additives which were submitted to the Environmental Protection Agency by manufacturers) (Status: Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment pending).

50. *Van W. Smart v. Food and Drug Administration*, N.D. Cal., Civil No. C-73-6118 SW. (Plaintiff seeks, *inter alia*, data considered by advisory panel on antacid drugs) Status: Answer filed).

51. *Wheatland Irrigation District v. U.S. Department of Agriculture, et al.*, D. Wyoming, Civil No. 5816. (Plaintiff seeks, *inter alia*, records pertaining to private ranching operations) (Status: Suggestion of mootness made).

52. *David L. Brockway, Sr. v. Department of the Air Force*, N.D. Iowa, Civil No. 73-C-11-CR. (Plaintiff seeks portions of Aircraft Accident Investigation Report) (Status: Answer filed).

53. *Mark J. Green, et al. v. Kleindienst*, D.D.C., Civil No. 331-73. (Plaintiffs seek business review records compiled by Justice Department Antitrust Division) (Status: Answer filed and pending on cross-motions for summary judgment).

54. *Roger E. Hawkes v. Bureau of Customs, et al.*, W.D. Washington, Civil No. 127-73C-2. (Plaintiff seeks documents relating to the conduct and efficacy of

searches and seizures performed at border-crossing points) (Status: Decision rendered ordering release of some information sought by plaintiff).

55. *Aviation Consumer Action Project v. Civil Aeronautics Board*, D. D.C., Civil No. 413-73. (Plaintiff seeks CAB "decision" submitted to the President on proposed airline merger) (Status: Defendant's motion to dismiss granted July 13, 1973). (Plaintiff has appealed).

56. *Legal Aid Society of Alameda Co., et al. v. Brennan, et al.*, N.D. Cal., Civil No. C-73-0282-ACW. (Plaintiffs seek EEO-1's, affirmative action programs and compliance review reports concerning federal contractors) (Status: Order entered holding proceedings in abeyance).

56a. *William A. Stretch v. Weinberger*, D. N.J., Civil No. 274-73. (Plaintiff seeks extended care facility survey reports on nursing homes from HEW) (Status: Plaintiff's motion for summary judgment granted, June, 1973) (On Appeal)

57. *Gerald A. Robbic v. Department of the Air Force*, S.D. N.Y., Civil No. 73 Civ. 1031. (Plaintiff seeks Air Force Accident Investigation Report) (Status: Answer filed).

58. *Consumers Union of United States, Inc. v. Richard G. Kleindienst*, D. D.C., Civil No. 921-73 (plaintiff seeks documents relating to communications between the Department of Justice and two companies concerning the companies' proposed merger) (Status: Answer filed).

59. *Robert Fellmeth, et al., v. Office of Economic Opportunity*, D. D.C., Civil No. 1069-73 (plaintiff seeks tape recording and the Office of Economic Opportunity's 1972 report to Congress) (status: Answer filed).

60. *Pacific Architects & Engineers, Inc. v. The Renegotiation Board*, D. D.C., Civil No. 918-73 (plaintiff seeks, *inter alia*, the raw data, analyses and information upon which the Western Regional Renegotiation Board allegedly made certain findings and seeks to restrain pending administrative proceedings) (Status: Order entered August 21, 1973) (Plaintiff has appealed).

61. *Citizens Advocate Center v. Hampton, et al.*, D. D.C., Civil No. 949-73 (Plaintiff seeks information bearing on its third-party administrative complaint of race and sex discrimination by GAO and letters sent by defendants, Civil Service Commission officials, to federal agencies regarding equal employment opportunity plans) (Status: Answer filed).

62. *James A. Barrett v. Local Board No. 9, et al.*, S.D. N.Y., Civil No. 73 Civ. 2622. (Plaintiff seeks a copy of his Selective Service file) (Status: Summons dated June 13, 1973).

63. *Washington Research Project, Inc. v. Department of Health, Education and Welfare, et al.*, D. D.C., Civil No. 1279-73. (Plaintiff seeks records pertaining to award of eleven research grants sponsored by the Psychopharmacology Research Branch of the National Institute of Mental Health). (Status: Order favorable to plaintiff entered, November, 1973) (Notice of Appeal filed).

64. *Project on Corporate Responsibility v. SEC, et al.*, (Plaintiff seeks documents relating to ITT investigation from the SEC and the Justice Department) (Status: Defendants' Motion to dismiss denied without prejudice to renewal, December, 1973).

65. *Stuart Levine v. United States of America, et al.*, S.D. Fla., Civil Action No. 73-1215-Civ-CA. (Plaintiff seeks United States customs declarations allegedly required of all incoming persons to Miami, Florida, from points outside the territorial limits of the United States, for the months of May and June 1972.) (Status: Defendants' Motion for Summary Judgment pending).

66. *Mark McIntyre, et al. v. John W. Warner*, D. D.C., Civil No. 1350-73 (Plaintiffs seek an Inspector General's and Auditor General's report prepared by the Department of the Navy in connection with possible violations of the Anti-Deficiency Act) (Status: Answer filed).

67. *National Wildlife Federation v. Claude S. Brincgar, et al.*, D. D.C., Civil No. 1269-73 (Plaintiff seeks to require defendants to publish certain information with respect to the Federal-Aid Highway Program) (status: Defendants' Motion to dismiss pending).

68. *Gulf Oil Canada, Ltd. v. George P. Shultz, et al.*, D. D.C. Civil No. 1405-73 (Plaintiffs seek alleged internal substantive regulations relating to the administration and enforcement of the Anti-Dumping Act) (status: dismissed by stipulation).

69. *James J. Hogan v. United States of America*, S.D. Fla. Civil No. 73-1385-Civ-Wm (Plaintiff seeks the Department of Justice Wiretap Manual) (Status: Motion to Dismiss denied October, 1973).

70. *Ina Louise Cates v. United States, et al.*, S.D. Calif., Civil No. 73-330-S

(Plaintiff seeks Aircraft Investigation Report from the Navy) (Status: Simmons dated August 14, 1973).

71. *Consumers Union of United States, Inc. et al. v. Board of Governors of the Federal Reserve System, et al.*, U.S.D.C., D.C. Civil No. 1766-73 (Summons dated September 14, 1973) (Plaintiffs seek certain data regarding interest rates charged by banks in California). (Status: Defendants' Motion to dismiss or, in the alternative for summary judgment pending).

72. *John T. Biezup v. Social Security Administration*, E.D. Pa. Civil No. 73-2052 (Plaintiff seeks copies of all medical reports submitted to the Social Security Administration in connection with the application for disability benefits by a named individual) (Status: summons dated September 13, 1973).

73. *Sam H. Bennion v. United States Geological Survey et al.*, D. Idaho, Civil No. CIV 47342 (Plaintiff seeks copies of applications for preference purchasing of crude oil, contracts written, preference waxers, production records of all crude oil produced on federal owned lands in Wyoming, copies of bid results, monthly reports of operations and correspondence and memoranda relative to exchange agreements) (Status: complaint filed September 10, 1973).

74. *Steven J. Cole et al. v. United States Department of Health, Education and Welfare et al.*, D.D.C. Civil No. 1712-73 (Plaintiffs seek records with regard to proposed regulations issued by the Social and Rehabilitation Service on April 20, 1973 regarding public assistance payments and related matters) (Status: Answer filed.)

75. *Aviation Consumer Action Project et al. v. Langhorne Washburn, et al.*, D.D.C. 1838-73 (Plaintiffs seek, *inter alia*, certain Commerce Department records relating to future plans and programs of the United States Travel Service). (Status: extension of time to respond to complaint obtained).

76. *Louis Kruh v. General Services Administration, et al.*, E.D. N.Y. Civil No. 73C1517 (Plaintiff seeks the classified document establishing the National Security Agency) (Status: Summons dated October 11, 1973).

77. *John R. Brunner, S.E. O'Neil*, N.D. Cal., Civil No. C731827-SC (Plaintiff seeks the names, addresses and organizational elements of all persons entering the Navy Supply Center, Oakland on October 9, 1973) Status: Summons dated October 16, 1973).

78. *Faye P. Sciitr v. Department of Transportation, Federal Aviation Administration*, W.D. Missouri, Civil No. 73 CV 143-C (Plaintiff seeks copies of reports, records and documents involved in FAA decision to deny Plaintiff a third class Airman's Medical Certificate) (Status: Summons dated October 29, 1973).

79. *Federation of American Hospitals et al v. Weinberger*, D.D.C. Civil No. 73-2472 IH (Plaintiffs seek copies of decisions of the Provider Appeals Committee established pursuant to HEW contract with the Blue Cross Association and copies of decisions of hearing officers rendered in those proceedings) (Status: summons dated October 23, 1973).

80. *Consumers Union of United States, Inc. v. Interstate Commerce Commission*, DDC Civil No. 1859-73 (Plaintiff seeks studies or reports concerning the operations of freight rate bureaus) (Status: summons dated October 3, 1973).

81. *Weisberg v. United States General Services Administration*, D.D.C. Civil No. 2052-73 (Plaintiff seeks the transcript of the January 27, 1964 executive session of the Warren Commission) (Status: summons dated November 13, 1973).

82. *Edward Koch et al v. Department of Justice et al.*, D.D.C. Civil No. 140-73 (Plaintiffs, members of Congress, seek copies of FBI files pertaining to themselves) (Status: Summons dated December 4, 1973).

83. *Aviation Specialties Co. v. Volle*, D. Ariz. Civil No. Cir. 73-746 PHX (Plaintiff seeks investigatory report regarding a particular customs penalty assessed against Plaintiff) (Status: Summons dated November 28, 1973).

84. *John T. Biezup v. Social Security Administration*, E.D. Pa. Civil No. 73-2551 (Plaintiff seeks medical reports submitted the Social Security Administration in connection with the application for disability benefits by a specified individual) (Status: Summons dated November 21, 1973).

#### Miscellaneous Decisions \*

1. *Black v. Sheraton Corp. of America*, 50 F.R.D. 130 (D.D.C. 1970)—the FOIA recognizes the policy in favor of maintaining the secrecy of FBI investigatory reports (dictum).

\* FOI issue collateral to other litigation or case discovered after summaries already in print; cases not included in lists.

2. *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968)—section 552(b)(7) does not protect from disclosure factual data and the investigative conclusions in Labor Department accident investigation report; but statements from third-party witnesses are exempt from disclosure.

3. *Dix v. Rollins*, 413 F.2d 711 (8th Cir. 1969)—publication of regulations under section 552(a) is not necessary prerequisite to recall of reservist to active duty in military.

4. *FTC v. Cinderella Career & Finishing Schools*, 404 F.2d 1308, 1318, (D.C. Cir. 1968)—“the FOIA . . . evidences a clear congressional purpose to open the information possessed by Federal administrative agencies to the general public on much the same basis that it is accessible to litigants in agency proceedings” (dictum).

5. *Freeman v. Seligson*, 405 F.2d 1326, 1340 (D.C. Cir. 1968)—the FOIA “is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such [Government] litigation or [adjudicative] proceedings” (dictum).

6. *Hodgson v. General Motors Acceptance Corp.*, 54 F.R.D. 445 (S.D. Fla. 1972)—the FOIA limitations “do not apply to a party litigant who might be accorded access to investigatory files by a court, without reliance on the Act,” but the “informers privilege” does apply.

7. *In re Pacific Far East Line, Inc.*, 314 F. Supp. 1330 (N.D. Calif. 1970)—a Navy Post regulation affecting the general public that is not published in the Federal Register is ineffective.

8. *International Brotherhood of Electrical Workers v. NLRB*, 417 F.2d 1144 (D.C. Cir. 1969). cert. den, 90 S. Ct. 536—NLRB rule not published as required by section 552(a) is not valid, but issue must be raised at administrative level.

9. *LaMorte v. Mansfield*, 438 F.2d 448 (2nd Cir. 1971)—once agency releases transcript to which investigatory exemption might have attached, confidential character of transcript ceases.

10. *Long Island Railroad v. U.S.*, 318 F. Supp. 490, 499 (E.D. N.Y. 1970)—“If the Commission had not made these [I.C.C. staff audits and work papers] available, as we assume it would, they could have been obtained under 5 U.S.C. Sec. 552(a)(3). Since any such underlying tabulations would be available on discovery in ordinary litigation, they would not fall within the exception of sec. 552(b)(5). Staff memoranda making policy recommendations to the Commission stand differently” (dictum).

11. *Piercy v. Tarr*, 343 F. Supp. 1120 (N.D. Calif. 1972)—Selective Service System “Letters to All State Directors” and “Temporary Instructions” are required to be published pursuant to section 552(a). “The defendants may not avoid these requirements by means of labels.” (Same facts and holding in *Gardiner v. Tarr*, 341 F. Supp. 422 (D.D.C. 1972).)

12. *Pifer v. Laird*, 328 F. Supp. 649 (N.D. Calif. 1971)—directive applicable only to federal employees are not required to be published in the Federal Register.

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**ATTORNEY GENERAL'S MEMORANDUM**  
**ON THE**  
**PUBLIC INFORMATION SECTION**  
**OF THE**  
**ADMINISTRATIVE PROCEDURE ACT**

A MEMORANDUM FOR THE  
EXECUTIVE DEPARTMENTS AND AGENCIES  
CONCERNING SECTION 3 OF THE  
ADMINISTRATIVE PROCEDURE ACT  
AS REVISED EFFECTIVE JULY 4, 1967

UNITED STATES DEPARTMENT OF JUSTICE  
RAMSEY CLARK, *Attorney General*

June 1967

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**STATEMENT BY PRESIDENT JOHNSON  
UPON SIGNING PUBLIC LAW  
89-487 ON JULY 4, 1966**

The measure I sign today, S. 1160, revises section 3 of the Administrative Procedure Act to provide guidelines for the public availability of the records of Federal departments and agencies.

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.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national 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.

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## FOREWORD

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 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.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

“\* \* \* 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.”

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89-487 in line with its spirit and purpose and the President’s instructions.

RAMSEY CLARK,  
*Attorney General,*  
*June 1967.*

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## SPECIAL NOTICE CONCERNING CODIFICATION

As this memorandum went to press, Public Law 90-23 had just been enacted. That law amends section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487. While the codification does not make substantive changes from Public Law 89-487, it makes about 100 changes in language, captioning, structure, and organization designed to conform the text to the other provisions of title 5 as codified in 1966.

Since all agencies must publish regulations under the new law by July 4, 1967, no attempt has been made to adapt this memorandum to the codified text. Such adaptation also seems inadvisable for other important reasons. A principal function of this memorandum is the correlation of the text of Public Law 89-487 with its relevant legislative history. The text of that legislative history is replete with references to phraseology and subsection designations in the act which are changed in the codification. Moreover, for almost a year the act has been discussed by those dealing with it by reference to the terms of its original enactment. Use of this memorandum by those who are charged with preparing and applying agency regulations would be hampered by shifting to the new phraseology and subsection designations in this memorandum.

Therefore, since the relevant committee reports make clear that the codification does not change the meaning of the originally enacted text, this memorandum will refer to the law in terms of the original text of Public Law 89-487. See S. Rept. No. 248, 90th Cong., 1st Sess., p. 3; H. Rept. No. 125, 90th Cong., 1st Sess., p. 1. Appendix A sets forth the full text of Public Law 90-23 in parallel column with the full text of Public Law 89-487. Appendix B in tabular form shows the relationship of their respective subsections.

## THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT

On July 4, 1966, President Johnson signed Public Law 89-487, which amends section 3, the "public information" section of the Administrative Procedure Act (the "APA").<sup>1</sup> The amendment, which becomes effective on July 4, 1967, provides for making information available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure. Agency decisions to withhold identifiable records requested under subsection (c) of the new law are subject to judicial review.

As the legislative history of the revised section 3 shows, dissatisfaction with the former section centered on the fact that it was not a general public information law and did not provide for public access to official records generally. That section, of course, was not a "public information" statute despite its title. It permitted withholding of agency records if secrecy was required either in the public interest or for good cause found. It was an integral part of the APA, and it required disclosure only to persons properly and directly concerned with the subject matter of the inquiry.

The revised section 3, on the other hand, is clearly intended to be a "public information" statute. The overriding emphasis of its legislative history is that information maintained by the executive branch should become more available to the public. At the same time it recognizes that records which cannot be disclosed without impairing rights of privacy or important operations of the Government must be protected from disclosure.

The report of the Senate Committee on the Judiciary (S. Rept. No. 813, 89th Cong., 1st Sess., p. 3)<sup>2</sup> describes the need for delicate balancing of these competing interests as follows:

"At the same time that a broad philosophy of 'freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records.

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<sup>1</sup> Public Law 89-487, 80 Stat. 250, revises 5 U.S.C. 552, formerly section 3 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1002 (1964 Ed.).

<sup>2</sup> For the sake of brevity, the following citations are hereafter used:

"S. Rept., 88th Cong." for S. Rept. 1219, 88th Cong., 2d Sess.

"S. Rept., 89th Cong." for S. Rept. 813, 89th Cong., 1st Sess.

"H. Rept." for H. Rept. 1497, 89th Cong., 2d Sess.

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.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

The Congress was aware that the decision to withhold or disclose particular records cannot be controlled by any detailed classification of all official records, but has to be effected through countless ad hoc judgments of agency officials, each intimately familiar with the particular segments of official records committed to his responsibility. Those executive judgments must still be made, for Congress did not attempt to provide in the revised section a complete, self-executing verbal formula which might automatically determine all public information questions. Indeed, the staggering variety of Government records makes such a formula unattainable. The revised section, instead, establishes in subsection (e) nine general categories of records which are exempt from disclosure. These categories provide the framework within which executive judgment is to be exercised in deciding which official records must be withheld.

Upon signing Public Law 89-487 the President stated :

"I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

"I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

"I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest."

This is the spirit in which agency officials are expected to construe and apply the limitations of subsections (a) and (b) and the nine exemptions of subsection (e). 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.

Prior to July 4, 1967, every agency should issue rules in which it describes, to the extent feasible, which of its records are within the requirements of the statute, where they may be inspected, the procedures to be followed in requesting access, the opportunities for administrative appeal, the fees to be charged, the stage at which records involved in matters in process are to be available, and whatever other considerations may be involved in achieving the statutory objectives.

### STRUCTURE OF THE REVISED SECTION 3

The revised section 3 consists of a general introductory clause discussed below, followed by eight subsections, (a) through (h). Each of the first four subsections, (a) through (d), establishes specific requirements for the publication or disclosure of different kinds of documents or information. Subsection (a) lists only those materials which must be published in the Federal Register. Subsections (b) and (d) describe materials which must be made available for public inspection or copying. Subsection (c) concerns requests for "identifiable records" which must be made available upon the request of any person. Each of the first three subsections contains its own sanction for noncompliance.

Subsections (a) and (b) contain, within the description of the materials to which they apply, explicit limitations upon what must be published or made available. For example, subsection (b) (C), which requires staff manuals and instructions to staff to be made available, is limited to "administrative" manuals and instructions, and to those which "affect any member of the public."

Subsection (e) declares that none of the provisions of section 3 shall be applicable to nine listed categories of matters. In its original form, the bill (S. 1160) provided exemptions in each subsection, designed to apply only to that subsection. The Senate subcommittee found that such approach resulted in inconsistencies. After considerable effort to tailor the standards established by the exemptions to the particular subsection to which they were to apply, the subcommittee decided to consolidate all of the exemptions in subsection (e), including in the earlier subsections the several limitations referred to above to meet the special needs of the requirements of each of those subsections.

Thus the exemptions of subsection (e) apply across the board and govern all of the materials described in subsections (a), (b), (c), and (d). Accordingly, materials which are exempted under subsection (e) need not either be published in the Federal Register or made available upon request or otherwise. It is important to bear this in mind in considering the discussion which follows.

## THE INTRODUCTORY CLAUSE

**"Sec. 3. Every agency shall make available to the public the following information:"**

### AGENCIES SUBJECT TO THE ACT

By its first two words, the introductory clause of the enactment makes it clear at the outset that its requirements are to apply to every department, board, commission, division, or other organizational unit in the executive branch. This results from the definition of the term "agency" in section 2(a) of the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," excluding Congress, the courts, and the governments of the territories and possessions and of the District of Columbia.

### ELIMINATION OF PREVIOUS GENERAL EXCEPTIONS

The introductory language of the previous section 3 established two general exceptions from all of its requirements. That language was as follows: "Except to the extent that there is involved (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 \* \* \*."

The revision begins instead with an affirmative direction to all agencies to make official information available to the public, thus proclaiming at the outset "a general philosophy of full agency disclosure" (S. Rept., 89th Cong., 3), and establishing the fundamental character of the revision as a "disclosure statute" rather than a "withholding statute" (S. Rept., 89th Cong., 5).

### SUBSECTION (a)—PUBLICATION IN THE FEDERAL REGISTER

**"(a) PUBLICATION IN THE FEDERAL REGISTER.—Every agency shall separately state and currently publish in the Federal Register for the guidance of the public \* \* \*."**

Subsection (a) concerns only materials which must be published in the Federal Register. Its general objective is to enable the public "readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies." (S. Rept., 88th Cong., 3.)

The report of the Senate committee, together with the Senate hearings on the bill, indicate that there were "few complaints about omission from the Federal Register of necessary official material." The comments received concerning Federal Register publication indicated "more on the side of too much publication rather than too little." (S. Rept., 89th Cong., 6.) Accordingly, the revised subsection contains provisions which permit incorporation by reference in the Federal Register of material "which is reasonably available" elsewhere, and avoid the necessity for "the publication of lengthy forms." It also incorporates "a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." (S. Rept., 88th Cong., 11.)

The two principal changes in subsection (a) result from (1) the elimination of the previous general exceptions, and (2) the tightening of the sanction for failure to publish materials required to be published. In addition to the provision that no one shall be required to resort to materials which the agency has failed to publish, the revised subsection provides that no person shall be "adversely affected" by such materials, unless he has actual notice hereof.

#### SUBSTITUTION OF EXEMPTIONS FOR THE PREVIOUS EXCEPTIONS

The previous subsection (a), like the other subsections of the previous section 3, was subject to the two general exceptions for "(1) any function of the United States requiring secrecy in the public interest" and "(2) any matter relating solely to the internal management of an agency." Further, it required the publication of only those statements of general policy and interpretations which were "adopted by the agency for the guidance of the public."

The revision eliminates these exceptions and relies upon the exemptions set forth in subsection (e) to distinguish the items listed in subsection (a) which should be published from those which should not. The words "for the guidance of the public", which still appear in the subsection, now explain the purpose of Federal Register publication of all material covered by subsection (a).

The considerations involved in determining what documents should be published in the Federal Register for the guidance of the public under subsection (a) obviously are very different from the judgments required in determining whether a particular record appropriately can be disclosed to a person who requests access to it under subsection (c). In meeting the requirements of subsection (a), the problem gen-

erally is to select, from a variety of information that anyone may see, material which is useful for the guidance of the public and therefore should be published. Under subsection (c), on the other hand, the question is to determine whether disclosure will injure a public or private interest intended to be protected under the act.

The difficulties inherent in applying the subsection (e) exemptions to all of the various judgments required under subsections (a), (b), (c), and (d) not only necessitate commonsense constructions of the exemptions; they also increase the necessity for determining precisely what is to be included within each of the items listed in each of those subsections. For example, unless the limitations spelled out in subsection (a) are sensibly construed and applied, concern about the "tightened sanction" against nonpublication could lead to publication of many documents which are of no interest to the public and only serve to aggravate the problem of "too much publication."

In the case of a few agencies, national defense considerations may preclude substantial compliance with any of the requirements of subsection (a). In other cases, foreign policy considerations may limit the extent to which an agency is able to comply with the subsection (a) requirements. If in such cases classification under Executive Order 10501 or statutory or other authority does not afford an exemption from the requirements of this subsection, the agency should seek appropriate exemption by Executive order under subsection (e) (1).

The second exemption in subsection (e), for matters "related solely to the internal personnel rules and practices of any agency," is similarly important in applying the requirements of subsection (a). Its derivation from the previous internal management exception makes it clear that it is intended to relieve from the Federal Register publication requirements all matters of personnel administration. Such matters include personnel policies, interpretations respecting personnel questions, personnel administration forms and procedures, statements of the course and method by which personnel management functions are performed, regulations or general orders concerning the conduct of military personnel, and all other internal matters of personnel administration which do not involve the general public. The Senate report cites as examples "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." (S. Rept., 89th Cong., 8.)

However, it is apparent from the legislative history of exemption (2) that it is intended to relieve from the requirements of the revision—and therefore from the publication requirements of subsection (a)—much more than internal documents relating to matters of personnel administration. Congressman Gallagher explained on the

House floor that exemption (2) is intended to protect from disclosure such documents as income tax auditors' manuals. (112 Cong. Rec. 13026, June 20, 1966). Similarly, the House report explains that although this exemption "would not cover all 'matters of internal management' \* \* \*," it would exempt from public disclosure such matters as "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." (H. Rept., 10.)

Thus, in discussing each of the major requirements of subsection (a), it is important to keep in mind the possible applications of each of the subsection (e) exemptions, as well as the limitations spelled out in subsection (a) itself.

#### (A) DESCRIPTIONS OF AGENCY ORGANIZATION

**"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 submittals or requests, or obtain decisions;"**

The previous section 3(a) (1) required that every agency separately state and currently publish in the Federal Register descriptions of its central and field organization "including delegations by the agency of final authority," and descriptions of where the public can obtain information. The revision deletes the requirement that such delegations be published, leaving to each agency discretion to determine what delegations it should include in its descriptions of agency organization. The only other changes in the provision add the words "the officers from whom" and the words "or obtain decisions" to the requirement that the public be advised as to where to obtain information. In general, the amendments embodied in the revision of section 3(a) (A) should result in little, if any, change from previous practice.

The Office of the Federal Register suggests that publication of organizational information in the United States Government Organization Manual should not be regarded as a substitute for, but merely a useful supplement to, the requirement to "currently publish" such information in the Federal Register.

#### (B) METHODS OF OPERATION

**"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public \* \* \* (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;"**

This language is almost unchanged from the previous section 3 and apparently is intended to effect little change in present practice con-

cerning the publication of statements of the general course and method by which agency functions are performed. Although the revision substitutes the exceptions in subsection (e) for the previous general exceptions to section 3, nothing in either the Senate or House reports on S. 1160 or the explanations offered on the House floor suggests any change in the functions to which this publication requirement is to apply. The reports explain that the purpose of these provisions is "to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." (S. Rept., 89th Cong., 6; H. Rept., 7.) These provisions are intended to make available useful information concerning agency functions which are of concern to the public.

While exemption (2) in subsection (e) excludes matters of personnel administration and operating instructions, guidelines, manuals, and other materials which are for the use of agency staff only, it does not exclude all matters of internal management. (H. Rept., 10.) With respect to the "course and method" by which internal management functions are "channeled and determined," the criterion for publication is whether the particular "course and method" is of concern to the public. For example, procurement and other public contract functions and, in some cases, surplus property disposal functions are matters in which members of the public have an interest, whereas information concerning other proprietary functions usually would not be useful to the public. To the extent that internal management functions are of substantial interest to the public, agencies should describe in the Federal Register the methods they employ in performing those functions. Of course, functions such as adjudication, licensing, rulemaking, and loan, grant, and benefit functions, are within the publication requirement of section 3(a)(B), except as they may be exempted under subsection (e).

*General course and method.*—The subsection requires agencies to disclose, in general terms designed to be realistically informative to the public, the manner in which matters for which it is responsible are initiated, processed, channeled, and determined. In the case of functions exercised so seldom that it is not practicable to prescribe a definite routine, the published information should be as complete as may be feasible, identifying at least the title of the official who has responsibility for such matters and the office to which inquiries may be directed. The provision does not require an agency to "freeze" its procedures, or to invent procedures where it has no reason to establish any fixed procedure. However, any change in published statements of course and method should be announced in the Federal Register to assure that the public is currently informed.

*Formal and informal procedures available.*—Particularly in light of the revised provision governing the effect of failure to publish required materials in the Federal Register, agencies should reexamine their present published statements as to the nature and requirements of all formal and informal procedures to assure that their published materials fully apprise members of the public of their rights and opportunities. For example, if an agency provides opportunity to any member of the public for an informal conference on a matter within its jurisdiction, the fact that the practice exists should be stated in the Federal Register with a view both to serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioner. The general public should be informed as to their availability and how and where to take advantage of them.

### (C) PROCEDURAL INFORMATION

**"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public \* \* \* (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;"**

*Rules of procedure.*—Although the previous section 3 made no reference to "rules of procedure," such rules had to be published in the Federal Register because that section provided that no person was to be required to resort to procedure which was not published. The new requirement that "rules of procedure" be published is therefore merely a restatement of the previous requirement. However, both the Senate and House committees found instances in which agencies had not issued necessary rules of practice and procedure, had not published rules which had been issued, and had not kept published rules up to date. Such deficiencies should be remedied.

*Forms.*—To meet the problem of "too much publication," the revision relaxes somewhat the requirement concerning the publication of forms, giving the agencies broad discretion to determine what constitutes appropriate publication. Whereas the previous section 3(a)(2) required agencies to publish in the Federal Register statements of the "nature and requirements" of forms, the revised provision only requires publication of either "descriptions of forms available" or "the places at which forms may be obtained." The change is intended "to eliminate the need of publishing lengthy forms." (S. Rept., 89th Cong., 6.) However, it will usually be useful to the public to publish an up-to-date list of forms showing the heading, the number (if any) and the date of the most recent version, in addition to the place where

the forms may be obtained. The subsection, of course, does not require the creation of special forms for every type of relief which might be sought.

Section 3(a) (C) concerns only rules, forms, instructions, etc., which are to be used by the public. It does not require publication in the Federal Register of internal management forms and similar materials.

#### (D) SUBSTANTIVE RULES, POLICIES, AND INTERPRETATIONS

**"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public \* \* \* (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;"**

Section 3(a) (D) involves three changes. First, it applies only to substantive rules and interpretations "of general applicability." Second, it deletes the phrase "but not rules addressed to and served upon named persons in accordance with law." Third, it deletes the phrase "for the guidance of the public", which now appears at the beginning of subsection (a). Deletion of the latter phrase at this point is designed to require agencies to disclose general policies which should be known to the public, whether or not they are adopted for public guidance.

The first two changes are intended to be formal only. Ordinarily an agency would not adopt a rule or interpretation for publication in the Federal Register unless it is "of general applicability," which would exclude rules addressed to and served upon named persons. Thus, an agency is not required under subsection (a) to publish in the Federal Register the rules, policies and interpretations formulated and adopted in its published decisions. Instead, this "case law" is to be "made available under subsection (b)." (H. Rept., 7.)

Consistent with the purpose of all of subsection (a) to enable the public "to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests" (H. Rept., 7), rules, policy statements, and interpretations as to matters which do not concern the general public are to be omitted from the Federal Register. For example, agency rules governing the use of employee parking facilities and agency policy relative to sick leave are outside the requirements.

To the extent that rules, policy statements, and interpretations must be kept secret in the interest of the national defense or foreign policy but are not required to be withheld by Executive order or other authority, agencies should accommodate to the statutory plan by seeking an appropriate exemption by Executive order in accordance with subsection (e) (1).

Although the Senate committee expressed the view that rules of particular applicability "such as rates" have no place in the Federal Register (S. Rept., 88th Cong., 4), there is no requirement that all rate schedules be omitted. Frequently, rates are collected by a single utility, but are paid by and therefore may be of interest to a broad spectrum of the public. In some instances an agency may find it desirable to publish such rates in the Federal Register even in the absence of any requirement.

#### (E) AMENDMENTS

**"Every agency shall separately state and currently publish in the Federal Register for the guidance of the public \* \* \*(E) every amendment, revision, or repeal of the foregoing."**

"The new clause (E) is an obvious change, added for the sake of completeness and clarity." (S. Rept., 89th Cong., 6.)

#### FORCE AND EFFECT OF UNPUBLISHED MATERIALS

**"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."**

The previous subsection 3(a), like the revision, required publication in the Federal Register of substantive rules, statements of policy, and interpretations, in addition to information concerning agency organization and procedures. However, the previous provisions relating to failure to publish required materials applied only to materials concerning organization and procedure. It provided that no person shall be required "to resort to organization or procedure" not published in the Federal Register. Notwithstanding its finding that complaints with respect to Federal Register publication "have been more on the side of *too much* publication rather than *too little*" (S. Rept., 88th Cong., 11), the Senate committee decided that the revision should afford "added incentive for agencies to publish the necessary details about their official activities." Accordingly it added the provision that no person shall be "adversely affected" by any matter required to be published in the Federal Register and not so published.

In its report in the 88th Congress, the Senate committee explained with respect to this change that the "new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights." (S. Rept., 88th Cong., 12.) Of course, not all rules, policy statements, and interpretations issued by Federal agencies impose burdens. The Senate committee, apparently acknowledging this fact, decided after issuing its report in the 88th Congress, that the "new

sanction" should apply only to matters which impose an obligation upon persons affected, and not to matters which benefit such persons. Since the provision did not, in fact, "explicitly" state that unpublished materials are to be "of no force or effect," no change in the provision was necessary to reflect the committee's revised intention. All that was needed was a change in the explanation in the Senate committee report. Accordingly, the Senate committee report issued in the 89th Congress and the House report omit any reference to the "force and effect" of unpublished materials and explain only that no person shall be "adversely affected" by such matters. (S. Rept., 89th Cong., 6; H. Rept., 7.)

From the revised explanation it is evident that the new provision enlarges upon the corresponding provision of the original section 3. It applies not only to organization and procedure, but also to the other items within the publication requirements of subsection (a)—substantive rules, statements of policy, and interpretations. However, the new sanction operates only to relieve persons of obligations imposed in materials not published, and not to deny them benefits.

In any case, actual and timely notice cures the defect of nonpublication, and "a person having actual notice is equally bound" as a person having constructive notice by Federal Register publication. "Certainly actual notice should be equally as effective as constructive notice." (S. Rept., 88th Cong., 4.)

#### INCORPORATION BY REFERENCE

**"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."**

In its report the Senate committee found that there are "many agencies whose activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc. It would seem advantageous to avoid the repetition of much of this material in the Federal Register when it can be incorporated by reference and is readily available to interested members of the public. This is one way in which the Federal Register can be kept down to a manageable size." (S. Rept., 88th Cong., 4.)

It should be noted, however, that incorporation by reference is not a substitute for actual publication in the Federal Register except to the extent permitted by the Director of the Federal Register. See rules of the Director, 32 F.R. 7899, June 1, 1967, 1 C.F.R. Part 20.

*Standard of what is "reasonably available."*—To meet this test the material incorporated must be set forth substantially in its entirety in the public or private publication and not merely summarized or

printed as a synopsis. Also, if the publication to be incorporated is a private publication, it should be readily available to the class of persons affected thereby, and not be difficult for them to locate.

*Sufficiency of reference.*—For purposes of this provision, the Senate report explains that the term “incorporation by reference” contemplates “(1) uniformity of indexing, (2) clarity that incorporation by reference is intended, (3) precision in description of the substitute publication, (4) availability of the incorporated material to the public, and, most important, (5) that private interests are protected by completeness, accuracy, and ease in handling.” The provision is not intended to permit the incorporation of materials the “location and scope” of which are familiar to “only a few persons having a special working knowledge of an agency’s activities.” (S. Rept., 88th Cong., 5.)

### **SUBSECTION (b)—PUBLIC AVAILABILITY OF OPINIONS, ORDERS, POLICIES, INTERPRETATIONS, MANUALS, AND INSTRUCTIONS**

**“(b) AGENCY OPINIONS AND ORDERS.**—Every agency shall, in accordance with published rules, make available for public inspection and copying \* \* \*.”

In the previous section 3, subsection (b) related only to “final opinions or orders in the adjudication of cases.” Although the heading of the revised subsection (b) is “Agency opinions and orders,” it enlarges the scope of the subsection by adding “those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register” and “administrative staff manuals and instructions to staff that affect any member of the public.”

The extended coverage of the subsection is explained in the House report as follows:

“In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases \* \* \*.”

“As the Federal Government has extended its activities to solve the Nation’s expanding problems—and particularly in the 20 years since the Administrative Procedure Act was established—the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) of S. 1160.” (H. Rept., 7.)

## AGENCY RULES GOVERNING AVAILABILITY

All of the materials to which subsection (b) applies are of the kinds which would ordinarily be available in a public reading room if one is provided by the agency. Some agencies may find the operation of one or more such facilities the easiest and most practicable way of complying with the requirements of subsection (b). Others may find different means of making materials available more satisfactory.

Every agency is required by the subsection to publish rules which should deal, at least, with (1) access to the items listed in the subsection, (2) deletion of identifying details, as provided in the subsection, (3) the availability of copies, and (4) the maintenance of a current index. Charges should not be made for the normal use of reading rooms or other similar facilities for examination of information of the type required by subsection (b) to be made available for public inspection. Charges should be made, however, to recover the costs of any search of records or of duplicating, reproducing, certifying, or authenticating copies of all documents, whether the documents are located in the reading room or in storage warehouses. (S. Rept., 88th Cong., 6.)

The only charges in connection with materials on file in reading rooms and similar facilities should be the actual cost of duplicating or copying materials where copies are requested. "Subsection (b) requires that Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference. Presumably, the copying process would be without expense to the Government since the law (5 U.S.C. 140) already directs Federal agencies to charge a fee for any direct or indirect services such as providing reports and documents." (H. Rept., 8.)

## INCLUSION OF MATERIALS NOT SUBJECT TO THE REQUIREMENTS

The basic purpose of subsection (b) is "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." (S. Rept., 88th Cong., 12.) Yet the subsection does not require access to or the indexing of all of the materials which may be useful to further this purpose. Statements of policy and agency interpretations which are published in the Federal Register pursuant to the requirements of subsection (a) are specifically exempt from the requirements of subsection (b), including the indexing requirement of the latter subsection. In establishing procedures and facilities for making subsection (b) materials available, however, agencies should keep in mind the basic purposes of the subsection and include whatever materials may provide "essential in-

formation." A reading room, for instance, will be more useful if it provides ready reference to all rules and policy statements which have been published in the Federal Register.

#### (A) FINAL OPINIONS AND ORDERS

**"(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 \* \* \*."**

The term "order" is defined in section 2(d) of the APA as the whole or a part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in any matter other than rulemaking. Thus the term includes every final action of an agency except the issuance of a rule.

Neither the previous section 3 nor the revised section contemplates the public availability of every "order," as the word is thus defined. The expression "orders made in the adjudication of cases" is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding.

The sanction applicable to subsection (b) is set forth in its last sentence:

**"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."**

The scope of this sanction seems to limit the effective reach of subsection (b) to those orders which may have precedential effect. Other orders, of course, may be requested under subsection (c). However, keeping all such orders available in reading rooms, even when they have no precedential value, often would be impracticable and would serve no useful purpose. It should also be noted that subsection (b) expressly provides that it shall not apply to any opinion or order which is "promptly published and copies offered for sale." This is to afford the agency "an alternative means of making these materials available through publication." (S. Rept., 89th Cong., 7.)

The term "opinions" relates only to those issued with and in explanation of "orders made in the adjudication of cases." The words "concurring and dissenting opinions" were added to the previous requirement "to insure that, if one or more agency members dissent or concur, the public and the parties should have access to these views and ideas." (S. Rept., 89th Cong., 7.)

## (B) STATEMENTS OF POLICY AND INTERPRETATIONS WHICH ARE NOT PUBLISHED IN THE FEDERAL REGISTER

**"Every agency shall \* \* \* make available for public inspection and copying \* \* \* (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register \* \* \*."**

Whereas subsection (a) requires publication in the Federal Register of statements of general policy or interpretations of general applicability, subsection (b) covers statements and interpretations which are not of general applicability, but which the agency may rely upon as precedents. The policy statements and interpretations included within this provision are only those which have been adopted by the agency itself, or by a responsible official to whom the agency has delegated authority to issue such policy statements and interpretations. The provision in subsection (b) respecting the deletion of "identifying details" applies to such matters.

The House report (H. Rept., 7) emphasizes, however, that under the new language of section 3(b) (B), "an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases." (H. Rept., 7.)

## (C) MANUALS AND INSTRUCTIONS

**"Every agency shall \* \* \* make available for public inspection and copying \* \* \* (C) administrative staff manuals and instructions to staff that affect any member of the public \* \* \*."**

Standards established in agency staff manuals and similar instructions to staff often may be, for all practical purposes, as determinative of matters within the agency's responsibility as other subsection (b) materials which have the force and effect of law. In accordance with the basic purpose of subsection (b), "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies" (S. Rept., 88th Cong., 12), subsection 3(b) (C) requires the public availability of "administrative" staff manuals and instructions to staff if they "affect any member of the public." The exemptions of subsection (e) apply.

*Limitation to "administrative" materials.*—The hearings in both the Senate and House refer to a number of instances in which agency manuals and similar materials contain confidential instructions to agency staff which must be protected from disclosure if they are to

serve the purpose for which they are intended. For example, agency instructions to contracting officers governing the outer limits of what they may concede on behalf of the Government in negotiating a contract cannot be disclosed to private contractors without rendering fair negotiation virtually impossible. Similar problems exist in connection with instructions to agency personnel as to (1) the selection of samples in making "spot investigations," (2) standards governing the examination of banks, the selection of cases for prosecution, or the incidence of "surprise audits," and (3) the degree of violation of a regulatory requirement which an agency will permit before it undertakes remedial action.

Congressional recognition of these goals is shown by the limitation of section 3(b)(C) to what the draftsmen have designated "administrative" manuals and instructions as distinguished from those which contain confidential instructions. The Senate report (S. Rept., 89th Cong., 2) states that "The limitation \* \* \* to administrative matters \* \* \* protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action." The House report (at pp. 7-8) explains that "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases."

All agencies should reexamine all manuals, handbooks, and similar instructions to staff which have been used only internally, to ascertain whether they include standards and instructions which necessarily cannot be disclosed to the public. After any confidential standards and instructions are deleted, documents containing "essential information" of the kind sought to be made available to the public by section 3(b)(C) should be included in the public index and made available for public inspection and copying, or published and offered for sale, unless they come within one of the exemptions of subsection (e).

*Limitation to materials which "affect the public".*—Consistent with the general purpose of subsection (b), section 3(b)(C) is not intended to apply to materials which do not concern the public. For example, manuals on property or fiscal accounting, vehicle maintenance, personnel administration, and most other "proprietary" functions of agencies which do not affect the public would be excluded from the requirement of subsection 3(b)(C).

## EXCEPTION OF MATERIALS OFFERED FOR SALE

**"Every agency shall, in accordance with published rules, make available for public inspection and copying \* \* \* unless such materials are promptly published and copies offered for sale."**

To provide agencies with "an alternative means of making these materials available" (S. Rept., 89th Cong., 7), materials listed in clauses (A), (B), and (C) of subsection (b) which are "promptly published and copies offered for sale" are not subject to the requirement that they be included in a public reading room or otherwise be made available for public inspection and copying. This should not be construed to exclude materials offered for sale from the indexing requirement set forth later in subsection (b). As with materials published in the Federal Register, if a reading room is maintained, it would be helpful to the public if a copy of materials published and offered for sale were made available for examination in such a room. Of course, there would be no requirement to reproduce such materials since copies could be purchased.

## DELETION OF IDENTIFYING DETAILS

**"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."**

Throughout their consideration of S. 1160, the Senate and House committees were acutely aware of the need, in enacting any public records statute, to avoid any public disclosure of information which might result in an unwarranted invasion of privacy. At the same time, the public may need access to the statement of principles and standards, and the rationale and explanation of agency policy, set forth in agency decisions which determine private rights and obligations.

Accordingly, subsection (b) contains a special provision designed to make these matters available to the public but authorizing the deletion of "identifying details" in particular cases where disclosure of these details would result in an invasion of the privacy of the parties or other persons concerned. This special provision, as it relates to section 3(b) (A), makes a distinction between "opinions" and "orders," since it refers to the former and not the latter. The provision apparently contemplates that a statement of principles and reasoning may be set forth in an "opinion" issued with an order, and that the "order" itself is merely a summary statement of the agency's final action in the adjudication of a case. If disclosure of an order in a case file would constitute a clearly unwarranted invasion of personal privacy, the

order is exempt under subsection (e) (6) from any requirement of section 3 and need not be disclosed or indexed. However, if the agency issues an "opinion" which states any principle or policy of precedential significance, the agency in publishing the opinion or making it available may delete "identifying details" to the extent necessary to prevent a clearly unwarranted invasion of personal privacy, with a full explanation in writing of the "justification" for the deletions.

The purpose of the mechanism thus embodied in the revision is explained as follows in the Senate and House reports:

"The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public." (S. Rept., 89th Cong., 7.)

"The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." (H. Rept., 8.)

The reference to income tax matters in the House report shows that this provision is intended to protect privacy in a person's business affairs as well as in medical or family matters. In this connection, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, includes corporations and other organizations as well as individuals. In the context of this section, the reasons for deleting identifying details would seem as applicable to corporations as to individuals.

*Explanation of "justification for the deletion."*—"Written justification for deletion of identifying details is to be placed as preamble" to documents from which such details are deleted. (S. Rept., 89th Cong., 7.) Without such explanation, the public availability of the document, with all identifying details deleted, might present more questions than it answers.

Obviously, the explanation should not defeat the purposes of the deletion by raising inferences which may be even more injurious than the invasion of privacy which the provision avoids. Agencies must exercise careful judgments to assure that they furnish as much information as they can without violating the spirit or defeating the purpose of the provision.

There are agencies with large numbers of cases involving matters which, if disclosed, would invade personal privacy. As a matter of administrative feasibility, it may be necessary for such agencies to specify fully in the rules they issue to implement subsection (b) the usual reasons for deletions, and to cite these rules in the "preamble" to each opinion or group of opinions as the justification for the deletion, instead of attempting to set forth a complete explanation in each one of the opinions they make available.

#### PUBLIC INDEX

**"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."**

The House report explains that the provision requiring the maintenance of a current public index of materials within subsection (b) is designed to "help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance \* \* \*." (H. Rept., 8.)

The public index requirement is limited to items required to be made available by subsection (b). This excludes, for example, statements of policy and interpretations published in the Federal Register, since the Federal Register index is deemed sufficient as to them. In some cases, agencies may find it useful to include such materials in their public index in the interests of making it complete and comprehensive, even though such indexing is not required. The limitation also excludes from the requirement items exempted by subsection (e) and items outside the limits of subsection (b), such as administrative staff instructions which do not affect the public. The criterion as to what constitutes "identifying information," within the meaning of this provision, "is that any competent practitioner who exercises diligence may familiarize himself with the materials through use of the index." (S. Rept., 88th Cong., 6.)

Because "considerations of time and expense cause this indexing requirement to be made prospective in application only" (S. Rept.,

89th Cong., 7; H. Rept., 8), agencies may, at any time, cite as precedent an opinion, order, policy statement, interpretation, manual, or instruction adopted by the agency prior to July 4, 1967, the effective date of the requirement, irrespective of whether it is listed in the agency's public index. However, agencies should be mindful of the underlying purpose of the indexing requirement. For instance, agencies which do not maintain such an index at the present time may find it helpful to compile and make available an index of the major precedents now relied upon, even though they are outside the requirement.

Careful and continuing attention will be required to distinguish "documents having precedential significance" (H. Rept., 8)—the only ones required to be included in the index—from the great mass of materials which have no such significance and which would only clutter the index and detract from its usefulness. Of course, this does not mean that an agency is not free to include nonprecedential material where it considers such inclusion helpful.

To illustrate the nature of the index contemplated by this requirement, both the Senate and the House reports point out that many agencies already maintain public indexing systems which are adequate within the meaning of this requirement. (H. Rept., 8.) "Such indexes satisfy the requirements of this bill insofar as they achieve the purpose of the indexing requirement. No other special or new indexing will be necessary for such agencies." (S. Rept., 89th Cong., 7.)

Both the Senate and House reports (S. Rept., 89th Cong., 7; H. Rept., 8) cite the present indexing system of the Interstate Commerce Commission as a system which satisfies the requirements of this provision. Decisions of that agency are reported in several sets of reports, each of which deals with a substantial segment of the Commission's jurisdiction. Railroad and water carrier cases, for example, are printed in the series entitled "Interstate Commerce Commission Reports," now some 328 volumes. Decisions arising under its more recently granted jurisdiction over motor carriers are published in a separate set, now more than 100 volumes, entitled "Interstate Commerce Commission Reports, Motor Carrier Cases." Each of these sets contains in each volume an alphabetical subject-matter index which furnishes citations to page numbers in that volume only.

In addition, the Commission publishes a series entitled "Interstate Commerce Acts Annotated" (20-odd volumes) which is a comprehensive index digest patterned generally after the United States Code Annotated. It covers all of the Interstate Commerce Act and related acts administered by the Commission, as well as other acts which affect the Commission, for example, selected sections of title 28, United States Code, relating to appeals.

It is important to note that the indexing system of the Interstate Commerce Commission, although very comprehensive, is selective and does not attempt to list all final opinions and orders made in the adjudication of cases. It includes only those opinions which are considered by the Commission to be potentially significant as precedents. Its use as a model therefore accords with the explanation in the House report (H. Rept., 7) that the indexing requirement of subsection (b) is to include all documents "having precedential significance," and with the explanation in the Senate report (S. Rept., 89th Cong., 7) that orders, opinions, etc., which are not properly indexed and made available to the public may not be relied upon or cited "as precedent" by any agency.

#### ACTUAL NOTICE

Failure to index a document or to publish or make it available does not preclude using it as precedent against any party who has "actual and timely notice of the terms thereof." As assurance against defects in publication and indexing, some agencies may find it desirable to supplement their compliance with the index requirement by establishing procedures whereby all regulated interests are given actual notice of the terms of materials which may be used against them, through the use of mailing lists or otherwise. The same idea, of course, may be applied on a limited basis. If it is impracticable to afford actual notice to all interested parties subject to a particular policy or interpretation, it may be desirable to serve a copy upon those parties most interested. If such practice is adopted, it should be used in addition to rather than in lieu of the required publication and indexing, since the essential purpose of the subsection is to make available to the public the "end product" materials of the administrative process. (H. Rept., 7.)

Whereas the provision of the original section 3 relating to the effect of failure to make matters available under subsection (b) provided only that opinions and orders not made available for public inspection were not to be "cited as precedents," the corresponding language in the revision is that materials not thus available are not to be "relied upon, used or cited as precedent" against any private party who has not had actual notice of the terms thereof. The legislative history contains no explanation of the difference between the new provision and that which it replaces. The additional words may have been inserted merely for emphasis, or to preclude an agency, in making a final decision, from relying upon a precedent which has not been made public.

### SUBSECTION (c)—OTHER AGENCY RECORDS

“(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.”

#### AGENCY RECORDS TO WHICH SUBSECTION (c) APPLIES

The “Except” clause with which the provision begins is intended “to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records.” (S. Rept., 89th Cong., 2). Whereas subsections (a) and (b) require the publication or general availability of the materials described in those subsections, the “only records which must be made available” under subsection (c) “are those for which a request has been made.” (*Ibid.*)

The term “records” is not defined in the act. However, in connection with the treatment of official records by the National Archives, Congress defines the term in the act of July 7, 1943, sec. 1, 57 Stat. 380, 44 U.S.C. (1964 Ed.) 366 as follows:

“\* \* \* the word ‘records’ includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of the word ‘records’ as used in this Act.”

It is evident from the emphasis in the legislative history of Public Law 89-487 upon the concept that availability shall include the right to a copy, that the term “records” in subsection (c) does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value “as evidence.” It is equally clear that the definition is not limited to historical documents, but includes contemporaneous documents as well.

Subsection (c) refers, of course, only to records in being and in the possession or control of an agency. The requirement of this subsection

imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term "information" in the bill, as introduced, was changed by the Senate to "identifiable records" and by the legislative history of that change. (S. Rept., 89th Cong., 2.)

Most requests will probably be directed to records which are the exclusive concern of the agency of which the request is made. Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount, and that agency should make the decision to disclose or withhold after consultation with the other interested agencies. Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency. Every effort should be made to avoid encumbering the applicant's path with procedural obstacles when these essentially internal Government problems arise. Agencies generally should treat a referred request as if it had been filed at the outset with the agency to which the matter is ultimately referred.

#### MEANING OF THE TERM "IDENTIFIABLE"

A member of the public who requests a record must provide a reasonably specific description of the particular record sought. As the Senate report states, the "records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records. This requirement of identification is not to be used as a method of withholding records." (S. Rept., 89th Cong., 8.)

The requirement is thus not intended to impose upon agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize "fishing expeditions." Agencies should keep in mind, however, "that the standards of identification applicable to the discovery of records in court proceedings" are "appropriate guidelines," and 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. See S. Rept., 89th Cong., 2.

#### AGENCY RULES IMPLEMENTING SUBSECTION (c)

Because of the summary nature of the disclosure requirement of subsection (c), the abbreviated form in which the exemptions of sub-

section (e) are stated, and the technique of providing a single set of exemptions applicable to all of the publication and disclosure requirements instead of tailoring separate exemptions to fit each requirement, it is apparent that extensive implementation by agency rules will be necessary.

In addition to the rules required under subsections (a) and (b), every agency should promulgate rules which will establish, for agency personnel and the public alike, standards governing the availability under subsection (c) of types of records in the agency's possession. The guidelines of the statute afford little more than a framework. They should be implemented by agency rules which are clear and workable. The rules should prescribe the procedures to be employed in making records available, the time when they shall be available, the charges therefor, and the procedures involved.

#### COPIES

A substantial problem in the practical application of subsection (c) is the physical problem of producing records, upon request, which are not available in a public reading room or similar facility. A copy of a requested record should be made available as promptly as is reasonable under the particular circumstances. Where an agency's contract with a reporting service requires that copies of transcripts be sold only by the service, the copy in the possession of the agency should be made available for inspection. If a copy of the transcript is requested, the agency may refer the applicant to the reporting service.

Techniques of records retrieval and copying are advancing rapidly. Appropriate procedures and adequate equipment may contribute as much to successful compliance with subsection (c) as thoughtful and intelligent implementation of the statutory standards in the agency's rules. Therefore, all agencies should carefully plan and equip to meet the problems of physically producing requested records.

#### FEEES

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. Congressional intent on this point is further evident in the legislative history of this act. See H. Rept., 8, 9.

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 statu-

tory foundation of the user charges program. This user charges statute begins with the following statement of purpose:

"It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, \* \* \*."

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 \* \* \*."

Guidance in carrying out the user charges policy is contained in Bureau of the Budget Circular No. A-25, "User Charges." This 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." The circular prescribes general 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.

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) 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.

By charging reasonable fees which compensate the Government for the cost of performing such special services, the agency will comply with the congressional intent to recover costs. Charging fees may also

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

#### JUDICIAL REVIEW UNDER SUBSECTION (c)

**"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."**

Any person from whom an agency has withheld a record after proper request under subsection (c) may file a complaint in the appropriate United States district court. The agency then has the burden to justify the withholding, which it can satisfy by showing that the record comes within one of the nine exemptions in subsection (e).

While it is not the purpose of this memorandum to discuss the jurisdiction of the district courts or the procedures in such cases, it should be noted that most cases arising under subsection (c) will be handled by the General Litigation Section of the Civil Division of the Department of Justice. In those cases, upon receipt of a copy of the summons and complaint served upon the Attorney General and notification of its filing by the United States Attorney (see Rule 4, Federal Rules of Civil Procedure), the General Litigation Section will request the agency to furnish a litigation report.

Since subsection (c) provides that these cases should be given a priority on the court docket, the agency should similarly accord priority to the submission of its report in order that a timely response to the complaint may be filed, thus avoiding the necessity of requesting extensions of time.

Some agencies are authorized to conduct their own litigation. Where its authority permits, the agency may decide to handle its own cases under this act. In view of the general litigation responsibility which the Department of Justice has for all other departments and agencies in the executive branch, it is important that agencies handling their own litigation under this act keep the Department of Justice currently informed of their progress and forward to the Civil Division copies of significant documents which are filed in such cases.

The House report aptly describes the district court proceeding under subsection (c) as follows (H. Rept., 9) :

“The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.”

The injunction is an equitable remedy. As the above language recognizes, in a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted. In making such determination the court can be expected to weigh the customary considerations as to whether an injunction or similar relief is equitable and appropriate, including the purposes and needs of the plaintiff, the burdens involved, and the importance to the public interest of the Government's reason for nondisclosure. See *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) ; *United States v. Reynolds*, 345 U.S. 1 (1953) ; 2 POMEROY'S EQUITY JURISPRUDENCE §§ 397-404 (Symons 5th ed. 1941).

It should also be noted that district court review is designed to follow final action at the agency head level. The House report states that “if a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency.” (H. Rept., 9.) In reviewing this action, the district court is granted “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.” Jurisdiction of a suit against agency officers, as distinguished from the agency itself, is not explicitly granted. The subsection also provides that “in the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt.”

These provisions seem to assume the usual two-step procedure followed by courts of equity in contempt proceedings for violation of court orders. Following the statutory plan, the district court would presumably issue an order directed to the agency, which, under the language of the statute, is the only party defendant. In the event of noncompliance with the order—which would presumably have been served upon the head of the agency or whomever he delegated to make the final agency decision—the court would probably issue an

order to show cause directed to the responsible officer, which he would then have opportunity to answer. Subordinate officials who are not responsible for final agency action have a duty to follow the instructions of the agency head or his delegate and are probably not subject to the contempt provision. See *Touhy v. Ragen*, 340 U.S. 462 (1951).

### **SUBSECTION (d)—VOTING RECORDS OF AGENCY MEMBERS**

**“(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.”

This subsection applies, of course, only to the votes of members of boards, commissions, etc., and not to agencies headed by a single administrator. Originally, the provision required that a public record be kept of all votes by agency members. After study, the Senate committee concluded that there might be “considerable disadvantage” in the disclosure of “preliminary votes.” (S. Rept. 88th Cong., 7.) Therefore, the provision was revised to apply only to “final votes of multi-headed agencies in any regulatory or adjudicative proceeding.” (H. Rept., 9.) Again, the exemptions of subsection (e) apply as well to this subsection as to the other subsections.

### **SUBSECTION (e)—EXEMPTIONS**

**“(e) EXEMPTIONS.—**The provisions of this section shall not be applicable to matters that are \* \* \*.”

We have noted above that subsection (e), containing the exemptions, applies to all of the various publication and disclosure requirements of the new section 3. Adoption of this structure, rather than the tailoring of specific exemptions to each of the disclosure requirements contained in subsections (a), (b), (c), and (d), inevitably creates some problems of interpretation. An appropriate exemption from the Federal Register publication requirements of subsection (a) is not necessarily an appropriate reason for keeping secret a record requested under subsection (c). Exemption (2), for example, which relieves from all of the requirements of the act “matters that are \* \* \* related solely to the internal personnel rules and practices of any agency,” obviously is an appropriate exemption from the requirements of subsection (a) governing publication in the Federal Register. However, in the case of a request for access to a particular document under subsection (c), a strict, literal application of the language of exemption (2) frequently might produce incongruous results, shield-

ing from disclosure matters with respect to which there can be no possible reason for secrecy, such as blank forms used by Government employees in applying for leave.

It is obvious from a reading of subsection (e) that the exemptions must be construed in such manner as to provide a set of "workable standards," achieving the desired balance which is the basic statutory objective.

#### (1) NATIONAL DEFENSE AND FOREIGN POLICY

**"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;"**

In a statement on the House floor when S. 1160 was presented for consideration, Congressman Dole expressed the view that the "bill gives full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties \* \* \*." (112 Cong. Rec. 13022, June 20, 1966.) With respect to the same problem, Chairman Moss presented the bill as one which is "not intended to impinge upon the appropriate power of the Executive \* \* \*." (112 Cong. Rec. 13008, June 20, 1966.)

To the extent that agencies determine that matters within their responsibility must be kept secret in the interest of the national defense or foreign policy, and are not required to be withheld by Executive order or other authority, they should seek appropriate exemption by Executive order, to come within the language of subsection (e) (1). The reference in the House report to Executive Order 10501 indicates that no great degree of specificity is contemplated in identifying matters subject to this exemption. However, in the interest of providing for the public as much information as possible, an Executive order prepared for the signature of the President in this area should define as precisely as is feasible the categories of matters to be exempted.

#### (2) INTERNAL PROCEDURES

**"The provisions of this section shall not be applicable to matters that are \* \* \* (2) related solely to the internal personnel rules and practices of any agency;"**

The House report explains that the words "personnel rules and practices" in subsection (e) are meant to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function. The examples cited in the House report (H. Rept., 10) are "operating rules, guidelines, and manuals of procedure for Govern-

ment investigators or examiners." An agency cannot bargain effectively for the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential. Similarly, an agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed.

As the examples cited in the House report indicate, the exemption in subsection (e) (2) is designed to permit the withholding of agency records relating to management operations to the extent that the proper performance of necessary agency functions requires such withholding. However, as the House report states, at page 10, "this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." It follows that the exemption should not be invoked to authorize any denial of information relating to management operations when there is no strong reason for withholding. For example, the examining, investigative, personnel management, and appellate functions of the Civil Service Commission relate solely to the internal personnel rules and practices of the Government and, as such, are covered by the exclusion in subsection (e) (2). However, the Commission now publishes all its regulations in the Federal Register, and its instructions are available to the public through the Federal Personnel Manual, which may be purchased at the U.S. Government Printing Office. This is an example of the exercise of the principle that the exemption, even though it may be literally applicable, should be invoked only when actually necessary.

### (3) STATUTORY EXEMPTION

**"The provisions of this section shall not be applicable to matters that are \* \* \* (3) specifically exempted from disclosure by statute;"**

Explaining exemption (3) the House report, at page 10, notes that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160."

The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under

other statutes, whatever their terms. For examples of the variety of statement of such provisions compare 18 U.S.C. 1905; 26 U.S.C. 6103; 42 U.S.C. 2000e-8, 2161-2166; 43 U.S.C. 1398; 44 U.S.C. 397; and 50 U.S.C. 403g. For a general, but not exhaustive, compilation of relevant statutory provisions, see *Federal Statutes on the Availability of Information*, Committee Print, House Committee on Government Operations, 86th Congress, Second Session, March 1960.

#### (4) INFORMATION GIVEN IN CONFIDENCE

**"The provisions of this section shall not be applicable to matters that are \* \* \* (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential;"**

The scope of this exemption is particularly difficult to determine. The terms used are general and undefined. Moreover, the sentence structure makes it susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., "matters that are \* \* \* [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential." (bracketed initials added). Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Exemption (4) first appeared in the bill (S. 1666) following full committee consideration by the Senate Committee on the Judiciary in the second session of the 88th Congress. It then provided for the exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential." The Senate report explained the addition of exemption (4) as follows:

"This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, and other such privileges." (S. Rept., 88th Cong., 6).

When S. 1160 was introduced in the 89th Congress, exemption (4) differed in two respects from the previous version. The words "commercial or financial" had been substituted for the word "other," and the word "customarily" had been deleted.

While the first of these two changes could be read as narrowing the exemption, a comparison of the Senate reports in the 88th and 89th

Congress indicates, rather, that it was intended to make sure that commercial and financial data submitted with loan applications would come within the exemption. The description of exemption 4 at page 9 of the Senate report in the 89th Congress is the same as that quoted above from the report in the 88th Congress, except that reference to the "lender-borrower privilege" is inserted and the following sentence is added: "Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan."

The Senate report in the 89th Congress thus treats the change as expanding rather than contracting the coverage of the exemption, since it not only adds the above language, but also continues to refer to the doctor-patient and lawyer-client privileges, which certainly are not "commercial or financial," and all the other material referred to as exempt in the previous report.

Deletion of the word "customarily" apparently had a different basis. While at first glance the reach of "privileged" might be considered extended by removal of the modifying word "customarily," the change also serves a narrowing function by negating the possibility of a privilege created simply by agency custom. The word "customarily" is still used in the report, but with examples of the kinds of privileges which are protected by the exemption.

The House report on this exemption generally parallels the Senate language with several additions, including such matters as disclosures or negotiation positions in labor-management mediations, and scientific or manufacturing processes or developments. The report states at page 10:

"This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

The last two sentences, in particular, underline the protection afforded by this exemption to information given to the Government in confidence, whether or not involving commerce or finance.

It seems obvious from these committee reports that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the congressional intention as expressed in the committee reports.

In view of the specific statements in both the Senate and House reports that technical data submitted by an applicant for a loan would be covered, and the House report's inclusion of "scientific or manufacturing processes or developments," it seems reasonable to construe this exemption as covering technical or scientific data or other information submitted in or with an application for a research grant or in or with a report while research is in progress. Lists of applicants, however, would not necessarily be covered.

In view of the statements in both committee reports that the exemption covers material which would customarily not be released to the public by the person from whom the Government obtained it, there may be instances when agencies will find it appropriate to consult with the person who provided the information before deciding whether the exemption applies.

One change was made in exemption (4) by the Senate committee in the 89th Congress: the phrase "information obtained from the public" was amended by substituting the words "any person" for "the public." It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulae developed by its personnel for inks and paper used in making currency.

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (e) (4).

#### (5) INTERNAL COMMUNICATIONS

"The provisions of this section shall not be applicable to matters that are \* \* \* (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;"

The problems sought to be met by this exemption are principally the problem of prejudicing the usefulness of staff documents by inhibiting internal communication, and the problem of premature disclosure. The House report explains the exemption as follows:

"Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." (H. Rept., 10.)

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" (H. Rept., 10) unless protected by some other exemption. Conversely, internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited. As the President stated upon signing the new law, "officials within Government must be able to communicate with one another fully and frankly without publicity". The importance of this concept has been recognized by the courts. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.C., D.C., 1966), affirmed for the reasons stated in the district court opinion—F. 2d—(D.C. Cir. May 8, 1967).

In addition to its explanation of exemption (5) quoted above, the House report in its general discussion of the bill's provisions states:

"\* \* \* in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private

interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure \* \* \* in such cases." (H. Rept., 5-6.)

The above quotations make it clear that the Congress did not intend to require the production of such documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used.

#### (6) PROTECTION OF PRIVACY

"The provisions of this section shall not be applicable to matters that are \* \* \* (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;"

The Senate committee (S. Rept., 88th Cong., 7) explains this exemption as follows:

"In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording 'and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'."

The House report is to the same effect:

"Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed government records on an individual which can be identified as applying to that individual \* \* \*." (H. Rept., 11.)

It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. As was explained on page 19 above, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, would include cor-

porations and other organizations as well as individuals. The kinds of files referred to in this exemption, however, would normally involve the privacy of individuals rather than of business organizations.

Another possible area of invasion of privacy would be the furnishing of detailed information concerning Government employees or others. The House report (p. 6) notes that the Civil Service Commission has ruled that "the names, position titles, grades, salaries, and duty stations of Federal employees are public information." It seems reasonable to assume that the Congress regarded with approval the Commission ruling, which in a letter of March 17, 1966 addressed to the heads of Departments and agencies gives examples of the circumstances under which such information should be made available, and establishes guidelines to govern the discretion to disclose such information concerning Government employees. (See Cong. Rec., March 21, 1966, pp. A 1598-1599.) To assure the privacy sought to be protected by exemption (6), similar guidelines should apply to requests concerning lists of persons who are not Government employees. It should be noted that the Commission ruling referred to above does not authorize the release of employees' home addresses. Whether such addresses are protected by this exemption would depend upon the context in which they are sought.

#### (7) INVESTIGATIONS

**"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 private party;"**

The House report emphasizes that the term "law enforcement" is used in exemption (7) in its broadest sense, to include the enforcement not only of criminal statutes, but rather of "all kinds of laws, labor and securities laws as well as criminal laws." (H. Rept., 11.) Thus, the files compiled from investigation by Government agents into charges of unfair labor practices would be exempt as investigatory files compiled for the purpose of enforcing the labor laws. Similarly, a file compiled by the Immigration and Naturalization Service in the investigation of an application by an alien for adjustment of status, or one compiled by the Securities and Exchange Commission concerning violation of securities regulations, would be exempt as investigatory files compiled for the purpose of enforcing the immigration and securities laws respectively.

Frequently the investigations which are made reflect violations of law or circumstances requiring redress by administrative proceedings or litigation. The House report makes clear that in such cases the additional "files prepared in connection with related Government liti-

gation and adjudicative proceedings" are included within the exemption. (H. Rept., 11.)

It should be noted that the language "except to the extent available by law to a private party" is very different from the phrase, "which would not be available by law to a private party in litigation with the agency," used in exemption (5). The effect of exemption (5) is to make available to the general public those internal documents from agency files which are routinely available to litigants, unless some other exemption bars disclosure. The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the statement to be made available to the public. In addition, the House report makes clear that litigants are not to obtain special benefits from this provision, stating that "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." (H. Rept., 11.)

#### (8) INFORMATION CONCERNING FINANCIAL INSTITUTIONS

**"The provisions of this section shall not be applicable to matters that are \* \* \* (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;"**

The meaning and purpose of this exemption are obvious. It is "designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." (H. Rept., 11.)

An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4) as enacted, however, covers commercial and financial information as set forth at pp. 32-34 above. Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions.

## (9) INFORMATION CONCERNING WELLS

**"The provisions of this section shall not be applicable to matters that are \* \* \* (9) geological and geophysical information and data (including maps) concernings wells."**

The House report explains that "this category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure 'would be prejudicial to the interests of the Government' (43 CFR, pt. 2). Witnesses contended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration." (H. Rept., 11.)

It should be noted that, although the information involved in exemption (9) might not be a "trade secret" within the meaning of the earlier version of exemption (4), it would seem to constitute commercial and financial information covered by the present exemption (4), as described at pp. 32-34 above. The addition of exemption (9) is helpful in explaining the intention of the statute with respect to such information.

## SUBSECTION (f)—LIMITATION OF EXEMPTIONS

**"(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."**

The House report explains that "the purpose of this subsection is to make clear beyond doubt that all the materials of [the executive branch] are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information." (H. Rept., 11.)

## SUBSECTION (g)—DEFINITION OF "PRIVATE PARTY"

**"(g) PRIVATE PARTY.—As used in this section, 'private party' means any party other than an agency."**

The word "party" is already defined by the APA as including "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency pro-

ceeding." The term "agency proceeding," in turn is defined as any agency process involving rulemaking, adjudication, or licensing. See 5 U.S.C. 551(3) and (12).

#### SUBSECTION (h)—EFFECTIVE DATE

**"(h) EFFECTIVE DATE.—This amendment shall become effective one year following the date of the enactment of this Act."**

The date of enactment of Public Law 89-487 was July 4, 1966. The effective date of the act, therefore, is July 4, 1967. By that date agencies should already have published their rules and procedures implementing the new statute, and these rules and procedures should then become effective.

/Appendices of Comparative Texts and Comparative     
  Structures of P.L. 89-487 and P.L. 90-23 Omitted/

## The Information Act: A Preliminary Analysis

*Kenneth Culp Davis*

The Information Act,<sup>1</sup> effective July 4, 1967, requires disclosure of government records to "any person" except as "specifically stated" in the nine exemptions or in other provisions. District courts are given jurisdictions to enjoin an agency from withholding records.

The Act is difficult to interpret, and in some respects it is badly drafted. For instance, even though no reasonable person could have intended such a result, the Act in clear terms requires disclosure of non-commercial and non-financial information furnished to the government with a good faith understanding that it will be kept confidential.<sup>2</sup> Many problems of applying the Act can be solved only by going outside the Act, as by resort to the idea that an equity court will refuse to enforce what is plainly contrary to the traditions of equity practice, or by resort to the constitutional doctrine of executive privilege.

The Attorney General in June, 1967, released a 47-page printed pamphlet entitled *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*,<sup>3</sup> skilfully analyzing the Act sentence by sentence. The *Memorandum* is the law in the sense that it guides the government's practices under the Act, but it is not the law in the sense of binding the courts. Its quality is excellent but, quite legitimately, it reflects the point of view of the agencies, all of whom opposed the enactment. It is usually persuasive, but not always, as we shall see.

No one can now foresee the ultimate solutions of the many perplexing problems of interpretation. Yet practitioners and others are immediately confronted with these problems. An independent analysis, even though preliminary, may therefore be helpful at this stage.

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<sup>1</sup> 80 Stat. 250 (1966), codified by 81 Stat. 54 (1967), 5 U.S.C. § 552.

<sup>2</sup> See discussion in § 19 *infra*.

<sup>3</sup> Hereinafter cited as ATT'Y GEN. MEMO.

### 1. *A Quick Perspective*

The full texts of the original Act and of the codified Act<sup>4</sup> are set forth as an appendix to this article. The entire Act is the new section 3 of the Administrative Procedure Act. The first clause says: "Every agency shall make available to the public the following information." The first four subsections contain the affirmative provisions. Subsection (a) governs publication in the *Federal Register*. Subsection (b) governs disclosure of six kinds of documents—opinions, orders, statements of policy, interpretations, staff manuals, and instructions. Subsection (c) provides that "every agency shall, upon request for identifiable records . . . make such records promptly available to any person." Subsection (d) requires disclosure of final votes of each member of an agency in every proceeding. But subsection (e), containing nine exemptions, takes back a goodly portion of what the first four subsections give. The meaning of the exemptions is vitally affected by subsection (f), which says: "Nothing in this section [the entire Information Act] authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section . . ." Because the extent of required disclosure usually depends upon interpretation of the exemptions, this "specifically stated" clause usually aggravates the difficulties of interpretation. Indeed, one recurring problem is what to do when no exemption "specifically" authorizes nondisclosure but when common sense obviously requires it.<sup>5</sup>

### 2. *The Legislative History in General*

Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate committee report and in a fourteen page House committee report.<sup>6</sup> Problems of interpretation

<sup>4</sup> This article necessarily uses the language of the 1966 enactment, for the legislative history, which is often crucial, is geared to that. The codification became effective June 5, 1967. Of course, the theory of the codification is that the substance is unchanged.

<sup>5</sup> Subsection (g) defines "private party," and subsection (h) specifies the time the Act becomes effective.

<sup>6</sup> S. REP. NO. 813, 89th Cong., 1st Sess. (1965) [hereinafter cited as SEN. REP.]; H.R. REP. NO. 1497, 89th Cong., 2d Sess. [hereinafter cited as HOUSE REP.]. See also S. REP. NO. 1219, 88th Cong., 2d Sess. (1964); *Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758, and S. 1879, Administrative Procedure Act*, 89th Cong., 1st Sess. (1965); *Hearings Before the Subcommittee of the House Committee on Government Operations, on H.R. 5012-21, 5237, 5406, 5520, 5583, 6172, 6739, 7010, and 7161, Federal Public Records Law*, 89th Cong., 1st Sess. (1965); *Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act*, 88th Cong., 2d Sess. (1964); *Hearings before the Subcommittee of the House Committee on Government Operations, Government Information, Plans and Policies*, 88th Cong., 1st Sess.

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are aggravated not only by the "specifically stated" clause but also by the differences between what the Act says on its face and what the committee reports say, and they are further complicated by differences between the two committee reports. In general, the Senate committee is relatively faithful to the words of the Act, and the House committee ambitiously undertakes to change the meaning that appears in the Act's words. The main thrust of the House committee remarks that seem to pull away from the literal statutory words is almost always in the direction of nondisclosure. The *Attorney General's Memorandum* consistently relies on such remarks by the House committee.

### 3. Executive Privilege

A vital part of the background of the Act is the doctrine of executive privilege, under which nearly every President, beginning with Washington, has asserted constitutional power to withhold records. The Presidents have often withheld information from Congress and have always prevailed in doing so except when they have voluntarily yielded, although no such case has been judicially determined. A clear statement of the modern doctrine was made by President Eisenhower on May 17, 1954: "[T]hroughout our history the President has withheld information whenever he found that what was sought was confidential or its disclosure would be incompatible with the public interest or jeopardize the safety of the Nation."<sup>7</sup> A 1957 study by the Department of Justice claimed even more executive power.<sup>8</sup>

Some of the literature about executive privilege gives the impression that congressional investigators and executive withholders live in a perpetual state of tension, but the realities may be along the line of a Department of Defense report that during three years it complied with 300,000 inquiries from Congress but refused to comply with only thirteen.<sup>9</sup> The executive branch usually states the privilege in absolute

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(1963); *Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1966 and S. 1663, Freedom of Information*, 88th Cong., 2d Sess. (1963); *Hearings before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee on S. 921, Freedom of Information and Secrecy in Government*, 85th Cong., 2d Sess. (1958).

For discussions and significant action on the floor of each House, see 103 CONG. REC. 7491-92; 104 CONG. REC. 6547-75; 104 CONG. REC. 15688-99; 110 CONG. REC. 17086-89; 110 CONG. REC. 17666-68; 111 CONG. REC. 26820; 112 CONG. REC. 13007.

<sup>7</sup> Letter from President Eisenhower, *Hearings Before the Subcommittee on Constitutional Rights Senate Committee on the Judiciary, Freedom of Information and Secrecy in Government*, 85th Cong., 2d Sess., at 271 (1958).

<sup>8</sup> The claim was that not only the President but also department heads could withhold information "where, in their own judgment, the disclosure would, on public considerations, be inexpedient." *Hearings, id.* at 63-146.

<sup>9</sup> Letter from Department of Defense, *Hearings, id.* at 385-87.

terms, but it recognizes the constitutional power of Congress to investigate, and practical accommodations are normally made.

Issues about the extent of executive privilege have been numerous and complex. The doctrine is in part constitutional law but the extent to which it is common law or constitutional law remains uncertain, and no court has considered the doctrine in a context of executive withholding of information from Congress. Yet the practice about withholding from Congress and the case law about withholding from courts make two major propositions reasonably clear: (1) A doctrine of executive privilege unquestionably exists. (2) Courts which have jurisdiction to consider problems of executive privilege participate in determining the scope of the privilege. Both these propositions were recognized by the Supreme Court in the key case of *United States v. Reynolds*.<sup>10</sup>

A well-drafted Information Act could adopt those portions of the doctrine of executive privilege which are sound and practicable and could probably provide leadership for working out the refinements of the doctrine, so that, in effect, the constitutional law, the common law, and the statutory law would coalesce. But the Information Act misses by a wide margin any such accomplishment. Instead, the fourth exemption seems capriciously to adopt executive privilege completely for commercial or financial information and to reject it completely for non-commercial and non-financial information.<sup>11</sup>

Because executive privilege seems to me vital in the solution of problems under the Information Act, I am surprised that the *Attorney General's Memorandum* does not mention it. The Department of Justice as recently as 1965 took an official position that in withholding information "the Executive is accountable only to the electorate. Under the separation of powers concept, Congress cannot transfer responsibility for Executive records to the courts."<sup>12</sup> That position seems to me extreme, just as the opposite position that the courts may take the whole

<sup>10</sup> 345 U.S. 1 (1953). Widows of men killed in the crash of a bomber testing secret equipment sued under the Tort Claims Act and sought production of the Air Force's official accident investigation report. The Secretary of the Air Force stated in a letter to the district court that "It has been determined that it would not be in the public interest to furnish this report." The Supreme Court held that the claim of privilege under Rule 34 of the Federal Rules of Civil Procedure was valid, that "the privilege against revealing military secrets" was ". . . well established in the law of evidence," *id.* at 6-7, and that "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *Id.* at 9-10.

<sup>11</sup> See § 19 *infra*.

<sup>12</sup> Statement of Norbert Schlei, Assistant Attorney General, *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758, and S. 1879*, 89th Cong., 1st Sess. 192, 205 (1965).

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power away from the executive would be extreme; the long-term constitutional solution is likely to follow the middle position of the *Reynolds* case<sup>13</sup> that the executive determines the scope of executive privilege, subject to a judicial check whenever a court has jurisdiction.<sup>14</sup>

#### 4. *The Act Governs Disclosures to the Public and Precludes Balancing of Private Interests*

The Act's sole concern is with what must be made public or not made public. The Act never provides for disclosure to some private parties and withholding from others. The main provision of section 3 says that information is to be made available "to the public" and the central provision of subsection (c) requires availability of records to "any person."

That required disclosure under the Act can never depend upon the interest or lack of interest of the party seeking disclosure is emphasized by the history. The previous section 3 provided for disclosure "to persons properly and directly concerned." That was changed to "any person."

One consequence is legislative departure from the customary practices of normal people, who often disclose to those having a special reason for knowing and withhold from those who do not. Private practices frequently depend on the difference between disclosure to the public and disclosure to one person or a restricted few. An individual employer would not make public his appraisal of an employee but he will disclose it to a prospective employer who inquires. Individuals would not make public many of the confidences they do not hesitate to share with colleagues, secretaries, wives, and others. But under the Act, Uncle Sam's information is either made public or not made public. The Act never requires it to be protected from all except those who have a special need for it.

Another consequence of limiting the Act's provisions to disclosures "to the public" and "to any person" is to preclude the balancing of the interest of one private party against the interest of another private party. For instance, the sixth exemption in subsection (e) authorizes withholding of medical files if disclosure "would constitute a clearly

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<sup>13</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>14</sup> Under such cases as *Federal Radio Commission v. General Elec. Co.*, 281 U.S. 464 (1930), separation of powers is violated when a *de novo* review provision requires a court to perform a nonjudicial function. The argument of the Department of Justice seems to be that this doctrine invalidates the Information Act's requirement of *de novo* review of withholding information. But no step a court takes in such *de novo* review is nonjudicial—neither finding facts nor interpreting the Act nor applying constitutional law of executive privilege nor applying common law of executive privilege.

unwarranted invasion of personal privacy." If the officer or judge finds that the disclosure will be an unwarranted invasion but is in doubt whether it is "clearly unwarranted," a natural approach to decision would be to weigh the privacy interest against the interest of the party seeking the information, so that disclosure would be made to one with a legitimate need but not to one who is malevolently motivated or an officious intermeddler. But under the Act such a balancing is inappropriate. All parties are equal in satisfying the words "any person."

##### 5. *The Act Never Forbids Disclosure but Other Law May*

The Act contains no provision forbidding disclosure. It requires disclosure of all records except what is "specifically" within the nine exemptions and other provisions. The exemptions protect against required disclosure, not against disclosure. The Act leaves officers free to disclose or withhold records covered by the exemptions, but they may then be governed by other statutory law, by the common law, by executive privilege, by executive orders, or by agency-made law in the form of regulations, orders, or instructions. Many statutes confer discretionary power upon agencies to disclose or not disclose specified information, and many statutes require or prohibit such disclosure.<sup>15</sup>

Although disclosure required by the Information Act is always to the public or to "any person," other law may require or permit disclosure to one or to a few, and it may require or permit a balancing of the interests of private parties on both sides. When the Information Act does not require disclosure and other identifiable law is not controlling, the custodian of the information presumably has discretionary power to determine whether and what to disclose and to whom.<sup>16</sup>

A crucial observation that some will find regrettable is that apparently no federal statute of general applicability forbids federal agencies or employees to make disclosures that would constitute clearly unwarranted invasions of personal privacy.<sup>17</sup>

<sup>15</sup> See § 18 *infra*.

<sup>16</sup> For instance, the Department of Justice has vast records about those who have been considered for appointments to the bench. Many items are unfavorable to individuals, whether or not they are now judges. Apparently without violating any law, an officer who has access to those records can disclose them to any outsider. As a practical matter, the officer can unfairly favor one outsider over another and he can allow access that should be denied. Judicial review of such discretion may be theoretically available but may be seldom practical. See 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 3.13 (1958).

<sup>17</sup> Of course, federal employees are often forbidden by agency rules or instructions to make unauthorized disclosures. The so-called "Housekeeping Statute," 5 U.S.C.A. § 301 (1966), authorizes the head of each department to govern "custody, use, and preservation" of records. It was amended in 1958, however, to make clear that it "does not authorize withholding information from the public or limiting the availability of records to the public." The Court held in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951),

#### 6. *Discretion of an Equity Court to Refuse Enforcement of the Act*

The Information Act contains no mandatory provision for its judicial enforcement. The key words are: "Upon complaint, the district court . . . shall have jurisdiction to enjoin the agency from withholding of agency records and to order the production of any agency records improperly withheld from the complaint." The court has jurisdiction to enforce; it is not commanded to enforce. Furthermore, the word "enjoin" is enough to invoke the traditions of equity. And an equity court by its intrinsic nature has a discretionary power to refuse to participate in bringing about results that are inconsistent with sound equitable practice.

Even though the Emergency Price Control Act of 1942 provided that an injunction "shall be granted" against a violation, the Supreme Court held "we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks."<sup>18</sup> The Court emphasized the fundamental character of equity jurisdiction: "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."<sup>19</sup> The Court accordingly upheld a refusal to enjoin violations resting on "mistakes . . . made in good faith . . ."

When the Supreme Court so holds even under a statutory provision that an injunction "shall be granted," surely equitable traditions apply under the Information Act's provision that the court "shall have jurisdiction . . ."

When a public interest is involved, not merely a private interest, the reasons for the equitable tradition are all the stronger: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."<sup>20</sup>

The equity practice is clear and strong. The court that has jurisdiction to enforce the Information Act also has jurisdiction to refuse to enforce it whenever equity traditions so require.

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that an employee of the Department of Justice may obey a Department regulation in refusing to obey a subpoena, but the Court was not passing upon the power of the Attorney General. An especially informative case about power to withhold information is *Appeal of the United States Securities and Exchange Commission*, 226 F.2d 501 (6th Cir. 1955).

<sup>18</sup> *The Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944).

<sup>19</sup> *Id.* at 329-30.

<sup>20</sup> *United States v. First National City Bank*, 379 U.S. 378, 383 (1965), quoting with approval from *Virginian R. Co. v. Federation*, 300 U.S. 515, 552 (1937).

### 7. *Publication in the Federal Register*

Subsection (a) prescribes what must be published in the *Federal Register*. The main items are descriptions of organization, formal and informal procedures, rules of procedure, substantive rules of general applicability, statements of general policy or interpretations of general applicability, and amendments of the foregoing.

The nine or more minor changes from the previous section 3 are quite complex. They are comprehensively explained in the *Attorney General's Memorandum*,<sup>21</sup> and I shall not duplicate that long discussion. Instead, I shall comment on the one significant change that is likely to be most troublesome, with respect to which I am inclined to question the Attorney General's position.

The previous section 3 required publication of "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated 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." The requirement was largely ineffective because agencies often deemed policy statements and interpretations to be more for guidance of particular parties or staff than for public guidance. The revision requires publication in the *Federal Register* of "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."

The requirement with respect to rules is limited to those "adopted as authorized by law" and that probably means rules pursuant to the rule-making procedure prescribed by the APA.<sup>22</sup>

The troublesome problem is to find the meaning of the two terms, "statements of general policy" and "interpretations of general applicability." In finding that meaning, we must take account of the provision of subsection (b) requiring availability of "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." Putting (a) and (b) together, "statements of policy" must be available and "statements of general policy" must be published; "interpretations which have been adopted by the agency" must be available and "interpretations of general applicability" must be published.

<sup>21</sup> ATT'Y GEN. MEMO. 4-13.

<sup>22</sup> The deletion of the words "but not rules addressed to and served upon named persons in accordance with law" does not make the requirement applicable to rules announced in adjudicatory opinions because the reason for the deletion was that the same thought is adequately expressed by the words "of general applicability." SEN. REP. 6. But rules announced in adjudicatory opinions must be published if they are either "statements of general policy" or "interpretations of general applicability."

On the problem of what is "general" or "of general applicability" the committee reports and the rest of the legislative history furnish no help. The answer must be based on word analysis and practicalities.

In adjudicatory opinions, what policy statements are "statements of general policy" and what interpretations are "of general applicability"—all, or some, or none?

I think the answer has to be some. It cannot be all, because the determination of a unique question is not "general" or "of general applicability." The answer cannot be none, because adjudicatory opinions do often contain statements of general policy or interpretations of general applicability. For instance, to choose a clear example, the National Labor Relations Board in the *General Cable* case announced in its opinion: "Today, a decade and a half following the establishment of the Board's basic 2-year contract-bar rule, we enlarge the 2-year period to 3, making no other changes."<sup>23</sup> The context shows that the Board was making a new policy or interpretation for all parties, not just the parties before it.<sup>24</sup> The 3-year rule seems to me clearly a "statement of general policy."

But what about the practicality of publishing such a policy statement in the *Federal Register*? I think the 3-year rule should have been so published; indeed, I think that rule-making procedure should have been followed for formulating the rule.<sup>25</sup> Furthermore, a very useful purpose will be served if agencies are required to publish in the *Federal Register* their especially significant statements of general policy or interpretations of general applicability. Such publication will call attention to the legislative quality of such statements and interpretations and to the appropriateness of rule-making procedure. Yet, for practical reasons, I would draw the line closer to cases resembling the *General Cable* case than to unique cases at the other end of the scale.<sup>26</sup>

The *Attorney General's Memorandum* takes the position that no statement of policy in an adjudicatory opinion can be "general" and that no interpretation in such an opinion can be "of general applicability." It says that

. . . an agency is not required under subsection (a) to publish in the Federal Register the rules, policies and interpretations

<sup>23</sup> *General Cable Corp.*, 139 N.L.R.B. 1123, 1125, 51 L.R.R.M. 1444 (1962).

<sup>24</sup> Not until the last paragraph of the opinion did the Board say: "Turning now to the instant case and applying the above policy . . ." 139 N.L.R.B. at 1129, 51 L.R.R.M. at 1447.

<sup>25</sup> Reasons are spelled out in 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 6.13 (Supp. 1965).

<sup>26</sup> For reasons in support of the view that the old § 3 of the APA required publication in the *Federal Register* of many opinions accompanying adjudicative orders, see Newman, *Government and Ignorance—A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929, 936-37 (1950).

formulated and adopted in its published decisions. Instead, this "case law" is to be "made available under subsection (b)." (H. Rept., 7.)<sup>27</sup>

The reference to the House committee has to do with subsection (b), not with subsection (a), and the committee says merely that the bureaucracy's case law must be available for inspection. Of course it must. And in addition, in my opinion, the case law that contains "statements of general policy" or "interpretations of general applicability" must be published in the *Federal Register*, because subsection (a) says so. To reason that because case law must be open to inspection "statements of general policy" and "interpretations of general applicability" need not be published in the *Federal Register* would be to indulge in a clear non sequitur. The Attorney General merely states his conclusion without supporting reasoning, without setting forth an analysis of the words of subsection (a), and without mentioning the advantages of *Federal Register* publication in such a case as *General Cable*.

Apart from adjudicatory opinions, what statements of general policy or interpretations of general applicability must be published? The *Attorney General's Memorandum* does not discuss this question. For instance, the Internal Revenue Service publishes in its *Cumulative Bulletin* its "revenue rulings," which are designed to serve as precedents, but it neither publishes nor opens to public inspection its "letter rulings," which are not designed to serve as precedents. Since all revenue rulings are planned as guides to tax law, they all seem to be "interpretations of general applicability" and therefore must be published in the *Federal Register*, if the clear statutory words are to be followed. I recognize that publication in the *Cumulative Bulletin* is satisfactory and that duplication of publication is undesirable, but Congress seems to have spoken with clarity. The alternative would be to say that an interpretation which is intended to have general applicability is not an interpretation of general applicability.

### 8. *Opinions, Orders, and Votes*

Subsection (b) requires opening to public inspection "all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases," and subsection (d) requires such opening of "a record of the final votes of each member in every agency proceeding."

The United States Parole Board never gives reasons for denying a written application for parole; this is a flagrant and long continuing

violation of section 6(d) of the APA.<sup>28</sup> The Board can be required to give reasons, and under the new Act it has no excuse for refusing to open them to public inspection. The Federal Deposit Insurance Corporation recently refused to answer reasonable questions as to whether any of its members dissented from the granting of a license;<sup>29</sup> such a refusal would violate subsection (d) of the new Act. An "order" may say no more than "application granted" or "application denied," but that much has to be open to public inspection; whether that much may be meaningful has to depend upon the application of the Information Act to the other papers in the case.

"Order" and "adjudication" are much broader concepts under section 2 of the APA than one not familiar with section 2 might suppose. Section 2(d) provides: "'Order' means the whole or any part of the final disposition . . . of any agency in any matter other than rule making but including licensing." The *Attorney General's Memorandum* refers to this definition and says:

Neither the previous section 3 nor the revised section contemplates the public availability of every "order" as thus defined. The expression "orders made in the adjudication of cases" is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding.<sup>30</sup>

I think the *Memorandum* is clearly mistaken because section 2(d) also provides: "'Adjudication' means agency process for the formulation of an order." Under the APA definitions, every order is issued as part of the final disposition of an adjudication. Therefore, the correct statement is precisely the opposite of what the Attorney General says: Both the previous section 3 and the revised section contemplate the public availability of every "order" as defined by section 2(d).

The auditing of a single tax return may involve dozens of orders and dozens of adjudications, as defined. Each of the million licenses issued

<sup>28</sup> Section 6(d), now 5 U.S.C. § 555 (1966), requires prompt notice of denial of a written application and provides: "Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accomplished by a brief statement of the grounds for denial."

<sup>29</sup> *Washington Post*, Sept. 2, 1966, tells the story of the FDIC's grant of insurance for a bank, although the applicant, "an affable and affluent wholesaler of Arkansas land and liquor," was reportedly disapproved by the examiners. The sophisticated reporter said: "The whole affair is 'classified' so far as FDIC is concerned. Chairman Randall won't even confirm that he voted to insure the bank. His position is that the internal workings of FDIC are 'confidential and privileged.'" The General Counsel of FDIC has confirmed these facts to me.

<sup>30</sup> ATT'Y GEN. MEMO. 15.

annually by the FCC is an adjudication, even if automatically issued. Every one of the Immigration Service's 700,000 dispositions of applications annually is clearly an order; when an officer checks one of thirty reasons on a printed card, the check-mark is an opinion.<sup>31</sup> "Any matter other than rule making" includes no-action letters of the SEC and informal merger clearances by the FTC or the Antitrust Division; these materials, not heretofore available for public inspection, clearly should be and clearly will be under the Act, except to the extent that facts stated are within an exemption.

### 9. *Statements of Policy and Interpretations*

Subsection (b) requires opening to public inspection "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register."

The FCC once debated for half a day whether to set a broadcast renewal application for hearing; the debate crystallized an issue of policy. Three commissioners voted to set the case for hearing and four voted not to. The outside world, including the applicant, never learned that the question was even considered. The determination of policy was fully stated in the Commission's confidential minutes. The Act requires disclosure of such minutes, unless they are an intra-agency memorandum within the meaning of the fifth exemption.<sup>32</sup>

Other such questions about "statements of policy" are affected by the same considerations as apply to "interpretations," to which we now turn.

An important body of law heretofore kept mostly secret is the vast accumulation of SEC no-action letters. Such a letter typically states that the Commission's staff will recommend no action against the applicant for doing what the applicant has proposed to do. Such letters are orders and they are also interpretations of law or facts. Facts stated in such letters may sometimes be exempt from disclosure under the fourth exemption, but the "interpretations" must be made available under subsection (b). A representative of the SEC has argued before an audience that letters by the Commission's staff are not "interpretations which have been adopted by the agency," but that argument seems to me without merit. The staff is authorized, the Commission supervises, the Commission has never refused to honor such a letter, and most of what the Commission does it does through its staff. Furthermore, the staff is an "agency" within the definition in section 2 of the APA.

The term "interpretations which have been adopted by the agency"

<sup>31</sup> But see text accompanying note 114 *infra*.

<sup>32</sup> See discussion of the fifth exemption in § 21 *infra*.

seems clearly to include not only the Internal Revenue Service's revenue rulings, heretofore published in the *Cumulative Bulletin*, but also the so-called letter rulings, heretofore not only unpublished but also closed to public inspection.<sup>33</sup> The theory of the letter ruling has been that it is not carefully enough considered to serve as a precedent for other cases.<sup>34</sup> Subsection (a) requires "interpretations of general applicability" to be published in the *Federal Register* and subsection (b) requires availability of "interpretations which have been adopted by the agency"; the natural line of distinction is use or nonuse of the interpretations as precedents.

The face of the Act seems clear but we still must examine the complex legislative history. The Senate committee merely restates the words of the bill.<sup>35</sup> The House committee says that subsection (b) "would require agencies to make available statements of policy, interpretations . . . . This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions."<sup>36</sup> Some of what the House committee says here is necessarily so. Suppose, for example, that a letter ruling gives taxpayer X a favorable interpretation; surely the interpretation has "the force and effect of law" in X's case. Using the House committee's implicit reasoning that what has the force and effect of law must be disclosed, the letter ruling must be disclosed.

The House committee goes on to say that "the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the material which would be made available under subsection (b) . . . ." I do not see how any reasonable person could

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<sup>33</sup> See Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 764-66 (1965): "In contrast to a letter ruling a 'Revenue Ruling' is an official interpretation by the Service, issued only by the National Office and published in the *Internal Revenue Bulletin* . . . . The Service selects for publication all letter rulings having substantial value as precedents . . . . Basically, however, both the Revenue Ruling and the letter ruling constitute an interpretation of the Code with respect to a particular state of facts."

The Internal Revenue Service issues about 30,000 rulings per year. The recent *Cumulative Bulletins* contain only about 360 per year. This means that only a little more than one per cent are published. Under the Information Act, all are required to be open to public inspection.

<sup>34</sup> "No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases." Preface to each recent volume of the *Cumulative Bulletin*.

<sup>35</sup> SEN. REP. 6.

<sup>36</sup> HOUSE REP. 7. As to the House committee's statement that "interpretations" are "the end product of Federal administration," see § 11 below.

disagree with this passage. The case law of the agencies has to be available for public inspection. The statute so requires. Fairness so requires.

But the House committee then contradicts itself:

However, under S. 1160 an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by an officer or employee of the agency as a precedent in the disposition of other cases.<sup>87</sup>

This statement, in my opinion, is not the law, even though the *Attorney General's Memorandum*, without explanation, quotes it with approval.<sup>88</sup> It is contrary to the needs of fairness, contrary to the House committee's earlier statements, contrary to the report of the Senate committee, and contrary to the clear words of the statute. If a letter ruling interprets tax law in favor of X, fairness requires that Y who has the same problem should have opportunity to know the interpretation in X's case. The House committee's earlier statement that an agency's "case law" must be available is in accordance with the statute. The Senate committee was faithful to the plain statutory meaning. The statutory words that every agency must make available "interpretations which have been adopted by the agency" are unqualified. Nothing on the face of the Act supports the House committee's statement that an interpretation not relied upon as a precedent need not be made available.

True, the last sentence of subsection (b) says: "No . . . interpretation . . . may be relied upon, used or cited as precedent by an agency against any private party unless it has been . . . made available or published . . ." These words clearly do not say that an interpretation need not be made available if it is not used as a precedent. What the statute requires is one thing; what the sanctions of the statute reach is quite another. Congress is entitled, if it chooses, to enact mandatory requirements for the government's officers and to support them with full enforcement machinery, with no enforcement machinery, or with partial enforcement machinery. The scope of the requirements should not be measured by the sanctions. I specifically disagree with the *Attorney General's Memorandum*: "The scope of this sanction seems to limit the effective reach of subsection (b) to those orders which may have precedential effect."<sup>89</sup> This seems to me mistaken in two respects:

<sup>87</sup> HOUSE REP. 7.

<sup>88</sup> ATT'Y GEN. MEMO. 16.

<sup>89</sup> *Id.* at 15.

(1) Even if "the effective reach" of a mandatory statute were measured by the enforcement machinery, the effective reach would not be "those orders which may have precedential effect" but it would be only those orders which operate "against any private party" and may have precedential effect; the effective reach would not extend to orders operating in favor of a private party. (2) In my opinion, the Attorney General should not tell government officers that lack of enforcement machinery means they are free to violate clear statutory requirements. The Attorney General should insist that government officers obey mandatory statutes whether or not enforcement machinery is provided.

Furthermore, I think subsection (b) is enforceable not only through the no-reliance-no-citation provision but also by getting a court order, for reasons stated in the next section.

#### 10. *Judicial Enforcement of Subsection (b)*

The House committee's remark just considered may have rested on the assumption that subsection (b) is not judicially enforceable, and the *Attorney General's Memorandum* silently assumes at two points that it is not, without supporting analysis.<sup>40</sup>

My opinion is that subsection (b) is judicially enforceable—both pursuant to the Act's provisions and apart from the Act. The statutory language is clear: Subsection (c) requires disclosure of "records," an interpretation in an agency's file is a record, and a court has jurisdiction to "order the production of any agency records improperly withheld from the complainant." True, subsection (c) has an "except" clause: "Except with respect to the records made available pursuant to subsection (a) and (b), every agency shall . . . make records promptly available to any person." But one can hardly read "records made available" to mean "records not made available" or "records improperly withheld."

The "except" clause is without sensible meaning, since it excepts "records made available" from the requirement that records be made available, and therefore one might argue that it must be given meaning different from the meaning it has on its face. Even so, "records made available" cannot mean "records not made available." A possible

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<sup>40</sup> The implication appears at page 15 when the *Memorandum* says: "The sanction applicable to subsection (b) is set forth in its last sentence." The implication also seems to appear at page 23 when the *Memorandum* says: "The 'Except' clause with which the provision begins is intended 'to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records.' (S. Rept., 89th Cong., 2)." In this statement and quotation, the Attorney General seems to join in the assumption of the Senate committee that "records made available" means "records improperly withheld"—an assumption shortly to be discussed.

reading would build on the idea that the statute, not the agency, makes records available, and that the "except" clause applies to records the statute has made available, so that the "except" clause would be read as if it said: "Except with respect to records made available by subsections (a) and (b) . . ." But the statute does not say "by"; it says "pursuant to."<sup>41</sup> One cannot say that the statute makes records available pursuant to the statute; one must say that the agency makes records available pursuant to the statute. So the Information Act nonsensically excepts records the agency has made available from its requirement that the agency make records available.

In the face of these analytical considerations, a court would have to strain to find that subsection (b) is not judicially enforceable. But a discerning court would be inclined to strain in the opposite direction, if need be, because judicial enforcement is so clearly desirable. In absence of judicial enforcement, the only enforcement of subsection (b) would rest on its last sentence:

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.

If this provision were the only means of enforcement, subsection (b) would be without any means of enforcement most of the time. An agency usually produces its case law supporting its position against a private party, but it cannot always be counted on to disclose case law favorable to a private party. The provision fails to reach the disclosure of materials that favor the private party.

Even if the Act did not provide for judicial enforcement of subsection (b), the courts could enforce it apart from the Act. Federal courts have a general equity jurisdiction, and the APA provides that final agency action is reviewable except to the extent that statutes preclude judicial review or agency action is committed to agency discretion by law.<sup>42</sup> No statute precludes review, and action in violation of a mandatory statute is not committed to agency discretion by law. The *Attorney General's Memorandum* makes the assumption of judicial unenforcea-

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<sup>41</sup> The Senate committee, however, in explaining its addition of the "except" clause, used the word "by" instead of the words "pursuant to": "This is a technical amendment to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records." SEN. REP. 2.

<sup>42</sup> Formerly § 10, now §§ 701 and 704 of the codified Act.

bility of subsection (b) without mentioning the question whether judicial enforcement may be appropriate apart from the specific provisions of the Information Act.

11. *Interpretations Growing out of Such Activities as Investigating, Prosecuting, Negotiating, Settling, Litigating*

A question of great importance, not mentioned by the *Attorney General's Memorandum*, is whether the Act requires availability of all interpretations, including those made through processes other than adjudication and rule making, or whether the requirement of availability is limited to interpretations embodied in the end product of administration.

Subsection (b) requires disclosure of "interpretations which have been adopted by the agency." Nothing on the face of the Act says that the interpretations to be disclosed must be embodied in a final order or rule. From the face of the Act one would expect that "interpretations" means all interpretations.<sup>43</sup>

The Senate committee, by merely repeating the Act's words, seems to say that the provision applies to all interpretations.<sup>44</sup> But the House committee says that "interpretations" are "the end product of Federal administration."<sup>45</sup> Yet that statement is in the form of a statement of fact, not a statement of intent, and as a statement of fact it seems clearly mistaken; interpretations are made not only as the end product of administration but at any interim stage of administration. Interpretations are made in deciding whether to investigate or to prosecute and what position to take in negotiating, settling, or litigating.

On the question of what meaning *should* be given to "interpretations," a limitation of the term to the end product of administration would be clearly undesirable, for interim interpretations are in the nature of law, and private parties who are affected by an agency's law should always be entitled to a disclosure of it.

For instance, when much is at stake the careful lawyer who is making thorough preparation for negotiating with an agency may want to know its positions in negotiations with other parties. Indeed, the only "interpretation" having significance to such a lawyer may be those made in prior such negotiations. Similarly, if an agency, wholly or partly on the basis of "interpretations," decides to investigate A but not B, to prosecute C but not D, to settle with E but not with F, and to litigate with G but not with H, opening all such interpretations to public inspection

<sup>43</sup> For discussion of the absence of the word "all" see note 55 *infra*.

<sup>44</sup> SEN. REP. 6.

<sup>45</sup> HOUSE REP. 7.

seems clearly desirable. My opinion is that such opening is desirable not only because affected parties should have a chance to know the agency's law but also because public criticism may have a salutary effect on the agency and its staff.

Because of this clear desirability, I would interpret the Act in accordance with its literal words and in accordance with the Senate committee report, and I would reject the somewhat ambiguous statement of the House committee that interpretations are the end product of administration.

If my interpretation is correct, a further observation necessarily follows: The Attorney General and all his subordinates, including every United States Attorney, are all "agencies" within the meaning of the APA, so that all "interpretations" by any one of them are required to be available for public inspection, unless an exemption applies. And the term "interpretations" covers a great deal. It probably applies whenever law is applied to particular facts, including even such consent arrangements as a plea of guilty to a lesser charge.

## 12. *Administrative Staff Manuals and Instructions*

Subsection (b) requires every agency to make available for public inspection "administrative staff manuals and instructions to staff that affect any member of the public." An earlier version of the bill did not contain the word "administrative" and the Senate committee explained the addition of that word:

The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.<sup>46</sup>

Since the word "administrative" was added to say what the Senate committee says, the committee statement is probably the law. The committee's dichotomy at first seems to be "administrative matters" and "law enforcement matters." But that raises the question how to classify administrative enforcement of law, and the committee explains that law enforcement means "prosecuting violations of law in court." So the dichotomy turns out to be enforcement in court and enforcement in an agency. But no rational reason supports that. If both the

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<sup>46</sup> SEN. REP. 2, Amendment No. 1.

Antitrust Division and the Federal Trade Commission instruct their staffs as to what mergers should be prosecuted, I think the instructions should be subject to compulsory disclosure to the extent that they involve interpretation of law and only to that extent. Yet if the Senate committee's statement is followed, *all* the instructions to the Trade Commission's staff and *none* of the instructions to the Antitrust Division's staff will have to be disclosed.

The House committee's interpretation is along a different line and is not much better: "[A]n agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases."<sup>47</sup> Since the statute requires availability of administrative staff manuals and instructions that affect any member of the public, the House committee's statement that portions of administrative staff manuals and instructions that affect any member of the public need not be available seems to contradict the statute. Furthermore, the House committee's statement differs from the Senate committee's. In this circumstance, the words of the statute must control unless such a result is impracticable; I firmly believe that staff manuals or instructions in the nature of substantive or procedural law *should* be available. For instance, "guidelines for the staff in auditing" of tax returns ought to be open to the taxpayer to the extent that they tell the auditor the position of the Internal Revenue Service on any question of tax law. Furthermore, contrary to what the House committee says, I think a portion of "guidelines for the staff . . . in the selection or handling of cases . . . or criteria for defense, prosecution, or settlement of cases" should be open to inspection by any party affected by them. I agree that secrecy is desirable to the extent that policies about prosecuting depend upon such strategies as inducing maximum compliance with the least expenditure.

The opinion I have just expressed about what is desirable seems to me closer to what the statute says than the statements of the two committees, which differ from each other and differ from the statute. When the materials emerging from the legislative process are so confused, an interpreter must be guided in part by what he believes to be a sound system. One fundamental principle is that secret law is an abomination.

Yet I feel obligated to bring out an argument against the conclusion

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<sup>47</sup> HOUSE REP. 7-8.

just stated. In 1964 I suggested to the Senate subcommittee a requirement about disclosure of staff manuals.<sup>48</sup> In 1965 I said to the subcommittee:

Section 3(b) adopts many of my suggestions of last year, and I think it is greatly improved. One of my suggestions, however, has been carried too far. I recommended that a provision be included to require opening to public inspection the portions of operating instructions to an agency's staff that amount to substantive law. . . . Opening to the public all instructions "that affect any member of the public" goes too far and needs to be cut back. For instance, one who is investigated may be affected by instructions to the investigator about how to investigate, but some such instructions are properly confidential. I recommend that the provision be revised to read as follows: "staff manuals and instructions to staff to the extent that they embody agency interpretations of law."<sup>49</sup>

Since the subcommittee and hence Congress did not adopt this recommendation, can the Act be interpreted as if the recommendation had been adopted? The only merit of an affirmative answer is that it is desirable and that every available alternative has less merit.

The *Attorney General's Memorandum* concludes that manuals and instructions should be available after deletion of "standards and instructions which necessarily cannot be disclosed to the public."<sup>50</sup> This is sound as far as it goes, but the guidance can and should be more specific.

### 13. *Deleting Identifying Details*

Subsection (b) provides: "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."

May an agency delete identifying details in order to prevent a clearly unwarranted disclosure of commercial or financial information a corporation has submitted to the agency in confidence? Clearly an agency

<sup>48</sup> *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act*, 88th Cong., 2d Sess. 244, 273 (1964).

<sup>49</sup> *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1160, S. 1336, S. 1758 and S. 1879, Administrative Procedure Act*, 89th Cong., 1st Sess. 138, 178 (1965).

<sup>50</sup> ATT'Y GEN. MEMO. 17.

should have such power, even though the bad draftsmanship says otherwise. For instance, because much law is contained in the interpretations embodied in the SEC's no-action letters, the interpretations should be disclosed to affected parties, but the confidential information in the letters should be protected. The easy solution is often to disclose the letters but to delete the identifying details. Yet one probably cannot say that a corporation has a "personal privacy." The ineptitude of the draftsmen should not prevent a sensible result.<sup>51</sup>

Although the requirement that "the justification for the deletion must be fully explained in writing" at first seems excessive, the *Attorney General's Memorandum* makes the excellent suggestion that agencies specify in rules the usual reasons for deletions and then cite the rules to help justify deletions.<sup>52</sup>

#### 14. *The Index Requirement*

Subsection (b) provides:

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.

The requirement is limited to "a current index." Files in existence on July 4, 1967 need not be indexed. Secret law existing at that time may remain secret for want of access to it through an index.

The difficult problem, surprisingly, is whether the statutory requirement of an index for "any matter . . . required to be made available" means all matters or only some. From the face of the statute, one would unhesitatingly say that "any matter" in this context means all matters. The Senate committee so assumed.<sup>53</sup> The House committee said that subsection (b) "requires an index of all the documents having preceden-

<sup>51</sup> The Senate committee speaks of "the private citizen's right to be secure in his personal affairs," SEN. REP. 7. The House committee speaks of "the need to protect individual privacy." But the committees' failure to think of corporations was probably an inadvertence.

The *Attorney General's Memorandum* curiously says at page 19 that the definition of "person" in section 2(b) of the APA includes corporations, and that ". . . the reasons for deleting identifying details would seem as applicable to corporations as to individuals." But the statute does not use the word "person" and the definition of it is therefore irrelevant.

<sup>52</sup> ATT'Y GEN. MEMO. 20.

<sup>53</sup> "Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary . . . This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion . . ." SEN. REP. 7.

tial significance."<sup>54</sup> But this remark is a misfit for half the six items, because the concept of precedential significance is not customarily applied to policy statements, staff manuals, or instructions.<sup>55</sup>

Taken together, the clarity of the statute and the Senate committee's interpretation of it seem to me to outweigh the House committee's half-wrong statement.

As to what interpretation is desirable, the first step is to recognize that the House committee's remark about precedential significance cannot be used to limit the indexing of policy statements, manuals, or instructions. Indexing seems to me especially desirable for opinions and interpretations. They contain a high proportion of useful case law of the agencies, and I insist that all law should be available to affected parties. Some opinions may have little value, but I would prefer to have all of them available and indexed than to have agencies select the ones they believe to have precedential significance. A private party who wants to know the agency's law should be entitled to make his own determination of what precedents have value.

If I were making a legislative choice, however, I would not require the indexing of all orders. One who needs agency case law seldom goes to the orders, which may say only "granted" or "denied." Furthermore, the indexing of all orders may be impracticable—depending on what an index is. The Social Security Administration issues more than four million orders a year, the Bureau of Customs three million orders, the Department of Agriculture two million feed grain and wheat diversion orders, and the FCC more than one million licenses (each an order).

Because I have discovered no analytical means under the statute for requiring the five items, but not orders, to be indexed, and because I think the index requirement should reach all of the five items, I would interpret the statute to require indexing of all six items, but I would interpret "index" to include any classification system that helps find a paper in a mass of files. Probably the most important remark that can be made about the index requirement is that an index need not be alphabetical, or by subject matter, or by numbering, or by names of parties, or by any other particular form of classification.

A single example may provide a lead for further imagination about

<sup>54</sup> HOUSE REP. 8.

<sup>55</sup> Because the 1966 statute says "all" before each of the first two of the six items required to be disclosed but omits "all" before each of the other four, it could mean all orders and all opinions but some policy statements, some interpretations, some staff manuals, and some instructions, but it could not mean some orders and all of each of the other items. The 1967 codification, however, takes care of the problem by omitting "all" before each of the six items, thereby implying "all" before each.

other types of records: The Immigration Service, I think, already has an index to the 700,000 applications on which it acted last year. Every application is assigned a file number upon receipt by a district office (unless a file already exists). Every application has to be accompanied by a small fee. All the money goes to a cashier, who records the amount, the date, the number of the file, and the nature of the application; these items are printed by the cash register on rolls of tape, and the rolls are systematically kept in each office. The rolls are not sent to the central office in Washington. The rolls seem to me to be an index and to satisfy the statutory requirement.

The *Attorney General's Memorandum* assumes without discussion that the House committee's half-wrong remark overrides the clear statute and the Senate committee's view. The *Memorandum* sets forth no analysis of the statutory words, recognizes no difference between orders and the other five items, and does not mention the impropriety of applying the concept of precedential significance to policy statements, manuals, or instructions. As long as the agencies follow the *Memorandum*, a good many systems of secret law will continue.

The Act's judicial enforcement provision does not reach indexing.<sup>56</sup>

#### 15. *The Nine Exemptions Are Limited to What Is "Specifically Stated"*

Before we consider the nine exemptions one by one, we must observe that each exemption is limited to what is "specifically stated." Subsection (f) provides: "Nothing in this section [the entire Information Act] authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section . . ." The Senate committee says: "The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e)."<sup>57</sup> The House committee's statement is almost the same.<sup>58</sup>

The pull of the word "specifically" is toward emphasis on statutory language and away from all else—away from implied meanings, away from reliance on legislative history, away from needed judicial legislation.

Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in *narrowing* the ascertainable mean-

<sup>56</sup> The judicial enforcement provision of subsection (c) confers "jurisdiction . . . to order the production of any agency records improperly withheld . . ." A nonexistent index cannot be a part of "agency records."

<sup>57</sup> SEN. REP. 10.

<sup>58</sup> HOUSE REP. 11.

ing of the words of an exemption, but in some degree they are restricted in following those habits in *broadening* that meaning. The "specifically stated" restriction operates in only one direction.

When no constitutional problem is involved, may Congress by expressly limiting interpreters to what Congress specifically states require departures from what common sense obviously requires? The answer is clearly yes. Congress unquestionably has the power. But it may be very unwise in exercising this power. Its own competence to make law on a complex subject may be so limited that it should invite, not prevent, the help of administrative and judicial interpreters to make its enactments workable and sensible.

The *Attorney General's Memorandum* discusses the exemptions one by one, dealing with difficult problems of interpretation, without once mentioning the "specifically stated" clause.<sup>59</sup> Yet my opinion is that that clause is often relevant in determining the proper interpretation of particular exemptions. The *Memorandum's* only mention of the clause is in its separate discussion of subsection (f).<sup>60</sup>

#### 16. *National Defense and Foreign Policy*

In late 1961 President Kennedy and his advisers conferred about adding a military force of 15,000 men to the few hundred "military advisers" in Vietnam. Undersecretary George Ball said this would commit the prestige of the United States to the war and asked whether the others were prepared to commit 300,000 Americans to achieve a military solution. Ball said he was not. As Reston tells the story, "Rusk and McNamara both conceded that Ball's question was fair but also said yes, they were prepared to see it through. But the American people were not told that. The decision was seen by the public as a modest increase of the noncombatant American force, signifying no significant change in American policy . . ." <sup>61</sup> Representatives of the press believe that such a policy choice should not be concealed but should be publicly understood and debated. This is a sample of the belief by the press that is a main political force behind the Information Act.

Yet the Act does precisely nothing to carry out the point of view of the press with respect to national defense and foreign policy. Instead, it strengthens the President's hand in withholding information on those subjects. The first exemption relieves from required disclosure "matters that are . . . specifically required by Executive order to be

<sup>59</sup> ATT'Y GEN. MEMO. 29-39.

<sup>60</sup> *Id.* at 39.

<sup>61</sup> See RESTON, *THE ARTILLERY OF THE PRESS* 25-26 (1966).

kept secret in the interest of national defense or foreign policy." Under the Act the President may withhold information about national defense or foreign policy with the formal approval of Congress, previously lacking.

Whether the Act enlarges the executive power to withhold information is unclear. Apart from the Act, a court applying the law of the *Reynolds* case<sup>62</sup> may in some circumstances participate in the determination of the scope of executive privilege. The Secretary of the Air Force certified that furnishing the investigation report "would not be in the public interest," and the holding was, in part, that "The court itself must determine whether the circumstances are appropriate for the claim of privilege . . ." <sup>63</sup> Under the Act, the Secretary would presumably ask the White House for an executive order, and a presidential assistant would presumably comply. The court then might be bound by the executive order, on the theory that the Act has delegated power to the President. But the argument the other way has merit: The first exemption, like all the other exemptions, merely means that the Act's disclosure requirements do not apply, and when the Act has no effect, the law is what it would have been without the enactment.<sup>64</sup>

### 17. *Personnel Rules and Practices*

The second exemption applies to "matters that are . . . related solely to the internal personnel rules and practices of any agency."

The Senate committee explains: "Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."<sup>65</sup> This statement seems fully faithful to the words of the statute.

But the House committee, once again, tries to change the meaning of the legislative language: "Matters related solely to the internal personnel rules and practices of any agency: Operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be all exempt from disclosure . . ." <sup>66</sup>

As usual, the *Attorney General's Memorandum* assumes that what the House committee says is the law. It does not mention that the

<sup>62</sup> *United States v. Reynolds*, 345 U.S. 1 (1953).

<sup>63</sup> *Id.* at 8.

<sup>64</sup> The congressional acquiescence does not reach withholding from Congress because subsection (f) provides: "[N]or shall this section be authority to withhold information from Congress."

<sup>65</sup> SEN. REP. 8.

<sup>66</sup> HOUSE REP. 10.

Senate committee said something altogether different. Nor does it set forth an analysis of the statutory words.

My opinion is that the words "internal personnel rules" mean what the Senate committee says, not what the House committee and the Attorney General say. "Operating rules" may be "internal personnel rules" only to the extent that they deal with the relations between an agency and its employees, not to the extent that they deal with the relations between an agency and an outsider or between employees of the agency and an outsider.

The House committee goes on to say that "this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law."<sup>67</sup> The committee is now going in the opposite direction, but again I must disagree; I think that "employee relations and working conditions" are a part of "internal personnel rules and practices" which may be withheld from disclosure. Of course, "routine administrative procedures" must be not only disclosed but even published in the Federal Register if they affect anyone outside the agency.

No good reason for exempting "internal personnel rules and practices" has ever come to my attention. The exemption seems to me opposed to the basic push to let the public know what the government is doing.

#### 18. *Other Statutes Which Specifically Allow Nondisclosure*

The third exemption covers "matters that are . . . specifically exempted from disclosure by statute."

A very useful compilation of statutes, which says in its preface that it "does not purport to cover all of the Federal statutes," is a House Committee Print, entitled *Federal Statutes on the Availability of Information*, for the use of the Committee on Government Information, published in 1960 in 303 pages.

Some of the statutes authorize agencies to determine whether specified information shall be made available to the public. For instance, the Securities Exchange Act authorizes the Commission to "hear objections" and then to make available an "application, report, or document only when in its judgment a disclosure of such information is in the public interest."<sup>68</sup> If the Commission under this provision decides against public disclosure, is the information, within the meaning of the third exemption, "specifically exempted from disclosure

<sup>67</sup> *Ibid.*

<sup>68</sup> 48 Stat. 901 (1934), 49 Stat. 704 (1935), 15 U.S.C. § 78x (1964).

by statute"? Although a respectable argument may be made that the information is exempted by the Commission and not by the statute, that interpretation will defeat the intent of the Securities Exchange Act, which is more specific than the Information Act; therefore, perhaps the Securities Exchange Act should be deemed to "specifically exempt" whatever information the Commission, acting within the power granted, decides to withhold.

19. *Trade Secrets and Commercial or Financial Information Obtained from Any Person and Privileged or Confidential*

The fourth exemption is probably the most troublesome provision in the Act. Obedience to its rather clear words would be extremely injurious. Some escape from the plain meaning of the statutory words is essential.

The Act provides: "The provisions of this section shall not be applicable to matters that are . . . (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential." The troublesome question is what to do about non-commercial and non-financial information which is privileged or confidential. For example, when a government officer induces a corporation to furnish him some non-commercial and non-financial information, with a good faith understanding that the information will be kept confidential, can the fourth exemption be interpreted to protect the information from required disclosure?

The requirements of common sense directly collide with the clear statutory language. Obviously, the good faith understanding that the information will be kept confidential should be honored. But the statutory words clearly limit the exemption to "commercial or financial information." The word "information" is modified by "commercial or financial" and it is also modified by "privileged or confidential." The words plainly limit the exemption to information which is commercial or financial and which is privileged or confidential. Indeed, I think the meaning of the statutory words is not merely reasonably clear but entirely clear.

Even so, some escape is necessary. A *possible* interpretation would recognize three items that are exempt: (1) "matters that are . . . trade secrets"; (2) "matters that are . . . commercial or financial information obtained from any person"; and (3) "matters that are . . . privileged or confidential." The first and third make sense but the second does not; Congress could not have intended to exempt all commercial or financial information obtained from any person.<sup>69</sup> Furthermore, cutting up

<sup>69</sup> The history of the provision helps to show that the exemption (apart from trade

the exemption into these three categories does violence to the statutory language because the word "information" is so clearly modified by both "commercial or financial" and "privileged or confidential."

The *Attorney General's Memorandum* never acknowledges that the statutory words of the fourth exemption have a plain meaning. Instead, the *Memorandum* says that the words are

... susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., "matters that are \* \* \* [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential." (bracketed initials added). Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain meaning of the statutory language, a detailed review of the legislative history of the provision is important.<sup>70</sup>

Especially fascinating is this sequence: The Attorney General (1) says the statute is susceptible of several readings, (2) he lists those readings, and (3) he then reaches a conclusion different from any he lists! If what he says implies that the statute is not susceptible of the reading he adopts, then I agree! Yet I am in basic sympathy with the Attorney General in all this because I fully agree with the fundamental idea that underlies what he says in the passage quoted—that no reading of which the Act is susceptible can feasibly govern what the agencies will do. The fault is that of Congress, not that of the Attorney General.<sup>71</sup>

Of the three readings the Attorney General lists, he properly rejects the third, for it is utterly preposterous and contrary to the clear words; it would mean that trade secrets are not exempt unless they are com-

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secrets) reaches only that information which is privileged or confidential. The 1964 version was: "Every agency shall make all its records promptly available to any person . . . [except] records . . . which are . . . trade secrets and other information obtained from the public and customarily privileged or confidential." S. 1666, § 3(c), as printed in SEN. REP. NO. 1219, 88th Cong., 2d Sess. (1964). One could say that this exempts "records . . . which are . . . trade secrets" and "records . . . which are . . . customarily privileged or confidential," but one is barred by common sense from saying it exempts "records . . . which are . . . other information obtained from the public."

<sup>70</sup> ATT'Y GEN. MEMO. 32. The brackets and the asterisks are those of the Attorney General.

<sup>71</sup> The Attorney General's word analysis is not designed to find the proper interpretation but only to find that the statute has "uncertain meaning" and that therefore "a detailed review of the legislative history of the provision is important." I agree that the legislative history is important, but I cannot agree that the statutory words have "uncertain meaning." The only uncertainty I find stems from the undesirability of what the words plainly say, not from the grammatical sense of the statutory words.

mercial or financial. He properly rejects the first reading because he finds that Congress could not have intended to exempt all commercial or financial information. This leaves the second, which I believe to be fully supported by the clear statutory words; the Attorney General's only reason for rejecting the second is legislative history, to which we now turn.

The most important fact about the legislative history is that no explanation appears for the addition to the fourth exemption of the words "commercial or financial." The 1964 version of the bill (S. 1666) provided for exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential."<sup>72</sup> That version was passed by the Senate, but the House did not act, and when the bill (S. 1160) was introduced in the 89th Congress, two changes had been made: The word "customarily" was deleted,<sup>73</sup> and the words "commercial or financial" were added.<sup>74</sup>

Not only was no explanation ever made for the addition of the words "commercial or financial," but both the Senate committee and the House committee in their reports seem to read the words "commercial or financial" as if they were not there. Both reports, for instance, say the exemption would cover "information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges."<sup>75</sup> Since information within the doctor-patient privilege is normally non-commercial and non-financial, the committees seem to be strangely ignoring the statutory words "commercial or financial." Furthermore, the Senate committee says the exemption includes "any commercial, technical, and financial data," and the House committee says that it includes "technical or financial data." The committees do not attempt to explain how the words "commercial or financial" can be stretched to include "technical." The reports on their face appear to involve a flagrant attempt to defeat the plain meaning of the words "commercial or financial."<sup>76</sup>

<sup>72</sup> SEN. REP. No. 1219, 88th Cong., 2d Sess. 6 (1964).

<sup>73</sup> The deletion of "customarily" is not explained in a committee report but was discussed on the floor of the Senate. Senator Humphrey objected to the word, but the bill's sponsor, Senator Long of Missouri, explained that agencies' customs of keeping information confidential should not be the guide. 110 CONG. REC. 17667 (1964). The Senate kept Senator Long's version and passed the bill. But when the bill was introduced in the new Congress, the word "customarily" was deleted without explanation.

<sup>74</sup> A third change, later made, substituted "any person" for "the public." This change was designed to cover information obtained from an agency's staff member, that is, information generated by the agency.

<sup>75</sup> SEN. REP. 9; HOUSE REP. 10.

<sup>76</sup> The most appealing passage, which in my opinion ought to be the law with respect to all information but clearly is not the statutory law with respect to non-commercial and

But the discrepancy between the statutory language and the reports turns out to be a mere inadvertence. The Senate committee simply failed to alter its earlier report, based on the earlier bill without the words "commercial or financial," to reflect the addition of the words "commercial or financial."<sup>77</sup> And the House committee seven months later copied most of the Senate committee report.<sup>78</sup>

Committee reports explaining the earlier version of the bill that did not include the words "commercial or financial" do not seem to me to be a satisfactory basis for finding the meaning of the enacted version that did include those words.<sup>79</sup>

Yet the *Attorney General's Memorandum* concludes that Congress did not intend to require disclosure of non-commercial and non-financial information that is privileged or confidential, and the only support for that conclusion is the committee reports that were addressed to the earlier version of the bill, the version that was not enacted.

I cannot help but wish that the Attorney General's conclusion were a sound one, for I think that all privileged or confidential information *should* be exempt from required disclosure, not merely such information which is commercial or financial. But the words "commercial or financial" were added to the statute, and I do not see how they can be interpreted to include non-commercial and non-financial information. I do not mean that statutory words should override a discernible congressional intent. On the contrary, my opinion is that intent is the fundamental; when intent can be discerned it should often override the statutory words, even when those words on their face seem reasonably clear. But the problem here is to determine what the intent was.

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non-financial information, appears in the House committee's report: "[A] citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." Congress should have said this in the statute, but instead of saying it, Congress limited the fourth exemption to "commercial or financial information."

<sup>77</sup> SEN. REP. 9. The only changes were addition of "lender-borrower" to the list of privileges and addition of a sentence that the exemption would cover "commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan." The *Attorney General's Memorandum* at page 33 argues that these changes expand the exemption, but I think not; addition of "lender-borrower" merely makes the exemption slightly more specific. The word "other" in the earlier report was already as broad as "lender-borrower."

<sup>78</sup> HOUSE REP. 10.

<sup>79</sup> Both the 1964 and the 1966 reports say, for example: "This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would *customarily* not be released to the public by the person from whom it was obtained." (Italics added.) That language is obviously addressed to the 1964 bill, which did not include the words "commercial or financial." The report twice uses the word "customarily" even though it had been deleted from the bill.

Committee reports not addressed to the enacted version of the bill do not show the intent of Congress in enacting the statute. They show what the intent of Congress would have been if it had enacted the bill it did not enact.

The clear words of the statute are a better guide to legislative intent than committee reports that take no account of the enacted words.

The Attorney General's discussion of the fourth exemption involves an additional infirmity. It fails to take into account the provision of subsection (f) that availability of records cannot be limited "except as specifically stated." The Attorney General concludes that the fourth exemption protects from required disclosure "information given to the Government in confidence, whether or not involving commerce or finance."<sup>80</sup> I do not see how any court could conscientiously find that an exemption of non-commercial and non-financial information is "specifically stated" by the statutory words "commercial or financial information obtained from any person and privileged or confidential."

The result that seems to me to be compelled by even the minimum degree of integrity in statutory interpretation is obviously unsatisfactory from a practical standpoint, because required disclosure of non-commercial and non-financial information which is privileged or confidential is clearly undesirable. The solution, in my opinion, should be in spite of the statute or outside the statute.

When the President signed the bill, he said that "this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires." The President could build on that statement. He could announce that in the exercise of his power under the Constitution he finds that the national interest requires continued confidentiality for information submitted to the government with a good faith understanding that it is to be kept confidential, whether or not the information is commercial or financial. All officers of the executive branch could be so instructed. Then if judicial enforcement of the Act is sought, the court could avoid resort to the Constitution by explaining that the traditions of equity practice do not allow the court to compel an officer to violate a good faith understanding that information furnished to the government will be kept confidential.

Of course, the administration is now committed by the *Attorney General's Memorandum* to the view that the fourth exemption should be interpreted to reach non-commercial and non-financial information. That commitment means that all officers of the executive branch will withhold such information. That is enough to protect the information

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<sup>80</sup> ATT'Y GEN. MEMO. 34.

but is it enough to avoid deterring private parties from continuing their normal practice of furnishing information to the government in confidence? If I were advising such a private party, I would feel more secure under a presidential finding of what the national interest requires than under what I consider to be an unsound analysis by the Attorney General.

## 20. *Privileged Information*

Even though the *Attorney General's Memorandum* does not inquire into the question of what information is privileged, such an inquiry seems desirable because (1) the statute exempts commercial or financial information which is privileged, (2) the statute may require disclosure of non-commercial and non-financial information which has heretofore been exempt from disclosure because of privilege, and (3) executive privilege, not mentioned by the *Memorandum*, may be of major consequence.

The committee reports mention three privileges that are usually unimportant to disclosure of government information but fail to mention privileges that are vital to that subject. Both reports say the fourth exemption "would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges,"<sup>81</sup> and the Senate Committee adds "and other such privileges." The physician-patient privilege is of no consequence here because the exemption is limited to commercial or financial information and because the sixth exemption, not so limited, covers "medical files." The lawyer-client privilege is of little consequence because the government through its lawyers seldom serves private clients.<sup>82</sup> The lender-borrower privilege is usually of little consequence because commercial or financial information the borrower gives the government lender or guarantor in confidence is clearly exempt as confidential information.

Much the most important privilege about government records is executive privilege. The Act's word "privileged" can hardly be interpreted to exclude what is "privileged" under the doctrine of executive privilege, even though the committees failed to mention it.

A truly major proposition is this: Since the Act exempts "privileged" information which is commercial or financial and obtained from any person, since "privileged" information includes what is within executive privilege, and since the statute says nothing to deny assertions

<sup>81</sup> SEN. REP. 9; HOUSE REP. 10.

<sup>82</sup> The government has a lawyer-client relation with a private party when its lawyers serve as advisers to federal employees or others, represent a defendant in a court martial, or defend an officer who is sued in tort in his personal capacity on account of official action.

by the executive branch that "the national interest" is the test of what is within executive privilege, the effect of the Act on disclosure of commercial or financial information obtained from any person is precisely zero, because executive privilege based on "the national interest" is still the test, as it was before the Act.

Congress did nothing to confine executive privilege as applied to commercial or financial information. In view of its basic purpose, the partial statutory adoption of executive privilege seems surprising. Congress could have—and in my opinion should have—limited the applicability of executive privilege. Although executive privilege as asserted by presidents is based upon the grant of executive power by article II of the Constitution, Congress has power to affect its meaning. To some unascertainable extent, the privilege is common law. In the *Reynolds* case,<sup>83</sup> the Supreme Court spoke of "'privileges' as that term is understood in the law of evidence," and of "the privilege against revealing military secrets, a privilege which is well established in the law of evidence." The Court cited an English case, and it made no mention of the Constitution. The flavor is that of common law.

Even to the extent that executive privilege is a constitutional doctrine, Congress has a great deal of practical power to provide a leadership in putting content into the doctrine.

The fourth exemption does indeed seem capricious with respect to privileges. Instead of carefully weighing each privilege and modifying it to accomplish the basic congressional purpose Congress takes two positions wholly incompatible with each other: (1) It abolishes all privileges with respect to non-commercial and non-financial information; (2) It preserves all privileges with respect to commercial or financial information, including especially executive privilege. I think it should have recognized the existence of executive privilege for all information and should have enacted some confinement of it.<sup>84</sup>

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<sup>83</sup> *Reynolds v. United States*, 345 U.S. 1, 6-7 (1953). The Court made no mention of the Constitution in holding that a secret contract for spying service should not be disclosed and therefore could not be enforced in the Court of Claims. *Totten v. United States*, 92 U.S. 105 (1875). See also the two excellent opinions *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966); *United States v. Tobin*, 195 F. Supp. 588 (D.D.C. 1961), *rev'd on other grounds*, 306 F.2d 270, *cert. denied*, 371 U.S. 902 (1962).

<sup>84</sup> The Act cuts across many other privileges in addition to executive privilege. Wigmore devotes eight hundred pages to privileges. 8 WIGMORE, EVIDENCE 62-878 (McNaughton rev. 1961). An example is the informer privilege, which the Supreme Court has called "in reality the Government's privilege to withhold the identity of persons who furnish information of violations to officers." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). Since the informer's identity is not "commercial or financial" information, it is not within the fourth exemption. It should be. Despite the flaws in the Act, I assume that officers and courts will respect the informer's privilege, by invoking executive privilege, by applying

21. *Inter-Agency or Intra-Agency Memorandums or Letters*

The fifth exemption covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."

The APA defines "agency" to exclude Congress, a congressional committee, a congressman, a member of a staff of a congressman or committee, a court or judge, and state agencies and officers. Any communication between one of these and an agency is outside the exemption. For instance, confidential communications between the President and the governor of a state about plans for keeping racial peace in the state are clearly required to be disclosed.<sup>85</sup> But an enforcing court, finding the Act irresponsible, might in an appropriate case invoke equity tradition or executive privilege.

One unintended result is both welcome and amusing. Congressmen increasingly help constituents in their dealings with bureaucrats. More than 200,000 complaints concerning administration reach congressional offices annually.<sup>86</sup> Most of what congressmen do is innocuous and some of it is helpful, but some of it is harmful, especially when a congressman, with insufficient regard for the merits, puts pressure on an administrator for a favorable result. One careful student of the subject has asserted that "legislators, singly and collectively, are often the generators of rather than the guardians against maladministration."<sup>87</sup> Even though no one in Congress was aware that the Information Act would affect this problem, it provides a beautiful cure for the abuses by requiring correspondence between congressmen and agencies to be open to inspection. Probably notes recording a telephone conversation are not an intra-agency memorandum; an agency rule requiring such notes and providing for availability would be entirely appropriate. This is precisely what is needed—and no one planned it! If anyone's privilege is involved it is likely to be that of congressmen, and a claim of executive privilege would then be inappropriate.

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equity traditions, or by using the seventh exemption for "investigatory files" even if the informer's identity is not in an investigatory file because no investigation has been made.

<sup>85</sup> In my written statement to the Senate subcommittee I said: "If President Johnson and Governor Johnson of Mississippi exchange letters or telegrams about strategies for keeping racial peace in Mississippi, the papers will have to be made promptly available to any person, including those who want to defeat the strategies." See *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1663, Administrative Procedure Act*, 88th Cong., 2d Sess. 244, 248 (1964). With that observation before the subcommittee, it made no change. The President is forced to violate the statute, as I assume any President will, in the name of the constitutional doctrine of executive privilege.

<sup>86</sup> GELLHORN, *WHEN AMERICANS COMPLAIN* 93 (1966).

<sup>87</sup> *Id.* at 136.

Both committee reports say that the purpose of the fifth exemption is to avoid inhibiting frank discussion in writing in the process of arriving at legal and policy positions.<sup>88</sup> The exemption clearly serves that purpose, but the implication that the exemption does not go beyond that is unsound. It clearly reaches memorandums or letters which have nothing to do with the process of arriving at positions.

The explicit limit on the exemption is troublesome; it applies only to memorandums or letters which "would not be available by law to a private party in litigation with the agency." The words "a private party" seem to assume that every memorandum or letter would either be available or unavailable to "a private party" under discovery and related law, but that assumption is erroneous. All government records fall into three categories—those which are (1) always, (2) never, and (3) sometimes subject to discovery. The large category is probably the third, for the need of the party seeking the information is usually a factor.<sup>89</sup> The fifth exemption is workable for the first and second categories. But when a memorandum or letter would be subject to discovery by a party whose need for it is strong but not by a party whose need for it is weak, should the agency disclose it, refuse disclosure, or apply discovery law to the facts about the particular applicant? The last course seems desirable, but the Act seems to forbid that course, for it requires disclosure to "any person" and it replaces the former statutory words "persons properly and directly concerned."<sup>90</sup> The applicant's need cannot be the test. The agency cannot say that one person is "any person" but that another person is not.

But since the purpose of the exemptions is to cut down the requirement of disclosure to "any person," the purpose of the fifth exemption could be to whittle down the "any person" requirement so that, in effect, only a person with a strong enough interest is entitled to disclosure of a memorandum or letter. This idea makes practical sense, but it is contrary to the words of the fifth exemption. The key words

<sup>88</sup> The Senate committee said: "It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.'" SEN. REP. 9. The House committee made a similar statement. HOUSE REP. 10.

<sup>89</sup> *E.g.*, *Hickman v. Taylor*, 329 U.S. 495 (1947): "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Id.* at 512.

<sup>90</sup> The Senate committee said the bill "eliminates the test of who shall have the right to different information." SEN. REP. 5. The House committee emphasized the same thought. HOUSE REP. 8.

are "a private party." The words are not "the applicant" or "the party requesting disclosure." The focus is not on the applicant but on an abstract person, "a private party."

Then, if the Act cannot be interpreted to require an agency to disclose a memorandum or letter to one applicant and not another, the agency must choose between disclosing whenever any private party would be entitled to disclosure and withholding whenever any private party would not be entitled to disclosure. Neither the statute nor the Senate committee helps make this choice. But the House committee says that "any internal memorandums which would routinely be disclosed to a private party through discovery process in litigation would be available to the general public."<sup>91</sup> The key is that the disclosure is to "the general public" and not to the party requesting disclosure. The disclosure must be made to the public if "a private party"—not necessarily the applicant—would routinely be entitled to it through discovery.

So the applicant who is malevolent or merely curious has the same right to disclosure as the applicant who has a strong and legitimate need.

This result, in my opinion, is (1) undesirable because the discovery law as applied to the particular applicant would be a better test, but it is (2) based upon what seems to be a genuine intent of Congress and not merely on ineptitudes of the draftsmen.

The *Attorney General's Memorandum* discusses neither the disclosure of letters of congressmen nor the problem of whether "a private party" means the party who seeks records or some abstract party, but the *Memorandum* states a conclusion that

. . . internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited. As the President stated upon signing the new law, "officials within Government must be able to communicate with one another fully and frankly without publicity."<sup>92</sup>

No one will quarrel with the President's statement, but one may wonder whether the Attorney General's statement goes beyond the

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<sup>91</sup> HOUSE REP. 10.

<sup>92</sup> ATT'Y GEN. MEMO. 35.

President's and in doing so produces an unsound and undesirable result. The item I question is "opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency." The *Attorney General's Memorandum* does not seem to take account of such possible facts as that the "opinions and interpretations" may constitute the working law of the agency, that the agency's employees may be instructed to apply such law in all individual cases, that the agency may be systematically withholding such law from affected parties, and that therefore the effect of non-disclosure may be to protect an outrageous system of secret law. Nor does the *Attorney General's Memorandum* refer at this point to the clear congressional intent that "interpretations" and "administrative staff manuals and instructions" must be disclosed, as subsection (b) specifically requires. The problem, unrecognized by the *Memorandum*, is the accommodation of the purpose behind the requirements of subsection (b) to the purpose behind the fifth exemption. I think such an accommodation calls for disclosure of all "opinions and interpretations" which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law shall be. The need for secret communication among officials within the government should be recognized, but so should the need for prohibiting all secret law.

At another level on the same question, might "opinions and interpretations" be in the nature of an attorney's work product, so that they will be beyond the reach of discovery in litigation between a private party and the agency? I think the work product of a private attorney is something altogether different from a basic memorandum by the legal staff of an agency which is used by the agency as a guide in the handling of cases involving private parties. To the extent that such a memorandum states the effective law of the agency, its adoption by the agency makes it something more than the work product of the legal staff, even though the adoption appears in the agency's records only in such forms as "application granted" or "application denied."

The governing principle, which I think is without exception, is that secret law is forbidden.

## 22. *Personnel, Medical, and Similar Files*

The sixth exemption protects from required disclosure "matters that are . . . personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The draftsmanship this time is not seriously faulty, although I think the choice of the term "files" is unfortunate.

The terms "personnel and medical files," "similar files," and "clearly unwarranted invasion of personal privacy" are all reasonably clear standards having meaning that can gradually be made more precise through case-to-case development. The statute requires an invasion of personal privacy and it even requires an unwarranted invasion of personal privacy so long as it is not "clearly unwarranted." The use of the word "clearly" is a legitimate expression of a policy judgment, although one may wonder about its wisdom.

The term "files" may cause trouble. It is a crude term that is inconsistent with meticulous discrimination. For instance, much information in medical files, such as an individual's presence at a hospital on a particular date, has nothing to do with privacy.

Even though the statute on its face exempts "files," common sense seems to me to call for disclosing some information within files and withholding other information, and the question whether the statute permits this is not easy. The natural assumption is that all three types of files—"personnel," "medical," and "similar"—must be treated alike in this respect. But the *Attorney General's Memorandum* surprisingly treats two in one way and the third in the other way by saying that what is exempt is

. . . all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person . . .<sup>93</sup>

The *Memorandum* gives no explanation for this differentiation, and I know of no explanation that can be given.<sup>94</sup> I would treat all three in the same way.

Even though the statute and both committees speak of "files,"<sup>95</sup> some evidence exists of an intent to allow picking and choosing within files, and policy considerations pull strongly in that direction. The Senate committee said that "facts concerning the award of a pension or benefit should be disclosed to the public,"<sup>96</sup> and the House committee said the exemption does not cover "the facts concerning the award of a pension or benefit."<sup>97</sup> Taking out such facts means selecting within

<sup>93</sup> *Id.* at 36.

<sup>94</sup> The only reason I can find for not treating all three alike operates against the Attorney General's conclusion. The 1964 version said "similar matter," and that was later changed to "similar files." The Attorney General adopts precisely the view that Congress rejected by making the change.

<sup>95</sup> SEN. REP. 9; HOUSE REP. 10.

<sup>96</sup> SEN. REP. 9.

<sup>97</sup> HOUSE REP. 10.

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files. I believe that should be allowed with respect to all three kinds of files. Interpretation in this direction is not affected by the "specifically stated" clause.

The question whether whole files must be either closed or open suggests the further question whether whole documents must be either closed or open. What if a 65-page document is subject to required disclosure except for a few lines on page 33? The Act's words seem to discourage rather than to encourage a balancing of interests, but I think that if the applicant for disclosure needs all but page 33 the practical answer is that this should be allowed. Similarly, just as a discovery order may reach facts in a document but not the legal analysis, other kinds of dividing of the contents of documents should be allowed when important interests will be served by it; the person inspecting part of a document will pay a fee to compensate for any inconvenience.

Although a corporation's privacy may deserve protection, I think a corporation cannot claim "personal privacy" within the meaning of the statutory terms. Again the *Attorney General's Memorandum* surprises me. Instead of using the statutory language of "personal privacy," the Attorney General speaks of "the privacy of any person" and then goes on to say that "person" is defined in section 2(b) of the APA to include corporations and other organizations but that the exemption "would normally involve the privacy of individuals rather than of business organizations."<sup>98</sup> I think "personal privacy" always relates to individuals. The definition of "person" seems to me irrelevant because the exemption does not use that term.

### 23. *Investigatory Files*

The seventh exemption from required disclosure covers "matters that are . . . investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."

The Senate committee says only: "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."<sup>99</sup> Although the term "law violators" could mean criminal law, that term is probably compatible with the House committee's interpretation: "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws."<sup>100</sup> The House committee seems to me, however, to go beyond the terms of the statute

<sup>98</sup> ATT'Y GEN. MEMO. 36-37.

<sup>99</sup> SEN. REP. 9.

<sup>100</sup> HOUSE REP. 11.

when it says: "This would include files prepared in connection with related Government litigation and adjudicative proceedings." Litigation files and adjudication files may include investigatory files compiled for law enforcement purposes but they may also include files that are not investigatory files compiled for law enforcement purposes. But perhaps this is what the House committee means, for it goes on to say that the bill "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."<sup>101</sup>

The chief problem of interpreting this exemption will stem from the fact that investigations are often for multiple purposes, for purposes that change as the investigations proceed, and for purposes that are never clarified. Even the simplest question may be unanswerable in the statutory language: Is law enforcement the purpose of investigating the crash of a passenger plane? When the investigation begins no one may yet know. If the evidence disproves in three minutes a suspicion of bomb planting, but if three months are devoted to metal fatigue, is the file "compiled for law enforcement purposes"?

The Act is faulty in its use of the unsatisfactory term "files." Much of the contents of investigatory files compiled for purposes that may include law enforcement should not be exempt from required disclosure.

The committee reports shed no light on the meaning of the words "except to the extent available by law to a private party." Probably, for reasons explained above in our discussion of the fifth exemption, "a private party" means any party in the abstract and does not mean the particular party who is seeking the information. The law of the Jencks Act is applicable.<sup>102</sup>

#### 24. *Regulating Financial Institutions*

The eighth exemption applies to "matters that are . . . 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."

The Senate committee says this exemption "is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by, on behalf of, or for the use of such

<sup>101</sup> *Ibid.*

<sup>102</sup> 18 U.S.C. § 3500 (1964).

agencies."<sup>103</sup> We must be extremely careful or the facts about financial institutions might become known! We want the public to know the truth about almost all our institutions, but not about our financial institutions! At least, so says Congress, and what it says is the law. What it says is also in keeping with banking tradition, although that tradition rests heavily on facts of a former day such as uninsured bank accounts and runs on banks. The law is clear, but I still wish the lobbyists for the banking agencies had been less effective.

When an application is made to the Comptroller of the Currency for approval of a new national bank or a branch, an examiner interviews proponents and opponents, to dig up social, business, and economic facts, such as composition of the population, economic growth, banking needs, adequacy of the applicant's capital structure, and degree of public support. Such a report, until 1966, has always been "confidential."<sup>104</sup> I have proposed that such a report should be open, and apparently the Comptroller is now following that suggestion, although the regulation has not yet been formally changed.<sup>105</sup> My opinion is that Congress should not have provided that such a report is exempt from required disclosure. The other banking agencies are similarly maintaining systems of secret facts, secret law, and secret policy, and the eighth exemption will encourage such tendencies.

### 25. *Information about Wells*

The ninth and last exemption protects from required disclosure "matters that are . . . geological and geophysical information and data (including maps) concerning wells." The Senate committee comments on all the exemptions but this one. The House committee explains that "witnesses testified that . . . disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration."<sup>106</sup> I see no special problem of interpretation but I am inclined to believe that the present regulation of the Bureau of Land Management is preferable to what Congress has enacted. Instead of exempting the records from required disclosure, the regulation makes them available unless their disclosure "would be prejudicial to the interests of the Government."<sup>107</sup>

<sup>103</sup> SEN. REP. 10.

<sup>104</sup> COMPTROLLER'S GUIDELINES FOR NATIONAL BANK DIRECTORS 43-44 (1964).

<sup>105</sup> See Davis, *Administrative Procedure in the Regulation of Banking*, 32 LAW & CONTEMP. PROB. 713 (1967).

<sup>106</sup> HOUSE REP. 9.

<sup>107</sup> 43 C.F.R. § 2.1 (1965).

*Perspective and Conclusions*

Continuing our preliminary analysis, but shifting the focus from the separate provisions to the whole Act, let us now consider (1) the Act's accomplishments as to information, (2) its accomplishments as to secret law, (3) the weaknesses of enforcement, (4) problems of basic policy, (5) drafting deficiencies, (6) abuse of legislative history, (7) preclusion of judicial correction of legislative ineptitudes, and (8) amendments that are most needed and least controversial.

(1) *The Act's accomplishments as to information.* Probably more important than any other observations in all the foregoing discussion are three conclusions<sup>108</sup> about the fourth exemption (which protects from required disclosure "commercial or financial information obtained from any person and privileged or confidential"). The three conclusions are: (a) The Information Act is a nullity with respect to disclosure of commercial or financial information because when such information is "privileged" the Act exempts it from required disclosure, the word "privileged" probably includes what is within executive privilege, the test of executive privilege is "the national interest," and that was the test before the Act; (b) Because the fourth exemption is limited to commercial or financial information, the Act requires disclosure of non-commercial and non-financial information given to the government with the understanding that it will be kept confidential (unless it falls within another exemption, as much of it does not); such a result is so clearly unworkable that officers will refuse on the ground of executive privilege to make disclosures the Act requires and the courts will uphold the officers either on that ground or on the ground of equity traditions;<sup>109</sup> (c) Through the word "privileged," the Act with respect to commercial or financial information retains one hundred per cent of the previously existing law of privilege to the extent that that law protects against required disclosure, and at the same time the Act abolishes one hundred per cent of such law of privilege as applied to non-commercial and non-financial information; the abolition is so capricious that the law of privilege will survive its abolition, either because constitutional law of executive privilege will override the statute or because equity traditions will impel courts to refuse enforcement.

Because the first conclusion is that the law apart from the Act continues, and because the second and third conclusions are that the law apart from the Act overrides the Act whenever non-commercial and

<sup>108</sup> See §§ 19, 20, and 21 *supra*.

<sup>109</sup> See discussion of equity traditions in § 6 *supra*.

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non-financial information is privileged or confidential, combining the three conclusions produces this remarkable observation: *The Act is a nullity with respect to all commercial or financial information, and with respect to all non-commercial and non-financial information which is privileged or confidential.* The only information whose disclosure is governed by the Act's provisions, instead of by considerations beyond the Act, is non-commercial and non-financial information which is not privileged or confidential. This means that the Act governs disclosure of only a small portion of all government information.

To find what information is subject to required disclosure, we begin with that small portion and subtract what the Act exempts, the largest chunks being information about national defense or foreign policy within the first exemption, personnel and medical and similar files within the sixth, and investigatory files within the seventh. Not much is left. Even if we make the false assumption that the Act will be fully obeyed,<sup>110</sup> the information the Act opens up that would otherwise be closed is minimal. The most important single category of information opened up may be those communications to and from agencies which are not otherwise exempt and which are not "inter-agency or intra-agency memorandums or letters."

The overall conclusion is an easy one that the press, which was the principal political force behind the enactment, will benefit only slightly.

The conclusion that the Act is so unworkable that it must be in large measure superseded by official and judicial understanding based on considerations beyond the Act greatly increases the weight that must be given to the President's statement when he signed the bill that "this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires." Anyone who doubts that statement in the abstract is likely to doubt it less as he realizes the extent of the need for escape from the Act's requirements.

If Congress had succeeded in enacting a workable system, the courts might have held that the statute defines the national interest or the public interest under the doctrine of executive privilege, and that the constitutional law and the common law of executive privilege are embodied in the statutory law, which then would become the foundation for all law of disclosure. But the courts cannot so hold, for they will often have to override the Act. Instead of building on the statute, the courts will build on three foundations—the statute, the public interest

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<sup>110</sup> See § (3) *infra*, entitled "The weakness of enforcement."

according to the doctrine of executive privilege, and equity traditions.

Just as the President's judgment about the national interest will determine what will be disclosed about national defense or foreign policy, the judgment of the executive branch about the national interest could control the release of all other information, despite the Act. But that is unlikely. The executive branch may be expected to find that the national interest usually coincides with the Act's provisions. The instances when it finds otherwise, however, are likely to be both frequent and important.

(2) *The Act's accomplishments as to secret law.* Although the bar played a minor role in getting the Act enacted, members of the bar and their clients will be the principal beneficiaries. Unlike the Act's accomplishments in opening up information, its accomplishments in opening up secret law are impressive. The most significant gains from the entire Act are those growing out of the requirement in subsection (b) of disclosure of six items—orders, opinions, statements of policy, interpretations, staff manuals, and instructions. An incidental gain is the opening of agency members' votes in proceedings, required by subsection (d). Although the exemptions of subsection (e) drastically affect the disclosure of information, their effect on disclosure of legal materials is relatively small.

The agencies could conceivably claim executive privilege with respect to some of the legal materials, but I think they are unlikely to do so, and I think the courts in general will enforce subsection (b) without modifying it either by executive privilege or by equity traditions, because subsection (b) is rather reasonable as it stands, so that neither officers nor judges will find occasion to search for ways to escape from it. The one exception is the requirement that all orders be indexed, but agencies may find feasible ways to comply with that requirement and the Information Act does not authorize courts to enforce it. Except for the indexing of all orders, no provision of subsection (b) seems to overreach; the deficiencies involve requiring too little, not requiring too much.

One unplanned benefit from the Information Act may be opening to public inspection communications between congressmen and administrative officers; improper pressures leading to denial of equal protection will be less common if the pressures can no longer be applied secretly.

(3) *The weaknesses of enforcement.* One distinct gain from the Act is its provision for judicial enforcement. The Act's words are entirely clear that the judicial enforcement provisions apply not only to subsection (c) but also to subsection (b), although some doubt exists as to

whether that was the intent.<sup>111</sup> Judicial enforcement of the provisions opening up secret law is as necessary and desirable as judicial enforcement of the provisions opening up secret facts.

Even with respect to what is judicially enforceable, we must not assume, in appraising what the Act accomplishes, that the Act will be carried out according to its terms, or even that the Act as modified by executive privilege and equity traditions will be fully enforced. Administrative violations will be widespread, and most of them will go uncorrected. Not the statute but the House committee's remarks in the direction of nondisclosure, reiterated by the *Attorney General's Memorandum*, will be the guide for most officers until a high court holds otherwise and in many instances until such a court so holds on the particular point with respect to the particular agency. In many vast fields of administration no case will be brought to compel disclosure, and the officers will know that such a case is unlikely.

One way to estimate probable violations is through a quick look backwards. The old APA required disclosure of records "except information held confidential for good cause found."<sup>112</sup> The Attorney General formally provided in a regulation published in the Federal Register: "All files, documents, records and reports in the offices of the Immigration and Naturalization Service are regarded as confidential."<sup>113</sup> Simultaneously another subordinate of the Attorney General, the Board of Immigration Appeals, allowed all records of the same cases at the level of the Board to be open to public inspection.<sup>114</sup> At neither level was any judgment made as to what information should be confidential "for good cause found." At one level facts having nothing to do with privacy or confidentiality were withheld, and at the other level clearly unwarranted invasions of personal privacy were freely allowed. When even the Attorney General, the principal law enforcer, sets such an example, many other agencies will have little concern for the abstract provisions in the statutes.<sup>115</sup> And the reality

<sup>111</sup> See § 10 *supra*.

<sup>112</sup> APA § 3(c).

<sup>113</sup> 19 Fed. Reg. 8071, § 1.70 (1954).

<sup>114</sup> The Board has advised me that all its records are open to public inspection and that all its proceedings are open to the public.

<sup>115</sup> Sustained violations of this kind are not as uncommon as one might suppose. The United States Parole Board, another branch of the Department of Justice, has never complied with § 6(d) of the APA, requiring reasons for denying written applications. When a prisoner has waited for years to become eligible and is denied parole, he asks why. The Board tells him it never gives reasons. Yet the Board pretends to "rehabilitate" prisoners. The chairman has told me the APA does not apply. I wish it were possible for him, inside the Department of Justice, to get some legal advice on that question.

may be that fewer than one per cent of parties who want information and are entitled to it will go to court to get it.

As of this writing, only one set of proposed rules under the Information Act has come to my attention—those of the Immigration and Naturalization Service.<sup>116</sup> By defining “opinion and order” to exclude all orders except those “accompanied by a statement of reasons,” the proposed rules require nondisclosure of all other orders. Yet the Act is entirely clear in requiring disclosure of “all orders.” I know of no reasonable argument that can be made in defense of the proposed rules in this respect. Perhaps this is a sample of what the agencies will do. If the proposed rules become final, who will be likely to go to court to require the Immigration Service to comply with the Information Act?

I recommend this additional means of enforcement: When an officer who has flagrantly violated the Act comes before a Senate committee for confirmation of an appointment, Senators should question him about his violations. A few such cases may have a magic effect.

(4) *Problems of basic policy.* A vital policy choice was to limit the Act to (a) requiring and (b) not requiring disclosures to the public.<sup>117</sup> The Act never takes into account the need of the party seeking the disclosure; it never calls for balancing that need against the interest of a party adversely affected by disclosure. This policy choice reflects pressure from the press that “the public as a whole has a right to know”<sup>118</sup> and does not reflect a thoughtful rejection of the balancing approach that has been a part of all judge-made law. When the time comes for further legislation, I think this policy choice might well be re-examined.

The Act never forbids disclosure. It never protects privileged or confidential information from disclosure; it protects only from required disclosure. No general federal statute prohibits clearly unwarranted invasions of personal privacy. Comprehensive legislation about disclosure would deal with required disclosures to the public, forbidden disclosures to the public, required disclosures to parties with special interests, and forbidden disclosures to individual parties as distinguished from disclosures to the public.

I am unconvinced that “the internal personnel rules and practices of

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<sup>116</sup> 32 Fed. Reg. 6781, 6787 (1967). Provision is made for disclosure of “unpublished decisions,” but “decision” is defined to mean the same as “opinion and order,” which is defined to include only “a final determination in a proceeding under the Act, accompanied by a statement of reasons,” and to exclude explicitly “orders made by check marks, stamps, or brief endorsements which are not supported by a reasoned explanation, or opinion and orders incorporating preprinted language on Service forms.”

<sup>117</sup> See § 4 *supra*.

<sup>118</sup> SEN. REP. 5.

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any agency" should be exempt from required disclosure. Some personnel information, such as appraisals by superiors of subordinates, should be protected, but I think the public should be entitled to know the "rules and practices."<sup>119</sup>

The exemption of "files" by the sixth and seventh exemptions is too broad; specified information should be exempt, not "files." Much that is contained in the exempt "files" should be disclosed.<sup>120</sup>

The eighth and ninth exemptions, about financial institutions and wells, respectively, are both broader than is necessary to accomplish their purposes.<sup>121</sup>

Indexing all orders seems to have been intended by Congress, despite the House committee's contradiction of the statute, and I think the requirement of such indexing was ill-advised, even though the agencies may find economical ways to comply with the requirement.<sup>122</sup> The required indexing should be limited to opinions, statements of policy, interpretations, staff manuals, and instructions. These documents are a hundred times as useful as orders, and orders are a hundred times as numerous.

(5) *Drafting deficiencies.* That the Congress of the United States, after more than ten years of hearings, questionnaires, studies, reports, drafts, and pulling and hauling, should wind up with such a shabby product seems discouraging. The drafting deficiencies cannot be explained away as the product of extreme complexity, intractable subject matter, or unruly struggles between irreconcilable political philosophies. The failures in this instance are in the nature of inattention and indifference.

The House committee beautifully expressed a vital thought: ". . . a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."<sup>123</sup> But the bill as enacted, instead of expressing this thought, partly contradicts it. The statute clearly requires disclosure of non-commercial or non-financial information which is in good faith given to the Government in confidence.<sup>124</sup> Such a result is so obviously unreasonable that a court might well judicially legislate that Congress meant the opposite of what its words say, but that seems to be prohibited by the provision of subsection (f) that information may not be

<sup>119</sup> See § 17 *supra*.

<sup>120</sup> See §§ 22 & 23 *supra*.

<sup>121</sup> See §§ 24 & 25 *supra*.

<sup>122</sup> See § 14 *supra*.

<sup>123</sup> HOUSE REP. 10.

<sup>124</sup> See § 19 *supra*.

withheld "except as specifically stated" in the statute. Congress has not only legislated badly but has taken pains to prevent the courts from correcting its ineptitudes.

Other drafting deficiencies throughout the Act are almost as serious. The Act authorizes deletion of identifying details in disclosing documents "to the extent required to prevent a clearly unwarranted invasion of personal privacy," but it does not authorize deletion to protect information received in confidence.<sup>125</sup> The word "all" appearing before two of the six items in subsection (b) but not before any of the others seems to be the result of carelessness.<sup>126</sup> The exemption in (e)(5) of what "would not be available by law to a private party in litigation with the agency" is based on the erroneous assumption that what is available to "a private party" is the same as what is available to another private party; an inquiry into the law of discovery would have corrected this error.<sup>127</sup>

The introductory words of subsection (c), "Except with respect to the records made available pursuant to subsections (a) and (b)," are nonsense and may have been intended to be: "Except with respect to the records not made available as required by subsections (a) and (b)."

Failures such as these may be one reason why some political scientists are pointing out that, along with other legislative bodies throughout the world, Congress has declined drastically in both power and prestige. "No longer is Congress the source of major legislation."<sup>128</sup> Congress has lost most of the power it once had to initiate and to plan legislation. Eighty per cent of current legislation originates in the executive branch.<sup>129</sup> No longer is Congress the principal legislative organ of the government; the executive is. Congress is, in the main, limiting itself to the role of approving, modifying, vetoing or partly vetoing legislation initiated and formulated by the executive.

Perhaps the deficiencies of the Information Act are a fair sample of congressional formulation of its own legislation, without the help of the executive. Who is responsible for the deficiencies? The answer is the 535 men and their staffs, primarily the subcommittees and their staffs. But the responsibility probably cannot be further pinpointed. Among individuals it is widely diffused. The diffusion is splendidly geared to policy choices when many interests are pulling in all directions. But the system fails to assure reliable judgments about non-political complexities. Congressmen are neither penalized nor rewarded

<sup>125</sup> See § 13 *supra*.

<sup>126</sup> See note 55 *supra*.

<sup>127</sup> See § 21 *supra*.

<sup>128</sup> Huntington, *Congressional Responses to the Twentieth Century*, in *THE CONGRESS AND AMERICA'S FUTURE* 5, 22 (Truman ed. 1965).

<sup>129</sup> *Ibid.*

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for indifference or excellence in doing the thinking that goes with drafting, and the staffs largely reflect the same motivations or lack of them. Both the congressmen and the staffs include able and dedicated individuals, but the system still tends to miscarry in absence of the kind of assistance that executive officials usually supply.

What seems to me lacking is the designation of a single top-level individual for each piece of legislation which becomes final, who has the responsibility, the capacity, and *the incentive* to perform the back-stop job of protecting against serious inadvertences and oversights. I would not expect this from a subcommittee chairman; his attention should be primarily elsewhere. The individual should be a staff member, not a congressman. The authors of the *Attorney General's Memorandum* show insights that were largely lacking in the legislative process; I often quarrel with their positions as advocates but I respect their mastery of the complexities. Congress needs assistants of that caliber. Committee counsel are supposed to do the technical job, but their responsibility is diluted in two ways: Many others share it, and they have many other tasks. Perhaps what is needed is a stronger focusing in one individual of final responsibility for technical competence.

6. *Abuse of the legislative history.* After the bill had passed the Senate on the basis of a committee report that was reasonably faithful to the words of the bill, the House committee was subjected to pressures to restrict the disclosure requirements. It yielded to the pressures. But it did not change the bill. Instead, it wrote the restrictions into the committee report. These restrictions differ drastically from the bill as passed by the Senate; they often contradict the words of the bill,<sup>130</sup> and they sometimes contradict both the statutory words and the Senate committee report.<sup>131</sup>

I believe (a) that statements in a House committee report that contra-

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<sup>130</sup> Many examples of the House committee's contradiction of clear statutory language are presented in the foregoing pages. Perhaps the best example is the statutory requirement that "all orders" and "all opinions" be made available and its requirement of an index of "any matter . . . required by this subsection to be made available." The statute seems to me entirely clear in requiring all orders and all opinions to be indexed. The Senate committee discussed the requirement in the bill's language, saying nothing at variance with that language. SEN. REP. 7. The House committee said "documents having precedential significance" must be indexed, thus excluding from the index requirement more than ninety per cent of the documents required to be made available. HOUSE REP. 8.

<sup>131</sup> The best example of such a contradiction may be the exemption of "internal personnel rules," which obviously has to do with such items as employees' parking facilities, lunch hours, and sick leave, as the Senate committee quite properly explained. SEN. REP. 8. The House committee said this exemption reaches "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." HOUSE REP. 10. This seems to me a contradiction of both the statute and the Senate committee report, for rules governing relations between agency employees and outsiders are not "internal personnel rules."

dict the bill and depart from the understanding of the Senate committee are not the law, and (b) that inserting such statements into a committee report, instead of changing the bill, is a clear abuse. I realize that habits have grown up in some quarters, both legislative and judicial, that are sometimes at variance with these two beliefs, but such habits seem to me very much in need of re-examination. The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one. In this instance, only the bill, not the House committee's statements at variance with the bill, reflects the intent of both Houses. *Indeed, no one will ever know whether the Senate committee or the Senate would have concurred in the restrictions written into the House committee report.*

All along the line, I think the *Attorney General's Memorandum* is unsound in assuming that whatever the House committee says is the law even when the words of the statute are unequivocally the opposite. The agencies, of course, will follow the *Memorandum* because it strains in the direction they want to go. But the courts will provide a better balance.

The reasons why the courts will reject the House committee's abuse of legislative history, even though the Attorney General supports it, are overwhelming. Allowing the meaning of clear statutory words to be drastically changed by the House committee report would have many unsound consequences. Three major ones are: (1) The House that acts first would be deprived of any voice in the final meaning of the enactment, for the House that acts second could always adopt the same bill but alter its meaning through committee reports. (2) The sound system of the conference committee would be defeated, for the House that acts second, even when it knows the other House disagrees, could always make law as it chooses through the committee reports. (3) Statutes which are clear on their face would become unreliable indicia of the effective law. *Indeed, if the Attorney General's Memorandum were to prevail, no careful lawyer could ever give advice by looking at a statute; he would always have to examine the legislative history.*

Those who sponsor committee contradictions of statutory language should change the bill if they have the power to do so. If they lack that power, their view should not be written into committee reports. The occasional tendency of some courts to rely on committee contradictions of bills should be checked. Very helpful would be more judicial opinions stating that language in a committee report which is at variance with language in a bill tends to show that the sponsors of the committee language were unsuccessful in their effort to put that language into the bill.

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(7) *Preclusion of judicial contributions.* The courts have much to contribute to the difficult process of producing workable and sensible legislation, as much experience proves. Limited imagination, oversights, inadvertences, and imprecise expression can be and often are eased or corrected by sympathetic interpretation which emphasizes basic legislative purposes. Mr. Justice Frankfurter acknowledged the need for "imaginative interpretation."<sup>132</sup> Judge Learned Hand asserted that "one of the surest indexes of a mature and developed jurisprudence is not to make a fortress of the dictionary, but to remember that statutes always have some purpose to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."<sup>133</sup> Yet subsection (f) provides that information may not be withheld "except as specifically stated" in the statute.<sup>134</sup> This seems to me to say with force and clarity that the courts are barred from "imaginative interpretation" of the exemptions and that they must "make a fortress of the dictionary."

Even when drafting reaches an unusually high level of competence, preventing the courts from constituting themselves working partners with the legislative body to produce satisfactory law would be clearly undesirable. When the drafting is as slipshod as that of the Information Act, a "specifically stated" clause that deters correction of legislative errors in one direction, no matter who is hurt or how much, seems especially unfortunate.

I think the "specifically stated" clause ought to be repealed.

(8) *Amendments most needed and least controversial.* We can live with the Act because of the two fortunate facts, neither of which stems from Congress, that executive privilege<sup>135</sup> can override the Act and that equity traditions<sup>136</sup> can impel a court to refuse enforcement. Yet I think a dozen or more amendments are needed, as the foregoing discussion shows. Even so, I shall here merely give emphasis to the four amendments that seem most needed and least likely to invite controversy.

(a) The fourth exemption is most urgently in need of amendment. It exempts from disclosure "trade secrets and commercial or financial information obtained from any person and privileged or confidential." The Act contains no exemption for privileged or confidential information which is non-commercial and non-financial.<sup>137</sup> The fourth exemp-

<sup>132</sup> *FCC v. RCA Communications*, 346 U.S. 86, 90 (1953).

<sup>133</sup> *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

<sup>134</sup> See § 15 *supra*.

<sup>135</sup> See § 3 *supra*.

<sup>136</sup> See § 6 *supra*.

<sup>137</sup> See § 19 *supra*.

tion should be amended to read: "trade secrets and privileged or confidential information obtained from any person."

(b) Subsection (f) provides: "Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section . . ." The word "provided" should be substituted for the words "specifically stated" so that the courts will have their normal elbow room to make their own very much needed contributions to a workable and sensible system.<sup>138</sup>

(c) The first sentence of subsection (b) should be amended to make clear that statements of policy and interpretations adopted by an authorized representative of the agency are included, to make clear that statements of policy and interpretations must be disclosed whether or not they are used as precedents and whether or not they are the end products of administration, and to make clear that manuals and instructions must be disclosed to the extent that they embody the law of the agency.<sup>139</sup> The sentence should be amended to read: "Every agency shall, in accordance with published rules, make available for public inspection and copying (A) final opinions (including concurring and dissenting opinions) and orders made in the adjudication of cases, (B) statements of policy and interpretations which have been adopted by the agency or by any authorized representative of the agency, whether or not the statements or interpretations are used as precedents and whether or not they are the end products of administration, and (C) administrative staff manuals and instructions to staff that affect any member of the public, to the extent that the manuals or instructions embody the law of the agency. "

(d) The second sentence of subsection (b) authorizes deletion of identifying details "to the extent required to prevent a clearly unwarranted invasion of personal privacy." It should also authorize such deletion to protect confidential information or to prevent other special harm.<sup>140</sup> Part of the sentence should be amended to read: "To the extent required to prevent harm to any person from the disclosure of information, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, staff manual, or instruction."

<sup>138</sup> See § 15 *supra*.

<sup>139</sup> See §§ 9, 11, and 12 *supra*.

<sup>140</sup> See § 13 *supra*.

## APPENDIX

## I

Section 3 of the Administrative Procedure Act as amended by  
80 Stat. 250 (1966).

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 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) 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.

## II

### 5 U.S.C. § 552 as amended by 81 Stat. 54 (1967).

§ 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 procedures, 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 rule 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 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.

SEC. 2. The analysis of chapter 5 of title 5, United States Code, is amended by striking out:

"552. Publication of information, rules, opinions, orders, and public records." and inserting in place thereof:

"552. 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.

SEC. 4. This Act shall be effective July 4, 1967, or on the date of enactment, whichever is later.

*The article that follows was prepared by the author as a consultant to the Administrative Conference of the United States. It deals with a subject this Review has long thought significant, The Freedom of Information Act. It is our hope that the article will stimulate further discussion of that Act. . . . The Editors.*

## AGENCY PROCEDURES IMPLEMENTING THE FREEDOM OF INFORMATION ACT: A PROPOSAL FOR UNIFORM REGULATIONS

DONALD A. GIANNELLA\*

Supporters of the Freedom of Information Act believed that its passage would usher in a new era in which information concerning government operations would be freely and easily accessible to all citizens. Prior to its enactment the Public Information Section of the Administrative Procedure Act had not provided for public access to government records generally. It had permitted withholding of agency records if secrecy was needed either in the public interest or for good cause found, and it had required disclosure only to persons properly and directly concerned with the subject matter of an inquiry. The new Act, which went into effect in July 1967, did away with these requirements. Any citizen is now legally entitled to have access to any record held by a federal agency unless it contains certain kinds of information specified in the Act. Except for this exempt information, a person whose request for a record has been denied can bring suit in a federal district court to compel its production. In such an action the burden is on the agency to sustain its decision to withhold the record.

A number of charges have been made that contrary to the Act agencies are improperly invoking statutory exemptions to withhold records, are delaying action on requests and are generally taking steps designed to frustrate public access to government information. This article is based on research undertaken for the Committee on Information, Education and Reports of the Administrative Conference of the United States to determine the existence and extent of problems in implementing the Freedom of Information Act. The research included a comprehensive study of agency regulations, a limited survey of persons who have requested records from federal agencies, and personal interviews with officials in several federal agencies and departments.\*\* On the basis of

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\*\*Interviews were conducted at the Office of Economic Opportunity, the Civil Aeronautics Board, the Federal Trade Commission, the Department of Agriculture, the Department of the Interior, the Department of Transportation, the Department of Health, Education and Welfare and the Department of Defense and its component departments.

this research a proposal was drafted recommending that agencies adopt certain regulations governing procedures for the handling of requests for records. Recommended guidelines for such regulations appear in Appendix A. The reasons supporting the recommendations are set out in the body of the article.†

### THE PROBLEM

The main purpose of the Freedom of Information Act<sup>1</sup> is the public dissemination of information relating to government activities. The Senate report on the Act referred to Madison's observation that "popular government" requires "popular information" and stressed the importance "of having an information policy of *full disclosure*."<sup>2</sup> In signing the bill into law President Johnson stated that "a democracy works best when the people have *all* the information that the security of the nation permits."<sup>3</sup>

In line with this purpose of a reasonably complete and open information policy, the Act gives any citizen the right to examine records held by government agencies except for materials falling into one of nine specifically listed categories.<sup>4</sup> The exempt categories were designed to

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†At its plenary session on May 7 and 8 the Administrative Conference of the United States adopted as Recommendation No. 24 the proposal as it appears in appendix A. The Conference did not evaluate or approve the contents of the instant article. The author bears sole responsibility for the views expressed. The contents of the article were made available to the members of the Conference in support of the recommendation.

<sup>1</sup>81 Stat. 54, 5 U.S.C. § 552 (1964 ed. Supp. IV)

<sup>2</sup>S. Rep. No. 813, 89th Cong., 1st Sess. 2-3 (1966) (emphasis added) [hereinafter cited as S. Rep.].

<sup>3</sup>Statement by President Johnson Upon Signing Public Law 89-487 on July 4, 1966, as reproduced in 20 Ad. L. Rev. 263 (1968) (emphasis added).

<sup>4</sup>These exemptions are found at 5 U.S.C. § 552(t) (1964) and read as follows:

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

protect military secrets, internal instructions to agency staff, and confidential commercial, financial, or personal information about private parties that has found its way into government files; they were also intended to prevent premature disclosure of investigatory files and to preserve the confidentiality of internal memoranda where appropriate. These exemptions have been criticized as being generally too broad and yet too narrow where personal privacy is involved.<sup>5</sup> To date there is little evidence that the Act has resulted in significant invasions of personal privacy.<sup>6</sup>

No suits are known to have been brought under the Act by members of the press as of the date of this article, even though the Act was largely the product of their efforts.<sup>7</sup> This might indicate that a steady flow of records is being made available to the press and that the Act has served its main purpose. However, the absence of litigation does not of itself warrant this conclusion. Newsmen do not generally dig out stories relating to current events from government files; they are more likely to rely on information provided to them officially by the agencies or unofficially by knowledgeable contacts, as was the case prior to the Act.<sup>8</sup> Even when they do seek government records in relation to a current event, the legal right created by the Act is of little direct and immediate assistance because of the time pressure to get the story. It may be that the press has benefited substantially from the Act to the extent that it stands as a potential club and to the extent that it has liberalized agency attitudes generally, but this is a difficult matter to measure.

Recently Ralph Nader and his associates have leveled serious public criticism at agency implementation of the Freedom of Information Act.<sup>9</sup>

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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.

5. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 802-04 (1967); for a discussion of invasion of privacy problems that might arise under the Freedom of Information Act, see Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 Mich. L. Rev. 1089, 1193-1200 (1969).

<sup>6</sup>The agency officials interviewed all indicated that great care is taken to avoid unwarranted invasions of personal privacy or disclosure of confidential or privileged commercial information.

<sup>7</sup>H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 2-3 (1966) [hereinafter cited as H. Rep.].

<sup>8</sup>See Archibald, *Whose FOI Law?* The Bulletin of the American Society of Newspaper Editors, Dec., 1969, p. 10.

<sup>9</sup>Nader, *Freedom from Information: The Act and the Agencies*, 5 Har. Civ. R.-Civ. Lib. L. Rev. 1 (1970); Nader, *A Status Report on the Responsiveness of Some Federal Agencies to the People's Right to Know about their Government*, statement released publicly on

This criticism was based on the experience of various "study groups" in attempting to obtain access to the records of various agencies in the spring and summer of 1969. The criticism dealt in large part with the expansive view reportedly taken by agencies of the broad exemptions listed in the Act and with the consequent withholding of records that should have been released. Interpretation of the broad and ambiguous exemptions written into the statute has been a predictable and recurring cause of difficulty.<sup>10</sup> The ambiguity of the exemptions has been heightened by a sketchy and contradictory legislative history.<sup>11</sup> The resulting uncertainty has been compounded by the doctrine that a court of equity will not grant specific performance where, on balance, the benefits derived from the relief sought are outweighed by its harmful consequences.<sup>12</sup> At least one court has invoked this doctrine to grant only limited relief where unqualified application of the Act as written would have led to a contrary result.<sup>13</sup>

The continuing uncertainty built into the Act gives credence to the claim that the various agencies are interpreting the exemptions inconsistently. The Justice Department has taken some steps to secure uniform administration of the Act.<sup>14</sup> It is possible, however, that nothing short of statutory amendment can bring about an effective and lasting

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August 29, 1969, and reproduced in 115 Cong. Rec. H7480 (daily ed. September 3, 1969); Note, *The Freedom of Information Act and The Federal Trade Commission: A Study in Misfeasance*, 4 Harv. Civ. R.-Civ. Lib. L. Rev. 3-15 (1969).

<sup>10</sup>See Davis, *supra* note 5.

<sup>11</sup>*Id.* at 762-63, 809-810. Professor Davis points out that the "Senate Committee is relatively faithful to the words of the Act," but that the House Committee seems "to pull away from the literal statutory words" in some cases, "almost always in the direction of nondisclosure." *Id.* at 763.

<sup>12</sup>Professor Davis, in accord with the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, reprinted in 20 Ad. L. Rev. 263, 296 (1968), concludes that the court may refuse to grant relief under the Act on equitable principles. 34 U. Chi. L. Rev. at 767. He appears to welcome the exercise of broad judicial discretion to remove from the reach of the Act non-exempt records that nonetheless should not be disclosed. *Id.* at 802. Others would have the courts exercise only minimal equitable discretion in enforcing the Act, urging them to withhold the production of non-exempt records "only for those clearest equitable considerations for which Congress did not establish standards" in the Act. Note, *Freedom of Information: Court May Permit Withholding of Information not Exempted from Disclosure under Freedom of Information Act*, 5 Har. Civ. R.-Civ. Lib. L. Rev. 121 (1970).

<sup>13</sup>*Consumers Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).

<sup>14</sup>Shortly after passage of the Act the Attorney General issued a 47 page memorandum interpreting the Act as a guide to its application. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act*, reprinted at 20 Ad. L. Rev. 263 (1968). [hereinafter cited as *Att'y Gen. Memo.*]. The Justice Department has formed an internal committee on Freedom of Information matters to give advice to agencies on difficult questions arising under the Act. It has encouraged all agencies to consult with the committee before issuing a final denial in cases raising substantial doubts.

solution to the problem. Neither the proposed guidelines nor this article deal with the large and fundamental problems created by the broad exemptions in the Act. They deal instead with the more limited matter of uniform procedural guidelines to implement the basic policy of the law. The problems surrounding the exemptions do, however, provide relevant background and give added weight to other difficulties which are the subject of the instant proposal.

Critics have charged that agency delay, evasion, favoritism, commingling of exempt with non-exempt material to insulate the latter from production, and other practices have created barriers to a free information policy.<sup>15</sup> These charges may overstate the case to the extent that they are based on the limited, somewhat unique experience of the study groups. Sweeping requests by the groups for records may have generated resistance because of the burdens entailed, particularly where agency personnel may have viewed the groups as "raiding parties" primarily intent on searching out what was wrong with their operations. However, there is some contrary evidence indicating that members of the study groups were able to obtain records that would have been withheld in the case of lesser known requesters because of the unfavorable publicity that the groups could generate in the case of a refusal. Members of one group claimed to have received records that had been previously denied them, but only after they revealed their affiliation.<sup>16</sup> One member reported in an interview that a group was able to obtain records which the wife of another member had earlier been told did not exist.

To determine whether the difficulties reported by the study groups are truly representative, a questionnaire was sent to approximately four hundred organizations that might be interested in obtaining records from the Federal government. The results of the survey, which are set out in Appendix B, are of limited value because only ten per cent of the questionnaires were returned; and of these, twenty-five per cent indicated that the respondents had had no experience in requesting records from the federal government. The survey does, however, support the conclusion that the difficulties encountered by the study groups are not isolated occurrences.

On the basis of this survey, reported and publicized cases, interviews with individuals who have requested records, and information provided by the agencies in interviews or in responses to Congressional inquiries, it appears that the following kinds of difficulties have been encountered in implementing the Freedom of Information Act:

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<sup>15</sup>See note 9, *supra*.

<sup>16</sup>Nader, *Freedom from Information: The Act and the Agencies*, 5 Harv. Civ. R.-Civ. Lib. L. Rev. 1, 12 (1970).

*Equal Access to Records—Informing the Public.* There are practical problems in realizing the Act's goal that all citizens should have equal access to government information. The charge has been made that the agencies display favoritism with regard to freedom of information matters. It is claimed that the agencies compile information useful to those having cordial contacts with them while refusing to collect data of comparable interest to the general public, and that records made quickly available to these insiders are held up when requested by others.<sup>17</sup> The Act, in making information available primarily on the initiative of the private citizen, fully serves only those with sufficient knowledge, interest and resources.<sup>18</sup> This naturally places persons having established contacts with agencies in a more favorable position, if for no other reason than their great familiarity with agency operations and personnel. Short of eliminating existing social and economic inequalities, completely equal access to government information cannot be achieved as a practical matter. However, procedures and practices implementing the Act should seek to limit such disadvantages as far as possible.

*Evasive and Obstructive Practices—Formal Requirements for Requests.* In response to questionnaires or in interviews a few disappointed requesters have voiced the suspicion or conviction that agency officials have hidden records, giving misleading information or engaged in similar practices. To date our investigation has not revealed widespread complaints about these kinds of practices apart from the experience of the Nader "study groups," some of which claim to have encountered the deliberate secretion of records, false information and other deceptive practices.<sup>19</sup> However, some agency regulations tend to inhibit requests because of excessive and unnecessary requirements as to the form of the request.<sup>20</sup> Some agency regulations and practices appear to require an unnecessarily high degree of specificity that goes beyond the statutory requirement that the records requested be "identifiable."

<sup>17</sup>Nader, *supra* note 16, at 11-12.

<sup>18</sup>As a report of the House Committee on Government Operations observes, "The public, as well as the Government, has an obligation to know the law." Freedom of Information Act 8, 90th Cong. 2d Sess. (Comm. Print 1968). The Output Systems Corporation is helping private citizens and corporations to meet that obligation in a two-volume publication entitled "Legally Available U.S. Government Information as a Result of the Public Information Act." The price of the publication, which is primarily aimed at persons interested in procurement information, is \$84.00. Although for the most part the material is reproduced verbatim from sources available to the public, notably the Code of Federal Regulations and the Federal Register, it would require considerable time and research ability for an individual to collect all this information by himself.

<sup>19</sup>Nader, *supra* note 16, at 10-13.

<sup>20</sup>See text *infra* at notes 35-37.

Insistence on such specificity can effectively defeat many valid requests for information where the requester does not know just what records are in existence but does know precisely the kind of information he is seeking. In this connection, the treatment of broad categorical requests has given rise to somewhat inconsistent regulations among the agencies, to special problems with regard to handling exempt information and records, and to judicial decisions in conflict with agency practices and regulations concerning whether broad categorical requests come within the Act's "identifiable" records requirement.<sup>21</sup>

*Delay.* Interviews at two agencies revealed that action on some requests had been pending for months while the legal basis and policy reasons for possibly withholding the records were being studied. The primary reason for the delay appeared to be difficulty in getting the necessary officials to turn away from other matters and review the request. In one case a final decision had not yet been made on a request submitted more than a year prior to our visit. Concern that hasty action would release controversial material that "might be exempt" caused the delay. The Consumers Union of the United States waited for ten months to obtain a final determination on a request made under the Act.<sup>22</sup> At another agency rather extensive delay has arisen at the appeal stage. It was attributed to a change-over in high level officers, a development that creates general difficulties rather than special freedom of information problems.

*Commingling of Exempt and Non-Exempt Information.* To the extent that exempt and non-exempt information and records are indiscriminately and unnecessarily commingled, this can have the effect of sealing off non-exempt information that the agencies are unable or unwilling to segregate from exempt material in response to a request. The Nader study groups have charged the agencies in specific instances with deliberately combining non-exempt and exempt matters in the same record, or non-exempt and exempt records in the same file, so that the entire record or file could be withheld.<sup>23</sup> Three other charges of suspected commingling of exempt with non-exempt material to ensure the secrecy of the latter were made by disappointed requesters in interviews. The prevalence of unnecessary commingling will naturally be difficult to determine and even requesters who suffer as a result of it may be unaware of its presence in their particular cases. All the agencies interviewed acknowledged that

<sup>21</sup>See text *infra* at notes 67-68.

<sup>22</sup>*Prices of Hearing Aids. Hearing Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258, 87th Cong., 2d Sess. 257-58 (1968) (paras. 10-18 of plaintiff's complaint in *Consumer's Union v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969).*

<sup>23</sup>Nader, *supra*, note 16 at 9-10.

there would be substantial but innocent commingling of exempt and non-exempt information following normal filing procedures. Whether deliberate or accidental, commingling presents a potentially serious barrier to implementing the Freedom of Information Act that calls for procedures to keep its restrictive effects on the flow of information at a minimum.

*Resistance to Act by Lower Level Staff.* There is a problem of unknown dimensions concerning how lower level personnel are responding to requests for records, particularly in the case of large departments. One year after the Act went into effect the House Committee on Government Operations found "numerous instances" of lower level officials refusing to release information that could not be withheld under the Act.<sup>24</sup> One officer revealed in a recent interview that contrary to agency policy and regulations the staff in charge of procurement matters were somewhat uncooperative in producing non-exempt records relating to existing contracts where they believed that the requester did not have a proper interest in the information. Most of the agency officials interviewed suggested that there were probably no serious problems at the operating level at the present time but based this conclusion on the relative absence of appeals or complaints brought to their attention. This conclusion is hardly warranted. In response to the most recent questionnaire on freedom of information circulated by the Senate Subcommittee on Administrative Practice and Procedure, one large department reported finding that records had been denied by various offices holding them without any knowledge by the office designated in departmental regulations to handle the requests. There may be considerable departures of this kind from published agency regulations and policies that do not come to the knowledge of the agency's officers principally concerned with implementing the Freedom of Information Act. We have come across two instances where lower level officials denied access to records of a kind that had been recently declared non-exempt in a court decision.<sup>25</sup> In one instance the initial denial was reversed within the agency, and in the other, reversal appeared to be imminent at the time the matter was studied. Delay, evasiveness and a generally uncooperative attitude on the part of operating staff are less likely to come to the attention of high level officials than outright denials for which an avenue of intra-agency appeal exists.

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<sup>24</sup>House Committee on Government Operations, Freedom of Information Act 8, 90th Cong., 2d Sess. (Comm. Print 1968).

<sup>25</sup>The cases involved different departments, but both involved the withholding of land appraisals of property sold or purchased by the federal government. The non-exempt status of these appraisals was established in *Benson v. General Services Administration*, 415 F. 2d 878 (9th Cir. 1969).

*Uniform Fees.* The fees charged by agencies for locating and copying records are obviously relevant to the attainment of an open information policy. Unreasonably high fees can operate as obstacles that tend to accentuate sharply the advantage enjoyed by those with an abundance of economic resources. Variation in fees from agency to agency is also disturbing since it may reflect differing valuations of the public interest in making government records freely available, a development not in keeping with the policy of the Act.

Despite these instances of difficulties, one former government official who was interviewed gave his opinion that the Freedom of Information Act operates tolerably well since sustained efforts to obtain non-exempt records will usually be rewarded. Others have voiced somewhat similar views.<sup>26</sup> However, the absence of persistence may reflect a lack of sophistication and money, not a want of interest. If one examines the court cases in which parties have succeeded under the Act, one notes that the successful plaintiffs have usually been organizations with substantial resources or parties with a significant financial interest in the records involved.<sup>27</sup> The ideal goal of a free and open information policy which underlies the Act requires all information requests to be treated equally. The judicial remedy written into the Act will not assure this goal as a practical matter. Agency policies, regulations and practices will be more important in realizing it. The guidelines proposed are derived from this basic policy goal with an eye to the practicalities of agency operations. Although they are tailored to meet certain problems that have arisen under the Act, they are primarily put forward as an attempt to develop reasonable and practical procedures for agencies to adopt to implement the Freedom of Information Act.

### *I. Informing the Public of the Availability of Information*

Achievement of the ideal behind the Freedom of Information Act presumes a degree of sophistication on the part of the interested citizen that is exceedingly difficult, perhaps impossible, to attain. In order to afford ready and open access to information held by the government, the Act permits anyone to go beyond what government agencies and departments decide to publish and to examine records in government files.

<sup>26</sup>Cf. Archibald, *supra* note 8.

<sup>27</sup>General Services Administration v. Benson, 415 F.2d 878 (9th Cir. 1968) (records containing information relevant to a tax claim). American Mail Line, Ltd. v. Gulick, 411 F.2d 696 (D.C. Cir. 1969) (memorandum containing reasoning of Maritime Subsidy Board in claiming that plaintiff had to reimburse Government for \$3,000,000.00 excess subsidy payments); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D.N.Y. 1969); Tobacco Inst. v. FTC, Civ. Act. No. 3035-67, U.S.D.C. Dist. Col., April 11, 1968; Shell Oil v. Udall, Civ. Act. No. 67-C-321, U.S.D.C. Dist. Col., Sept. 18, 1967.

To do this the requester must first know what kind of unpublished information is legally available to him, the kinds of records in which he is apt to find that information, and the agency or department having custody of the relevant records. Only an unusually sophisticated and enterprising car purchaser would be able to ferret out most of the helpful information available from the government, published as well as unpublished, relating to the safety, performance and economy features of the various makes in which he is interested. To inform the public effectively requires positive programs that bring to their attention the general availability of certain kinds of information. More centralized, elaborate and expensive procedures for analyzing and indexing government information and for then publicizing effectively what is available would have to be established. For instance, in the area of consumer information some agency or department might act as a clearinghouse collecting and disseminating all information collected by the federal government relating to consumer products. In October, 1970, President Nixon issued Executive Order No. 11566 which establishes a Consumer Product Information Coordinating Center in the General Services Administration.<sup>25</sup> As its name suggests, the Center is to act as a clearinghouse of consumer product information gained by government agencies in their various testing programs.

The development of such positive programs is beyond the present requirements of the Freedom of Information Act, and the issues raised by them are beyond the scope of this study. However, there are two affirmative steps that can be taken in implementing the Act and they are embodied in the guidelines (1): 1) the public listing of officers in charge of records; and 2) adoption by the agencies of an express policy of assisting all citizens in translating their requests for information into requests for identifiable records.

#### *A. Listing of Officers in Charge of Records*

Ideally, the public should be given maximum information about the records that can be found in the various agencies. This could be achieved by having the agencies each compile and publish a directory of records. The listings of necessity could not cover every kind of internal document or body of correspondence that would be open to examination under the Act. Agencies with a more easily manageable set of files could provide a rather extensive listing of important records in their custody. The CAB compiled such a listing in a systematic manner by requesting its various offices to inventory the records held by them. From these inventories it

<sup>25</sup>35 Fed. Reg. 16675, October 28, 1970.

compiled a master list of records with accompanying information as to their location within the agency. This list was then published as an index to the regulations adopted for implementation of the Freedom of Information Act.<sup>29</sup> In its regulations the FCC also sets forth specific kinds of records available to the public and the offices where they may be located.<sup>30</sup>

It is difficult to assess the value of such a list. It probably is of limited value to the average citizen but could be of considerable help to an attorney or a person who is not too familiar with an agency's operations and regulations but who is concerned with a particular problem. It is possible that it may even be of significant assistance to the specialist in some cases since an orderly guide to an agency's records may reveal the existence and location of information never before brought to his attention. Along these lines, it may prove to be of value as a helpful internal guide to agency staff.

A basic question is whether the estimated value of such a directory of information justifies the burden of compiling it. A regulatory agency overseeing a circumscribed area, such as the CAB or FCC, can probably compile an inventory of important records more readily than executive departments with broad and varied concerns such as the Departments of Agriculture, Interior, or of Health, Education and Welfare. Officials interviewed in these large departments questioned the advisability of such a directory. Because it is doubtful that the value of such a directory would outweigh its cost to the agency in all cases, no recommendation is made on this point in the guidelines. However, if an agency finds that there is considerable public interest in certain types of records, it should consider the desirability of compiling a directory selectively listing those records. The Department of Transportation, despite its varied responsibilities and extensive files, has compiled a partial listing of the records within its subunits as an appendix to the regulations adopted pursuant to the Freedom of Information Act.<sup>31</sup>

The proposed guidelines require each agency to compile a brief directory containing the names or titles of officers in charge of records at the various offices of the agency and their respective addresses. This should place a relatively small burden on the agencies and achieve the minimum in informing the public where they can get additional information concerning records available to them.

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<sup>29</sup>14 C.F.R., part 200 at 430 (1970).

<sup>30</sup>47 C.F.R. § 0.455 (1970).

<sup>31</sup>49 C.F.R., part 7 at 27 (1970).

### *B. Agency Assistance*

The second step calling for informal agency assistance to the public is essentially hortatory. It involves motivating agency staffs to offer positive assistance in reducing a request for information to one for identifiable documents. Frequently, this can be done with little effort, because of the staff's familiarity with the agency's files. In such a case, a passive, uncooperative attitude could frustrate efforts to obtain information even though the relevant records could easily be identified and readily obtained.

There is little that can be done in the way of concrete procedures to inculcate cooperative attitudes. It would be helpful, however, to convey clearly and forcefully to lower-level personnel the agency's commitment to positive policies for the handling of information requests. Agencies could issue directives to their staff requiring them to assist in the formulation of information requests. These directives could be issued internally through staff memoranda and manuals or could be incorporated into formal published regulations, as some agencies have done.<sup>32</sup> Incorporation into published regulations is preferable since it tends to lead the public to expect and solicit assistance when necessary.

## *II. Requests for Identifiable Records*

### *A. Requirements as to Form of Requests*

The Freedom of Information Act only compels the honoring of requests for "identifiable" records. This requirement was added at the recommendation of the Senate Judiciary Committee to avoid an intolerable burden on the agencies.<sup>33</sup> Its purpose is to enable government agencies to locate the records requested without unduly burdening agency operations. It is clear that "this requirement . . . is not to be used as a method of withholding records."<sup>34</sup>

Some agency regulations can be read to call for unnecessarily high standards of identification inconsistent with the policy and legislative history of the Act. One agency requires the requester to supply the date, addressee and "title or subject matter" of the record sought or to give an explanation for the failure to specify each of these matters. The regulations of some other agencies, although not as rigid, could be read to require with some inflexibility that the requester supply specific details such as date, author, addressee and topic.<sup>35</sup> Other agencies require

<sup>32</sup>E.g., Office of Economic Opportunity, 45 C.F.R. § 1005.7 (a) (1970); General Services Administration, 41 C.F.R. § 105-60.401 (1970).

<sup>33</sup>S. Rep. at 2, 8.

<sup>34</sup>*Id.* at 8.

<sup>35</sup>Renegotiation Board, 32 C.F.R. § 1480.6(b) (1970).

<sup>36</sup>Department of Health, Education, and Welfare, 45 C.F.R. § 5.51(c) (1970); Department

requests for documents to be submitted on prescribed forms that call for such specific details.<sup>37</sup>

Those agencies that were interviewed do not insist on all these specific details, regardless of how their regulations read, where the information given by the requester is sufficient to identify and permit reasonably prompt location of the records. This may well be the general practice, or at least should be, in light of the statutory intent behind the requirement of identifiability. Even though agency practices may be reasonably flexible in this regard, apparently inflexible regulations or forms may mislead and discourage potential requesters and should be modified. This observation is applicable to what appears to be only a minority of the agencies. Many regulations are not misleading on this point; they provide that requests need only be specific enough to permit the finding of the records with reasonable effort.<sup>38</sup> A regulation could properly go further than this and point out that certain specific information regarding dates, addresses or document number would be most helpful and should be given if available, as long as it were made clear that such information would not be essential where the record was otherwise adequately described. The regulations of the Internal Revenue Service and the Department of Transportation are of this latter type.<sup>39</sup>

Apart from the above objection, the requirement of a form tends to be contrary to the spirit of the Act. It appears to be a kind of red tape tending to inhibit requests even though it may not have been designed for that purpose. This interpretation of the form requirement as a deliberate nuisance is reinforced when the form must be accompanied by an application fee that is non-refundable even if the agency does not produce the requested record.<sup>40</sup> When requests are made by mail, the necessity of obtaining and filling out the form can create substantial delay.<sup>41</sup>

Although prescribed forms do serve some useful functions, the reasons favoring them do not outweigh their disadvantages. The use of a well-designed form may assist an applicant to sharpen up his request. This

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of Housing and Urban Development, 24 C.F.R. § 15-13(a) (1970); Civil Aeronautics Board, 14 C.F.R. 310.6(b) (1970).

<sup>37</sup>E.g., Department of Commerce, 15 C.F.R. § 4.6(c) (1970).

<sup>38</sup>E.g., Department of Defense, 32 C.F.R. § 286.7(c)(1) (1970); Department of Agriculture, 32 Fed. Reg. 10118, July 8, 1967; Farm Credit Administration, 12 C.F.R. § 604.1 (1970); Federal Home Loan Bank Board, 12 C.F.R. 505.4(d) (1970).

<sup>39</sup>26 C.F.R. § 601.702(c)(4) (1970) (Internal Revenue Service); 49 C.F.R. § 7.43(d) (1970) (Department of Transportation).

<sup>40</sup>Department of Commerce, 15 C.F.R. § 4.6(c)(d) (1970) (\$2.00); Department of Justice, 28 C.F.R. §§ 16.3(a), 16.4(a) (1970) (\$3.00).

<sup>41</sup>The author waited over two weeks just to receive a copy of a form requested from one of the departments.

benefit may be obtained by making such a form available at the option of an applicant. Where a vague request requiring more precise details is received, the agency could send an optional form back to the requester to assist him. Some of the forms are also designed to direct and record agency action on the request. This advantage could easily be retained by designing a form for internal use only which could be attached to any written request upon receipt.

The proposed guidelines permit an agency to insist that requests be in writing, as the regulations of some agencies now provide.<sup>42</sup> Several agencies are currently very liberal as to the medium used in making requests, to the point of accepting them over the telephone.<sup>43</sup> There is no reason to discourage this practice and create unnecessary paperwork for an agency that is willing and able to make the records available. However, where a telephone request is denied, the requester should be orally informed of the opportunity of making a written request which can then provide the basis for an appeal.

One agency, the FTC, requires the requester to state in writing and under oath the nature of his interest in all but "public records" and the purposes for which they will be used.<sup>44</sup> This requirement contradicts the clear congressional purpose in dropping the prior limitation in the Public Information Act that information in government files be made available to "persons properly and directly concerned." One justification offered by the FTC for retaining this requirement is that practically all its records are "confidential" ones that fall into categories exempt from production, as in the case of investigatory files and the internal memorandums exemptions.<sup>45</sup> However, the Commission's own regulations indicate that this explanation is not completely satisfactory. After listing records exempt under the Freedom of Information Act as "confidential" records to be made available only on a proper showing, it adds to this list "all records of whatever nature not clearly identifiable as public records."<sup>46</sup> "Public records" are those required by § 552(a)(2) to be indexed and made readily available for public inspection and copying, notably agency opinions, policy statements and administrative staff manuals, and also all other records that the Commission decides to list and index as public ones, such as published reports on economic surveys.<sup>47</sup> In effect the Commission

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<sup>42</sup>Department of Labor, 29 C.F.R. § 70.4(a) (1970); Department of Transportation, 49 C.F.R. § 7.43(a) (1970).

<sup>43</sup>E.g., Civil Aeronautics Board, 14 C.F.R. § 310.6(a) (1970); Securities and Exchange Commission, 17 C.F.R. § 200.80(d) (1970).

<sup>44</sup>16 C.F.R. § 4.11(b) (1970).

<sup>45</sup>This explanation was given to the author in the course of an interview.

<sup>46</sup>16 C.F.R. § 4.10(c) (1970).

<sup>47</sup>16 C.F.R. § 4.9(e)(8) (1970).

classifies non-exempt documents, such as unpublished reports, as confidential simply by not listing them as "public records". Although the Commission is considering removing the requirement that requests be made under oath, it should also drop the requirement of a written statement of interest and intended use.

### *B. Treatment of Categorical Requests*

Broad categorical requests for documents have created some problems in the past and are a potential source of continuing difficulty. Some agency regulations refuse to honor any "blanket" or "general" requests.<sup>48</sup> These regulations appear to reject all categorical requests, and in doing so they take a highly questionable position. They assume that a general request is not one for "identifiable" records under the Act. Some support for this view is found in the Attorney General's Memorandum, which interprets the Act as requiring the requester to describe "the particular materials" he wants and which concludes that "Congress did not intend to authorize 'fishing expeditions.'"<sup>49</sup> The most vociferous critics of current agency practices under the Act would probably take sharp exception to the Memorandum on this point. The Nader study groups, for example, have attempted to use the Act for exactly the purpose of finding out what is going on in the various government agencies; in this sense their investigations are "fishing expeditions."

The term "fishing expeditions," however, has certain connotations that may not be fully appropriate where government records are concerned. The term has been used to condemn broad investigations into private records not based on a showing of "probable cause" as required by the Fourth Amendment.<sup>50</sup> The Freedom of Information Act clearly intends to remove any burden of showing probable cause or a special interest in, or need for information in government files. In so doing the Act proceeds on the premise that records in government files do not come within the interest of privacy that is at the heart of the Fourth Amendment. This premise seems reasonable in the case of a great many, perhaps most, records in government files. It is true, of course, that confidential

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<sup>48</sup>E.g., Civil Aeronautics Board, 14 C.F.R. § 310.6(b) (1970) (Blanket or general requests need not be honored and may be returned to requester); National Aeronautics and Space Administration, 14 C.F.R. § 1206.602(a) (1970); Department of the Navy, 32 C.F.R. § 701.1(g)(3)(i)(a) (1970).

<sup>49</sup>*Att'y Gen. Memo.* at 292.

<sup>50</sup>*FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924). The earlier proscription against "fishing expeditions" into private files was later relaxed by the Supreme Court in the case of administrative agencies conducting investigations within the scope of their regulatory powers. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *CAB v. Hermann*, 353 U.S. 322 (1957).

information relating to private individuals may be found in government records. This information should not be made freely available to the public. The Act recognizes the need to preserve the confidentiality of such government records by exempting from disclosure certain kinds of information, including that found in "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."<sup>51</sup> Preservation of personal privacy can be accomplished by the intelligent and sensitive application of these exemptions. If experience indicates that they are not sufficiently broad enough to preserve personal privacy, the Act can and should be amended. However, where a citizen seeks access to government records that do not contain private information, there is no reason to guard against the kind of "fishing expedition" repugnant to the values underlying the Fourth Amendment.

It is significant to note that the Act does not use "specific", "particular" or any other word requiring that the records sought must be actually *identified* by the requestor. The records need only be "identifiable," i.e., capable of being identified on the basis of the information presented by the requestor. As long as the records sought can be identified from the language in the request, this literal requirement of the Act is met. The Senate report also supports the acceptability of broad categorical requests by stating that the Act contemplates as an appropriate guideline the identification standards used for discovery in judicial proceedings.<sup>52</sup> Rule 34 of the Federal Rules of Civil Procedure governs the examination and copying of documents in a judicial proceeding. At the time the Act was passed Rule 34 simply required the moving party to "designate" the documents requested. There was a split of judicial opinion on the question of how specific the designation had to be. Some cases adopted a narrow view and required each document to be specifically identified so that the party served could go to his files, pick out the particular document and say, "here it is."<sup>53</sup> The broader view would have permitted a party to designate documents by category as long as the category was described with reasonable particularity.<sup>54</sup>

The broad view is the better view. It is the one adopted by the Federal

<sup>51</sup>See note 4 *supra*.

<sup>52</sup>S. Rep. at 2.

<sup>53</sup>*United States v. National Steel*, 26 F.R.D. 607 (S.D. Tex. 1960); *Lundberg v. Welles*, 11 F.R.D. 136 (S.D.N.Y. 1951); *Stewart-Warner Corp. v. Staley*, 4 F.R.D. 333 (W.D. Pa. 1945); *United States v. American Optical Co.*, 2 F.R.D. 534 (S.D.N.Y. 1942).

<sup>54</sup>*Scuderi v. Boston Ins. Co.*, 34 F.R.D. 463 (D. Del. 1964); *Connecticut Mut. Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y. 1955); *State Theatre Co. v. Tri-States Theatre Corp.*, 11 F.R.D. 381 (D. Neb. 1951); *United States v. U.S. Alkali Export Ass'n.*, 7 F.R.D. 256 (S.D.N.Y. 1946).

Court of Appeals for the District of Columbia in one of the very few appellate court decisions interpreting this aspect of Rule 34 prior to its recent amendment.<sup>55</sup> The broad view was also adopted by the commentators.<sup>56</sup> It is grounded on pragmatic considerations and recognizes that a person seeking information known to exist may not have sufficiently exact and definite knowledge to identify the specific documents in which it can be found. Under this view the description need only be "sufficient to apprise a man of ordinary intelligence what documents are required, and . . . the court . . . to ascertain whether the request has been complied with."<sup>57</sup> The newly amended Rule 34 has clarified matters. It expressly permits documents to be designated "by category." Designated categories must be described with "reasonable particularity." The proposed guidelines (3-2-b) adopt essentially the same standard in requiring the categories to be "reasonably specific."

Examination of the reasons why some courts insisted on great particularity in designating documents under old Rule 34 reinforces the conclusions that the broad view is the appropriate one in the case of government documents. Three reasons emerge from the cases for the particularity requirement: 1) to guide both the party served with the order and the issuing court supervising compliance with it;<sup>58</sup> 2) to prohibit a sweeping and indiscriminate search of a party's private papers—i.e., to prohibit "fishing expeditions" and their unjustifiable intrusion into privacy;<sup>59</sup> 3) to protect the party served from an unreasonable and oppressive burden.<sup>60</sup>

The first reason, that of securing compliance with a court order, does not apply as strongly in the case of a request for government records because the initial response by the official in charge of the records is not subject to a court order.<sup>61</sup> As long as the official can reasonably be able to

<sup>55</sup>Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958).

<sup>56</sup>2A Barron & Holtzoff (Wright ed.) § 796; Wright, Procedure in District Courts § 87 (2d ed. 1970).

<sup>57</sup>Wright, *supra* note 56 at § 87.

<sup>58</sup>United States v. American Optical Co., 2 F.R.D. 534 (1942).

<sup>59</sup>Stewart-Warner Corp. v. Staley, 4 F.R.D. 333 (W.D. Pa. 1945); Archer v. Cornillaud, 41 F. Supp. 435 (W.D. Ky. 1941).

<sup>60</sup>De Meulenaere v. Rockwell Mfg. Co., 13 F.R.D. 134 (S.D.N.Y. 1952); Wagner Mfg. Co. v. Cutler-Hammer Co., 10 F.R.D. 480 (S.D. Oh. 1950). (These cases involved subpoenas pursuant to Rule 45, which requires that documents be "designated" as does Rule 34; the standards applied in the case of both rules tend to be interchangeable.)

<sup>61</sup>Before a requester seeks a court order there would usually be an opportunity for the agency to suggest a refinement of the request, limiting it to certain files, etc., in order to cure any serious problem of uncertainty. Where the agency can demonstrate the perils of uncertainty, a court of equity could refuse to enforce the request unless the requester stipulated to limitations that would remove unfair risks of good faith non-compliance. *But*

decide whether a specific record comes within the request and can be reasonably certain that the examination of certain files will bring most if not all the requested records to light, the request is not too vague to be honored. The official can indicate the extent of his search to the requester and the latter can restate his request to include other files if he so desires.

The second reason, the protection of privacy, is not at all applicable where the records requested have little or no chance of including confidential information about private individuals. With regard to protecting privacy, it is interesting to note that old Rule 34 cases condemning "fishing expeditions" usually attacked broad requests not only for the lack of precise designation but also for the failure of the moving party to establish "good cause" for examining the records.<sup>62</sup> Congress deliberately struck the parallel "direct and proper interest" requirement from the Public Information section of the Administrative Procedure Act. It is also interesting to note that amended Rule 34 has dropped the good cause requirement.

Of particular relevance in applying judicial standards for the description of records to the Freedom of Information Act is the ability of a litigating party to learn of both the existence of private papers and their precise identification by depositions under Rule 26. Some cases taking the narrow view of old Rule 34 pointed out that the moving party can learn the precise description of documents relevant to his case by taking depositions.<sup>63</sup> This, of course, is not true in the case of a party requesting documents under the Freedom of Information Act. This lack of discovery suggests that a party should be permitted by categorical request to ask for non-exempt government documents that he cannot be sure are in existence, a step that takes us closer to "fishing expeditions."

The third reason for precise designation, the avoidance of unreasonable and oppressive burdens, applies in the case of government records. It is inconceivable that Congress intended to require compliance with sweeping categorical requests that would so burden agency operations as to disrupt their primary service to the public. However, the Freedom of Information Act does not expressly authorize rejection of requests because of the difficulties or costs that will be incurred by the agencies. The Act does expressly provide that the requester be charged for the services rendered to him.<sup>64</sup> Aside from this practical limitation, any Congressional policy

see *Bristol-Myers v. F.T.C.*, 284 F. Supp. 745, 747 (D.D.C. 1968), rev'd. 424 F.2d 935 (D.C. Cir. 1970).

<sup>62</sup>See footnote 59 *supra*.

<sup>63</sup>*United States v. National Steel*, 26 F.R.D. 607 (S.D. Tex. 1960); *Stewart-Warner Corp. v. Staley*, 4 F.R.D. 333 (W.D. Pa. 1945).

<sup>64</sup>5 U.S.C. § 552(a)(3) (1964 ed. Supp. IV.).

limiting burdensome requests will have to be read into the Act. Since the clearly dominant purpose of the Act is to give ready access to government held information, any implied limitation must rest on an equally clear overriding policy. For this reason, any agency that rejects a categorical request because compliance would be unduly burdensome should be ready to demonstrate that the request calls for an improper diversion of agency time and resources from its primary responsibilities.

As a practical matter, even extremely broad categorical requests can often be met without an undesirable diversion of agency resources if the requester is willing to accept gradual production of the records over a period of time. The proposed guidelines (B-2-b) would have the agency confer with the maker of a burdensome request. Through such conferences a compromise calling for refinement of the request or a relaxed production schedule could be worked out to the mutual benefit of both the agency and the requester.

The few cases under the Act dealing with categorical requests hold that they must be honored if the agency can readily ascertain what records come within their scope. The cases also suggest that such requests cannot be rejected because of the burdens and difficulties of collection they impose on the agency. However, a leading case can be read to suggest that at some point a request can become so burdensome that an agency can refuse to divert resources to handle it.

Initially, the Federal District Court for the District of Columbia looked with disfavor on broad categorical requests. In *Matonis v. Food and Drug Administration*, Civ. Act. No. 479-68, March 19, 1968, the court refused to give the plaintiff relief where she had asked "for all records . . . pertaining to the review of claims of the effectiveness of drugs for human use containing rutin, quercertin, hesperidin or biflavonoid." The court found that the records sought were not sufficiently identified.

In *Bristol-Myers v. F.T.C.*, 284 F. Supp. 745 (D.D.C.1969) Judge Holtzoff refused to enforce a general request for records relating to certain analgesic medicines and to a proposed rule relating to them. At one point in his opinion Judge Holtzoff's reasoning was reminiscent of that used by courts requiring specific designation of documents pursuant to old Rule 34; he referred to the possibility of a court order and the necessity to know with certainty what specific documents were requested.<sup>65</sup> However, his main concern was over the disruptive effects that compliance with the request might entail. He believed the request was apt to contain many records exempt from disclosure under the Act, and his opinion strongly

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<sup>65</sup>284 F. Supp. at 747.

implies that considerable time of high level officials would be consumed in screening out exempt records that should be kept confidential.<sup>66</sup>

On appeal the decision in *Bristol-Myers* was reversed.<sup>67</sup> The test used by the Court to determine the propriety of the request was whether the sought for records could be ascertained and located from the description given. Subsequently, this test was applied in *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970) to require agency compliance with an allegedly burdensome request. The plaintiff had asked the Department of Agriculture to produce letters of warning sent by the Compliance and Evaluation Staff of the Consumer Marketing Service to non-federally inspected meat or poultry processors suspected by the staff of engaging in interstate commerce. The Department rejected this request on the ground that collection of the records would require the search of many files and be extremely burdensome. The court interpreted this reason for rejection as an admission that the agency knew exactly what was being sought and was complaining only about the effort that would have to be made to collect the documents. The court went on to say:<sup>68</sup>

The fact that to find the material would be a difficult or time-consuming task is of no importance [in determining identifiability]; an agency may make such charges for this work as permitted by statute. To deny a citizen that access to agency records which Congress has specifically granted, because it would be difficult to find the records, would subvert Congressional intent to say the least. Therefore, this court finds the defendant's assertion that this requested information is not an "identifiable record" within the meaning of the statute to be totally without merit.

The *Wellford* opinion does not consider the possibility that some categorical requests might be so burdensome that compliance with them would put an undesirable strain on efficient administrative operations. No judicial decision has dealt squarely with this question. However, the decision of the Court of Appeals in the *Bristol-Myers* case could be construed as giving some recognition to the possibility that some categorical requests would place so great a burden on agency operations that they could be rejected.

In that case the court broke down the broad request into two parts. The request had sought "the extensive investigation . . . accumulated experience and available studies and reports" referred to as the basis for the proposed FTC rule in the notice announcing it. In addition, the

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<sup>66</sup>*Id.* at 746-47.

<sup>67</sup>424 F.2d 935 (D.C. Cir. 1970).

<sup>68</sup>315 F. Supp. at 177.

plaintiff had asked for records pertaining to the effects of analgesics as well as records pertaining to the accuracy of the plaintiff's claims of benefits derived from its own products. The circuit court held that records containing the materials relied on by the Commission in promulgating the proposed rule and referred to generally in the notice of the proposed rulemaking proceeding were adequately identified. It did go on to indicate that the records relating to the effects of analgesics generally and the accuracy of the plaintiff's claims for its own products might not all be encompassed in the materials pertaining to the proposed rulemaking. If this were the case, the court said, "the claim of failure to meet the identification requirement may be more plausible." It directed the trial court to consider this part of the request separately on remand to determine if it in fact did pose problems of adequate identification.

In treating the two parts of the request differently the court may very well have had in mind the practical difficulties in locating and collecting responsive documents rather than interpretive difficulties in ascertaining which ones would come within the request. That part of the request calling for records relating to the effects of analgesics generally does not seem to pose any difficult problems of interpretation. But the responsive records could be spread throughout a large number of files, and the Commission may never have had occasion to collect them for its own purposes. Because of the burden in assembling documents never before collected, this part of the request could in fact create far greater difficulties than the part calling for the materials that the Commission had so recently studied and collectively referred to in promulgating the proposed rule.

Agency practices also reflect an interpretation of the Act that treats categorical requests as ones for "identifiable" records where it is practical to locate and collect the materials requested. Some agency regulations call for the honoring of a categorical request if it will not entail an unreasonable burden.<sup>69</sup> From information gained in interviews it also appears that even agencies with regulations flatly rejecting all general requests usually grant categorical ones that do not cause undue interference with agency operations. This approach, which is embodied in the guidelines, leaves much to the discretion of the agency. This would be true even under a rule providing that only clear and substantial interference with an agency's primary operations will warrant the rejection of a categorical request. In the case of a potentially most burdensome request an agency can go out of its way to minimize costs and

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<sup>69</sup>Those regulations honoring requests couched in terms that permit location of records with no more than a reasonable amount of effort (see note 38 *supra*) in effect recognize categorical requests as ones for "identifiable records" as long as they can be located without imposing an undue burden on the agency.

difficulties while giving the requester full access to the information he seeks.

Whether it will do so depends on a number of factors. For instance, if an agency believes it can entrust the entire contents of numerous files to a particular requester, it will grant very liberal access to records. Accordingly, an agency is apt to grant a request from a scholar to examine all the documents relating to a particular topic covering the ten-year period from 1920 to 1930 if the records requested can be located in readily identifiable files. With relatively little effort the agency can produce the files from storage and present the requester with a mass of documents to examine. He, rather than agency personnel, will have to go through the files to find the specific documents that interest him most. There will be little diversion of staff time and no disruption of files currently in use. Nor would there be much concern that the researcher might come across records of a confidential nature that are exempt from production under the Act. Investigatory files would have long been closed, internal memoranda would not compromise existing agency programs or personnel and there would be little risk of revealing trade secrets or currently confidential personal or commercial information obtained from private citizens.

A request calling for many documents that are located in current files can present substantial difficulties in some cases. First of all, the general request may relate to documents that are scattered through a large number of actively used files. It may be difficult to determine which files must be examined to find all documents. Where the number of documents potentially subject to the request is great, it may be unduly burdensome to expect agency staff to extract the documents responsive to the general request from these files. The alternative of turning over the files to the requester for his perusal may be out of the question, particularly where there is a probability that exempt and confidential material may be located in these files.

In some cases an agency will be able to tell from the nature of even current files that their contents most likely will not include exempt information that should be kept confidential. In such cases some agencies permit the requester to search the files himself in order to locate the specific documents that are of interest to him. However even in such a case the agency may take some precaution to insure that important records in the file are not removed or destroyed. For example, a clerk from the agency may be stationed in the same room as the requester when a contract file is made available for examination.

In some cases the agency may conclude that it must have a knowledgeable member of the staff screen the file to remove exempt

records from it before turning it over to the requester. Some agencies appear to take a rather strong stand on this point, insisting on prior examination of any file that might possibly contain exempt material. They point out that some material must be kept confidential by statute and that officials who disclose such material are subject to criminal sanctions.<sup>70</sup>

The circuit court's decision in the *Bristol-Myers* case also dealt with the problem of screening out exempt records in complying with a broad categorical request. It rejected the trial court's approach of denying an enire request because of the likelihood that it included some exempt information. Instead it required the trial court to pass on the exempt status of each particular record sought to be withheld. Records coming within the broad request not found to be exempt were to be produced. Here again arises the question of whether at some point an agency can reject a broad categorical request because the screening out of exempt records would be unduly burdensome and disruptive.

At least one department has refused a broad categorical request by a "study group" because of the burden of screening out confidential records exempt under the Act and has asked the requester to indicate with greater particularity the documents that he was seeking. Agency action of this sort appears to have inspired the charge that exempt records are commingled with non-exempt ones to insulate the entire file from public scrutiny. The clear implication is that the agency has done this deliberately. It is not so clear that the implication is justified in all cases of commingling. It is possible that a rational filing system, designed primarily for efficient internal use will lead to a substantial commingling of exempt and non-exempt records.

It has been recommended that non-exempt material be kept in separate files from exempt material. The shortcomings of this approach are discussed within in connection with the guideline on commingling (B-3). The requirement that refusal of a categorical request must specify reasons for denial, as included in the proposed guideline (B-2-b), may provide a less burdensome and more effective way of dealing with improper commingling than the policy of systematic segregation of exempt and non-exempt materials. As Professor Davis has recommended, one means of structuring discretion to insure its more responsible exercise is to require that written findings and opinions accompany agency decisions.<sup>71</sup> Elaborate opinions and findings need not accompany refusals of

<sup>70</sup>E.g., 18 U.S.C. § 1905 (1964 ed.) (criminal penalties for the improper revelation of trade secrets or confidential economic or other data by government officials); 49 U.S.C. § 322(d) (1964 ed.) (criminal penalties for improper disclosure by ICC agent of information obtained during an official examination of private papers).

<sup>71</sup>K. Davis, *Discretionary Justice* 103-06 (1969).

burdensome categorical requests in order to achieve the salutary benefits of such an approach. A summary explanation of the kind of search that would be required to meet the request and of the kinds of difficulties that could be encountered should be sufficient. The explanation might identify the kinds of files in which records responsive to the request would be found and the difficulty involved in collecting them from these diverse sources. Where an agency unjustifiably rejects a broad request on the ground it would include many exempt records, an agency might have a difficult time explaining why it would be too burdensome to screen out possibly exempt records if the explanation included even a minimum of detail. The requirement of an explanation should also reveal blatant examples of improper commingling. In a clear case it might provide the basis for judicial relief in an action brought under the Act.

It should be recognized, however, that no procedures can guarantee an exercise of discretion that will accord absolutely equal treatment in all cases. There will be situations involving obviously burdensome requests in which agencies will feel it is in the public interest to make an extra effort. This means that in practice decisions may turn upon the different interests that requesters have in the records. It would be very difficult to capture these distinctions in any formula. None of the agencies interviewed believed that discrimination should be made between requesters where non-exempt records were involved. They referred to the difficulty of making distinctions that could withstand justification in light of a free and open information policy. But it is hard to believe that the importance and seriousness of a request will not carry weight in deciding how far an agency will go out of its way to accommodate it. The distinctions now being made by agencies, although somewhat imponderable, may be justified in many cases. An agency would be well within its discretion to reject a burdensome categorical request because of the requester's apparently minimal and casual interest in the matter. A clear case in point would be a sweeping request made by a high school student in connection with a civics term paper. One fear expressed by agency officials was the possibility in such a case that a requester might never bother to make use of the records collected for him.

One technique commonly used to discourage frivolous categorical requests is to have the requester bear the full costs of searching for the records and requiring prepayment of the estimated charge. The fee might even include an amount for the staff time involved in screening out exempt records where a great deal of professional time would be used for this purpose.

### III. Partial Disclosure of Exempt Records and Files

The Freedom of Information Act can be read to permit an agency to withhold a record because some small part of it contains exempt information.<sup>72</sup> Although the Act expressly permits an agency to delete identifying details in publishing and making available opinions, statements of policy, interpretations, or staff manuals and instructions,<sup>73</sup> no similar provision exists with regard to production of records. However, the language providing for exemption from disclosure does not speak of records but refers to "matters."<sup>74</sup> The word matters suggests that only the exempt information can be withheld rather than the entire record itself. But the specific exemption relating to inter-agency records refers to "memorandums or letters."<sup>75</sup> In discussing most of the exemptions, both the Senate and House reports and the Attorney General's Memorandum refer to "records" and "matters" interchangeably. In addition, the sixth and seventh exemptions relating to personnel and investigatory files respectively can be read to exclude from the Act both exempt and non-exempt records within the files.<sup>76</sup> The Attorney General's Memorandum appears to adopt this interpretation.<sup>77</sup>

Although the withholding of a twenty page record that has exempt information on only one or two pages may lie within the literal scope of the Act, it is clearly contrary to the free and open information policy behind it. In recent decisions the Federal Court of Appeals for the District of Columbia has looked to this policy in remanding two cases with directions to the trial court to order production of records containing trade secrets or confidential commercial or financial matters if the exempt information could be effectively deleted.<sup>78</sup> Relying on one of these cases, a lower court has ordered an agency to produce records containing exempt material.<sup>79</sup> The court held that the Act authorizes only the deletion of the exempt material, not the withholding of the entire records.

The proposed guidelines follow the line taken by these cases, requiring all agencies to produce records containing exempt information after appropriate deletions have been made. (B-3) Adoption of the guidelines by regulation would strengthen the case for granting judicial relief ordering

<sup>72</sup>Davis, *supra* note 5, at 799.

<sup>73</sup>U.S.C. § 552(a)(2) (1964 ed. Supp. IV).

<sup>74</sup>U.S.C. § 552(b) (1964 ed. Supp. IV).

<sup>75</sup>U.S.C. § 552(b)(5) (1964 ed. Supp. IV).

<sup>76</sup>See Davis, *supra* note 5, at 798.

<sup>77</sup>*Att'y Gen. Memo.* at 305-06. See also discussion at note 81, *infra*.

<sup>78</sup>*Bristol-Myers v. F.T.C.*, 424 F.2d 935, 938-939 (D.C. Cir. 1970); *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.* 425 F.2d 578, 582 (D.C. Cir. 1970).

<sup>79</sup>*Wellford v. Hardin*, 315 F. Supp. 768 (D.C. Cir. 1970).

production of records whenever deletion of the exempt material is feasible. The courts would most likely regard such a regulation as binding on the agency.<sup>80</sup>

Adoption of the guidelines would also help with the commingling problem since they require an agency, in response to a request, to pick out and produce non-exempt records in a file. Here again, adoption of the guideline would tend to ensure judicial enforcement of such a policy. However, a requester can probably get an order requiring production of non-exempt records within a file even without the guidelines.<sup>81</sup>

The proposed guidelines do not go as far as other proposals that would require non-exempt material to be kept in separate files from exempt material. The logical extension of these more ambitious proposals appears to be that all subject files should be broken down physically into two parts with one folder containing records open to the public and the other

<sup>80</sup>*General Services Administration v. Benson*, 415 F.2d 878, 880 (9th Cir. 1969). This case is discussed in the text *infra* at notes 117-120.

<sup>81</sup>The conclusion that the Act requires production of a file from which exempt records can be removed rests on a reading of § 552(a) (3) which requires "identifiable records" to be made available on request and § 552(b) which exempts from this requirement specified "matters." These sections read together would seem to forbid an agency from withholding a set of records identified by file simply because one or two that could be easily separated from the rest were exempt. (For an alleged agency refusal to segregate easily identifiable exempt records from a requested file see *Nader, supra* note 16, at 11 (fn. 33(i).) This interpretation should apply even in the case of the seventh exemption which applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." The modifying clause regarding unwarranted invasions of privacy could be read to exempt only those parts of the files that would constitute the intrusion into privacy. Both the Senate and House reports seem to read the exemption in this manner and they appear to extend this qualification to personnel and medical files as well as "similar files" because both would exclude from the exemption "facts concerning the award of a pension or benefit." S. Rep. at 9; H. Rep. at 11.

The Attorney General's Memorandum reads as though the entire contents of personnel and medical files are exempt; it states that the following need not be produced: ". . . all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person. . ." 20 Ad. L. Rev. at 305.

Where investigatory files are involved, however, the position advanced in the text does not appear to be applicable since the exemption by its terms requires production of only those parts of the file "available by law to a private party." As a matter of grammatical construction the exemption includes the remainder of the file. Besides, it is difficult to formulate a standard to separate out other supposedly non-exempt records from the file in addition to those made "available by law." The main purpose of the exemption is to protect a government investigation from premature disclosure (see Sen. R. at 8); the application of this broad objective to particular records in an investigatory file does not suggest judicially reviewable standards. It would seem necessary to leave the matter of disclosure, in the case of at least active files, to the unqualified discretion of the agencies except for the non-exempt items "available by law to a private party."

containing exempt ones closed from view. This method of segregation presents an impossible task if it is to include the rearrangement of material in existing files. Even if it is to be limited to the filing of new material, it poses a formidable task. New additions to the files would have to be evaluated to determine whether they were legally exempt. The amount of staff time that would be consumed in filing could result in serious interference with more important work in some offices.

In all offices it would impose a burden extremely hard to justify because the procedure tends to be self-defeating and could result in more records being withheld as exempt than would occur without segregation. Although the Act permits exempt records to be produced at the agency's discretion, practically all exempt records would be mechanically inserted into the closed files; only in the clearest cases where assertion of the exemption would serve no valid purpose would an exempt record find its way into the open file. Accordingly, records that an agency might make available in response to a specific request after careful evaluation would escape a categorical one. Also, in the case of any doubt as to the exempt status of certain documents, they would automatically be filed in the closed folder. It might be urged that even so there would be a net gain because all the documents in the open files would now be more accessible to an investigator making broad inquiry into agency operations. However, if the main reason for this burdensome procedure is the circumvention of deliberate efforts made to commingle embarrassing records with exempt ones, as is intimated by some of the proponents of this procedure, it is doubtful that it will solve such a problem. Determined resisters of freedom of information would be ingenious enough to raise doubts in their own mind as to the exempt character of embarrassing records and would always be so scrupulous as to put these doubts to rest by dropping the troublesome records into the closed exempt file.

#### *IV. Time to Reply to a Request*

Delay in responding to the requests for records can result from many causes. Some of them constitute legitimate reasons; others are questionable and reveal a generally unsympathetic attitude toward information requests. An improper reason for delay is the very low priority that may be given to requests for records by the busy administrator and his staff. Where this attitude prevails, such requests may be put aside for unreasonably long periods of time, perhaps until something prods the agency into action, such as a follow-up letter by the requester. An unfortunate but natural tendency may develop to give better and quicker service to persons having well established cordial contacts with agency officials than to some unknown citizen. At least one staff

member of an agency admitted during an interview that requests from prominent national and Washington law firms would ordinarily receive prompter attention than ones from out-of-town persons unknown to the agency. A deadline will act as a prod that clearly indicates the relative importance of freedom of information matters and encourage uniform treatment of all requests.

Another reason why an agency may be inclined to drag matters out is the hope that the passage of time will exhaust the requester's interest in documents that the agency is reluctant to produce. The harshest critics of agency practices have charged that delay is frequently used as a deliberate stalling tactic. They claim that after delaying any kind of reply for a substantial period of time some agencies reject the request for a reason that should have been apparent at the time it was received.<sup>82</sup> Sometimes, it is charged, the request is not denied outright but is deemed inadequate for lack of specificity, with the result that final action on the unpopular request is delayed while the requester attempts to reformulate it with more particularity.<sup>83</sup> The *Consumers Union* case is an example of protracted dealings between the requester and the agency in a case where it was subsequently found that the records were being withheld improperly.

Factors other than dilatory tactics may explain the delay in arriving at a final, judicially reviewable decision in some cases. The request may have raised knotty legal issues or serious questions of policy that required measured deliberation by the agency, or the requester may have opted to negotiate with the agency rather than force a showdown as soon as possible. Whatever the actual reasons in particular cases, instances of delay are open to the interpretation of deliberate evasion and invite procedures to minimize such a possibility, particularly when the Act specifies that requested records be made "promptly available."<sup>84</sup>

The proposed guidelines attempt to translate the prompt response requirement of the statute into a deadline that is generally workable for the agencies. At first, a seven-day deadline was considered. There was divided opinion among the agencies interviewed concerning the tightness of a seven-day deadline for the initial response to a request. The majority believed that it was too confining unless accompanied by a very broad escape clause. There was broader agreement on a ten-day deadline with a relatively easy escape clause. The proposed guidelines adopt this deadline for the initial response. (B-4) Some agency regulations have already adopted a ten-day guideline for either responding to or acknowledging a request.<sup>85</sup>

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<sup>82</sup>Nader, *supra* note 16, at 8.

<sup>83</sup>*Ibid.*

<sup>84</sup>5 U.S.C. § 552 (a)(3) (1964 ed. Supp. IV).

<sup>85</sup>E.g., Defense Supply Agency, 32 C.F.R. § 1260.6(b)(3) (1970).

The escape clauses specified in the guidelines attempt to include the substantial and justifiable reasons put forward by the agencies as recurring causes for delay. Once the agencies have been given adequate time to deal with these specified difficulties, ten working days should be enough to deal with an uncomplicated routine request. With such a deadline the requester may still have to wait about three weeks for a reply if mailing time is taken into account.

Turning to the escape clauses, one recurrent justification put forward for delay was that requests are frequently sent to an office that does not have the records in its charge. Any tight deadline would have to take this factor into account by tolling the period for response until such time as the request is received by the proper office. However, the tolling period should be limited. The office receiving the misdirected request should forward it to the proper office within ten days. At the same time it should also notify the requester of its action, something that can be done quickly by means of a standard form.

Once the proper office receives the request, it must act within ten days unless it reports to the requester that one of five specific reasons renders the deadline inapplicable. The first four reasons all relate to rather definite situations: 1) the physical location of records elsewhere; 2) a request for many records; 3) a categorical request and 4) a tracer search. When the agency invokes one of these reasons, it must also give some indication of when the records will be produced. Taken together, the specification of definite reasons for delay and the self-imposition of a new deadline should tend to limit the possibility of abuse, particularly where the first, second and fourth reasons are concerned; an unreasonably extended deadline should be more or less self-evident in these cases. In most cases the amount of time required to respond to a categorical request will depend on factors known only to persons familiar with the constitution of an agency's files. With regard to this escape clause, extended deadlines must be left primarily to the agency's responsible exercise of discretion.

The proposed guideline does enable requesters to utilize the appeal machinery within an agency to remedy improper delays connected with these first four reasons for extended deadlines. Where lower level officials impose unreasonable extensions or do not meet an applicable deadline including the initial one of ten days, the requester can petition the officer in charge of appeals to take corrective action immediately.<sup>36</sup> If the officer

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<sup>36</sup>Where lower level officials have not even acknowledged the request within the initial ten day deadline, the appeals officer can require that "appropriate steps" be taken. The "appropriate step" may be the sending of an acknowledgement and the self-imposition of an extended deadline where the request falls within one of the five groups which permit of this treatment.

fails to do so, the requester can seek judicial relief, a possibility discussed more fully below.

Delay caused by the necessity to evaluate the possibly exempt status of the records requested, the fifth and last reason for extending the ten-day period, could prove troublesome. There might be great temptation to protract unduly the consideration given to the matter of exemption, particularly in the case of an unwelcome request. The guidelines propose to deal with this situation by giving the requester the ability to accelerate the administrative process when he encounters this difficulty. If an agency fails to meet an extended deadline adopted to consider the matter of exemption the requester can petition the appeals officer to take appropriate action. The action must be taken within ten days. Failure to do so permits the requester to treat his request as denied and to file an appeal. (B-6-d). If the agency adopts an unreasonably extended deadline and the appeals officer does not remedy the situation upon petition by the requester, the latter can treat his request as denied and file an appeal after a reasonable period of time has elapsed from the time of his initial request. (B-6-d). Permitting the requester to challenge an extended deadline as unreasonable by filing an appeal is necessary in the first instance if he is to be able to take the initiative in moving the agency. The Department of Transportation's regulations similarly permit a requester to push for final action on the appeal level when the initial decision has been unreasonably delayed.<sup>67</sup>

The guideline does provide some sort of limit in the case of extended deadlines adopted to consider the matter of exemption. A ten day period is set as the usual limit. This should provide sufficient time for consultation with legal staff even where a close question is involved. A more extended deadline would permit the continuation of unnecessarily time-consuming procedures now followed by some agencies that refer all cases of initial denials involving any exercise of discretion to the highest level within the agency. This creates unnecessary delay since the requester will have to retrace the same route on appeal if an initial denial is forthcoming. Officials below the top rank should be able to make relatively prompt initial decisions in the great majority of cases, even when they exercise some discretion in deciding whether to assert an exemption. It is interesting to note that the first intra-agency appeal to the executive director of the Civil Aeronautics Board must be disposed of within seven working days after receipt,<sup>68</sup> yet this appears to be the first stage at which there is a significant exercise of discretion in deciding whether to assert a legal exemption.

<sup>67</sup>49 C.F.R. § 7.71 (b) (1970).

<sup>68</sup>14 C.F.R. § 310.9 (d) (1970).

The guidelines do recognize that there will be circumstances in which more time than two weeks will be needed to pass on difficult questions; but it expresses the presumption that this will not be the usual case. Where a requester challenges an extended deadline in excess of ten additional working days by filing an appeal after the passage of what he considers to be a reasonable time, the burden rests on the agency to come forward and specify "special circumstances" that warrant the additional delay. The kind of special circumstances contemplated would be exemplified by a categorical or similarly broad request that raises several difficult legal or policy questions. If the requester wishes to challenge the adequacy of the special circumstances advanced by the agency he could reassert his intention to stand by his appeal. If he does this and the agency does not take final action within the next twenty working days, he could bring suit in the federal district court under § 552(a)(3) to compel production of the record.<sup>89</sup> One of the defenses that the agency could raise would be the prematurity of the suit because the petitioner has not waited to exhaust his administrative remedies completely, and this would raise the issue of whether the extended deadline in excess of ten days was reasonable or not.

The above discussion suggests that agency regulations based on the proposed guideline might make judicial relief more accessible in cases of improper delay. Courts have in some cases required agencies to follow procedures set out in their own regulations even when they have not been mandated by statute or standards of constitutional due process.<sup>90</sup> Some have not only set aside agency action taken without observance of self-prescribed procedures, they have even issued orders in the nature of mandamus to compel compliance with them.<sup>91</sup> However, courts have on occasion refused to treat self-imposed time limitations as binding on agencies even when they have been formalized in regulations.<sup>92</sup>

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<sup>89</sup>As a practical matter an agency need only come up with an initial reply within the twenty day period to deter the requestor from filing suit at the end of it. If the reply should be a denial issuing from the officer in charge of the initial request rather than the officer in charge of appeals, the cautious requestor would reassert his appeal at this point to establish without question his exhaustion of administrative remedies.

<sup>90</sup>*Yellin v. United States*, 374 U.S. 109 (1963); *Vitaroli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Peters v. Hobby*, 349 U.S. 331 (1955); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

<sup>91</sup>*Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969). The Ninth Circuit has indicated in the recent case of *General Services Administration v. Benson*, 415 F.2d 878, 880 (1969) that it will hold an agency bound by its own substantive regulations implementing the Freedom of Information Act even when they may go beyond what the law requires. For discussion of this case see the text *infra* at notes 108-12.

<sup>92</sup>*M.G. Davis & Co. v. Cohen*, 369 F.2d 360, 363, (2d Cir. 1966). (Refusal by court to regard proceedings instituted after time limitation prescribed by agency regulation as in excess of agency's jurisdiction so as to warrant injunction that would terminate them prior to their completion.)

Nonetheless, one would expect the courts to enforce the time limitations adopted pursuant to the proposed guidelines, not simply because they would be embodied in formal regulations, but because they give precise form to rights implied by the Freedom of Information Act and other laws. Even if an agency did not adopt implementing regulations, a requester encountering unreasonable delay could obtain relief in the courts. The proposed guideline would not give rise to a remedy otherwise unavailable; it would do no more than make clearer, and perhaps accelerate, the time at which that relief might be sought.

The following statutes provide a basis for judicial relief to correct agency inaction on a request for records: 1) 5 U.S.C. § 552(a)(3) which provides that identifiable records will be made "promptly available" to any person and that federal district courts have jurisdiction "to order the production of any agency records improperly withheld from the "complainant"; 2) 28 U.S.C. § 1361 which authorizes federal suits in the nature of mandamus to compel government officials to perform a duty; 3) 5 U.S.C. § 555(b) which requires an agency "to conclude a matter" before it "within a reasonable time"; 4) 5 U.S.C. § 706(1) which authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed."

Since delay in coming to a decision results in a literal "withholding" of a record for the period of time necessary to make a decision, it can be argued that unnecessary delay results in a record being "improperly withheld" within the meaning of § 552(a)(3). This argument for judicial relief is reinforced by the statute's requirement of a prompt decision. Reliance on § 552(a)(3) alone, however, presents some difficulties. The word "withholding" can be interpreted to require an actual refusal to grant access to the record. Such a reading is most consistent with the legislative history of the Act as interpreted by the Attorney General's Memorandum, which finds in the House Report the implication that court review "is designed to follow final action at the agency head level."<sup>33</sup> However, unless a requester can obtain some kind of judicial relief where an agency refuses to make any decision, then all an agency need do to avoid judicial review entirely is to procrastinate interminably when presented with a distasteful request. It can be urged persuasively, then, that the right to obtain judicial relief in cases of delay is implied from the express judicial remedy provided in § 552(a)(3) in cases of denial.<sup>34</sup>

Even if § 552(a)(3) by itself does not afford a remedy in cases of delay, it can provide the basis for seeking relief in the nature of mandamus under 28 U.S.C. § 1361. This latter statute confers jurisdiction on federal

<sup>33</sup>*Att'y Gen. Memo.* at 296.

<sup>34</sup>*Environmental Defense Fund v. Ruckelshaus*, \_\_\_ F.2d \_\_\_ (D.C. Cir. 1970).

district courts to compel a federal agency to perform a duty owed the plaintiff. Section 552(a)(3) establishes a clear duty on government agencies to produce non-exempt records on request. For the most part the duty is ministerial. The only exercise of discretion that could ever arise in cases involving non-exempt records would come about in the determination of their non-exempt status. With regard to many requests, perhaps most, the non-exempt character of the records is so clear that mandamus seems particularly appropriate.<sup>55</sup> Even where a difficult question of interpreting an exemption arises, there is room for mandamus, at least to compel the agency to take expeditious action. By expressly requiring that the agency make records "promptly available," § 552(a)(3) establishes the duty that an agency handle a request for records without unreasonable, perhaps without unnecessary, delay.<sup>56</sup> A requester can enforce this duty even where difficult legal questions are involved. It is well settled that mandamus will lie not only to compel ministerial acts but also to compel the exercise of discretion; what it may not be used for is to determine or influence the exercise of that discretion.<sup>57</sup> In enforcing § 552(a)(3), mandamus can go beyond simply ordering the agency to make a prompt decision. It should be available to compel production of any non-exempt record, including one whose non-exempt status is not readily apparent. This point will be explored more fully below.

Another basis for a judicial remedy is found in 5 U.S.C. § 555(b) which carries forward in slightly different language the requirement originally found in § 6(a) of the Administrative Procedure Act that an agency act with "reasonable dispatch." The current formulation provides that "within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 706(1) affords a judicial remedy to enforce this provision in language identical to that used in the original formulation of § 10(e) of the Administrative Procedure Act: "The reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." In the leading case of *Deering Milliken v. Johnson*, 295 F.2d 856 (4th Cir. 1961) the court held that § 6(a) of the

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<sup>55</sup>*Skolnick v. Parsons*, 397 F.2d 523 (7th Cir. 1968). In this case the court took the position that a suit in the nature of mandamus brought pursuant to 28 U.S.C. § 1361 to enforce legal rights arising under 5 U.S.C. § 552(a)(3) stated a good cause of action.

<sup>56</sup>Congressional intent to create a legal right to have one's requests for records handled expeditiously is evidenced not only by the express requirements that records be made available "promptly" but also by the provision that suits brought to compel their production take precedence on the district court's docket. 5 U.S.C. § 552(a)(3) (1964 ed. Supp. IV).

<sup>57</sup>*National Anti-Vivisection Society v. F.C.C.*, 234 F. Supp. 696 (N.D. Ill. 1964); *Indiana & Michigan Elec. Co. v. F.P.C.*, 224 F. Supp. 166 (N.D. Ind. 1963).

Administrative Procedure Act gave rise to a legal right to have agencies act with "reasonable dispatch" and that this right could be enforced in an action seeking relief pursuant to § 10(c) of the Act. Writing for the court, Judge Haynsworth dealt with the problem presented by § 10(c) of the Administrative Procedure Act (now codified in 5 U.S.C. § 704), which states that "final agency action" is subject to judicial review. He found that "final agency action" in the usual sense of these words was not necessary where an agency had been considering a matter for an unreasonably long period of time. Since violation of § 6(a) gave rise to a "legal wrong," it was necessary to provide judicial relief even where an agency had not acted finally; otherwise the "legal wrong" suffered would not be subject to an adequate remedy.<sup>88</sup>

The petitioner in *Deering Milliken* was threatened with substantial injury because of the delay. Unfair labor practice proceedings had been in progress for more than four years when the petitioner brought suit to enjoin the NLRB from remanding the case to the trial examiner for a second time in order to reopen an issue already litigated. Not only would petitioner have incurred additional expense and inconvenience if the proceeding were to be drawn out any longer, the continuing uncertainty of outcome would have had a sharp dollars and cents impact because damages would have continued to accrue throughout the proceeding. It could be argued that absent such damage a party does not face the kind of "unreasonable delay" that warrants judicial intervention pursuant to § 706(1). This argument is not persuasive in a government records case. Although the requirement of irreparable harm might well be necessary where judicial intervention will tend to disrupt the orderly development of the administrative process in a matter within the special competence and jurisdiction of an administrative agency,<sup>89</sup> the production of agency records does not involve such disruption.

Taken by themselves §§ 555(b) and 706(1) of Title 5 would justify judicial relief when an unreasonably long period of time has elapsed. The proposed guideline might require an agency to act well before that time. But since the guideline is designed to translate the statutory requirement of prompt action into specific standards, it can be maintained that failure to observe these standards constitutes both "unreasonable" and "unlawful" delay. On this basis one may arguably maintain that relief can be sought pursuant to § 706(1) to compel adherence to the time limitations imposed by regulations.

In a suit to compel delayed agency action on a request it is conceivable,

<sup>88</sup>295 F.2d at 864-65.

<sup>89</sup>See generally, 3 Davis, *Administrative Law* § 20.06 (1958).

but not likely, that a court would limit its relief to an order requiring the agency to respond promptly to the request. With regard to other kinds of agency proceedings more integral to the administrative process, it would ordinarily be inappropriate for a court to remedy improper delay by an order influencing the outcome of the proceedings; the proper order would limit itself to expediting them.<sup>100</sup> Similar judicial restraint is not appropriate where the Freedom of Information Act is concerned. There is little reason to defer to administrative discretion where a request is made for non-exempt records. Although the question of whether a record is exempt under the Act may often raise difficult issues of statutory interpretation, these can be appropriately resolved by the courts without first referring them to the agency.

It is true that authority can be found for the proposition that a statute directing administrative action should be interpreted and applied by the agency in the first instance, particularly where the decision turns "on matters of doubtful or highly debatable inference from loose statutory terms,"<sup>101</sup> as would often be the case where the exemptions listed in the Freedom of Information Act are concerned. But the cases taking such a position involve the application of statutes relating to the agency's primary area of concern and competence; responsible participation by the agencies in the elaboration of these statutory norms is thought necessary for the proper development of the administrative scheme of regulation. This is not the case with regard to the statutory exemptions under the Freedom of Information Act which apply to all agencies more or less uniformly. Section 552(a)(3) on its face indicates that little weight is to be given to the agency's interpretation and application of the statutory exemptions. In an action to obtain records withheld by the agency the court is to determine the matter de novo "and the burden is on the agency to sustain its action." The language, purpose and history of the Act all indicate that Congress intended to place on the courts rather than the agencies primary responsibility for interpreting the scope of a citizen's right to obtain access to government records. This being so, the more relevant case authority is that which holds mandamus will even lie where the duty involved becomes clear only after the relevant statute has been construed.<sup>102</sup>

To summarize the above discussion concerning judicial remedies, it can be said that even without adoption of the proposed guidelines and implementing regulations a person whose request for records is completely

<sup>100</sup>M.G. Davis & Co. v. Cohen, 256 F. Supp. 128, 133 n.7 (S.D.N.Y. 1966).

<sup>101</sup>Panama Canal Co. v. Grace Lines, Inc. 356 U.S. 309, 317-18 (1958); R.E.A. v. Northern States Power Co., 373 F.2d 686, 695 n. 14 (8th Cir. 1967).

<sup>102</sup>Carey v. Local Bd. No. 2, 297 F. Supp. 352 (D. Conn. 1969).

ignored or sidetracked by agency inaction can now bring a successful suit to compel production. The guideline recommends regulations that set definite limits within which the agency must act, thereby clarifying the time at which resort can be had to the courts. The proposed deadlines might well have the effect of accelerating the time when judicial intervention can be sought. This possibility might give rise to the objection that a court may require an agency to act more quickly than the circumstances warrant. But this is an unlikely eventuality. If the agency makes a showing that it requires additional time to produce the requested records, the court will undoubtedly grant the agency a reasonable period to comply with its order.<sup>103</sup> Where the agency needs more time to evaluate the legal questions and policy considerations involved in deciding whether to assert a statutory exemption, it still has 60 days before the United States has to file an answer to the complaint.<sup>104</sup> More significantly, with regard to many requests the agency can easily obtain additional time prior to the filing of a complaint by taking appropriate steps when the requester complains to the appeals officer about improper delay.

In calling for a procedure that will enable a requester to seek relief from delay within the administrative agency itself, the guidelines permit an expeditious exhaustion of remedies within the agency. Most agencies do not presently have comparable procedural regulations. In their absence a requester complaining of improper delay might claim that he could resort to the courts without first seeking relief at the head level of the agency.<sup>105</sup> The chance that such an argument would prevail is not great. The courts will probably be disposed to give the agencies an opportunity to correct the improprieties of their operating staff, particularly since the requester can make an effort in this direction at slight cost and with little burden. Certainly an impatient requester would be ill advised to file suit charging improper delay without first petitioning the agency head or the appeals officer in charge of records for relief. The proposed guideline would clarify the need and means for thus exhausting administrative remedies.

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<sup>103</sup>Cf., *Kurio v. United States*, 281 F. Supp. 252 (S.D. Tex. 1968).

<sup>104</sup>*Martin v. Neuschel*, 396 F.2d 759 (3d Cir. 1968). The court held that the trial court could not enter judgment in the plaintiff's favor where the Government had not been given an opportunity to file an answer in accordance with Federal Rule 12 (a).

<sup>105</sup>In *Sunshine Publishing Co. v. Summerfield*, 184 F. Supp. 767 (D.D.C. 1960) the court rejected the argument that the plaintiff had failed to exhaust its administrative remedies where its application for second class mailing privileges had been held up for an unreasonably long time (15 mos.) by the Post Office. The court itself ruled on the application, taking the position that exhaustion was not necessary where the agency's procedure was either inadequate or unavailable.

## V. *Initial Denials of Requests*

### A. *Form of Denial*

The proposed guidelines (B-5-a) require an initial denial to be in writing and to include both a reference to the specific exemption invoked by the agency and a brief explanation of how the exemption applies to the record withheld. As originally formulated, this guideline also would have required each initial denial to include a brief written statement of why the exempt record was being withheld as a matter of agency discretion. The purpose of the original requirement was in large part to inform the requester of the basis for the agency's initial action so that he would have an opportunity to challenge it on appeal within the agency. Comments from a number of agencies suggested that this requirement placed an unnecessary burden on agencies in the many cases where a requester would not bother to appeal an initial denial. For this reason the guideline was amended to provide that an agency be required to specify its reasons for withholding initially only when asked to do so by the requester. However, in all cases of a final agency denial on appeal, the guidelines (B-6-c) require a written specification of the reasons for withholding the record. This requirement is discussed at greater length below.

The guideline would also require inclusion of a statement outlining the opportunity for appeal within the agency and subsequent review in the courts. Current regulations of some agencies require that the requester be informed of his right to an intra-agency appeal at the time of the initial denial.<sup>106</sup> Very little more of a burden is involved in requiring the agency to bring to the requester's attention the opportunity he has to bring a legal action eventually. Although there is a natural disinclination to invite litigation, the purpose of the Act suggests that every opportunity be used to insure that the individual citizen is aware of his legal rights.

### B. *Collection of Denials*

The guideline calling for centralized collection of initial denials is a form of internal control designed to achieve two ends: 1) stricter compliance with agency regulations and policies by operating staff; 2) uniformity in the assertion of exemptions at the initial denial stage. An incidental benefit derived from the practice will be the compiling of a readily available record of agency performance under the Freedom of Information Act. In a few interviews the objection was raised that the accumulation of the centralized file would be unduly burdensome. It is difficult to appreciate the merits of this objection, since the procedure will

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<sup>106</sup>E.g., Internal Revenue Service, 26 C.F.R. § 601.702 (8) (1970); Department of Defense, 32 C.F.R. § 601.703 (8) (1970).

only require the making of an additional carbon of the denial and the periodic transmittal of this to a centralized point. Some rather large departments already provide for such an agency-wide file of denials or for some equally centralized control over denials.<sup>107</sup>

## VI. Intra-Agency Appeals

### A. Single Level of Appeals

The guidelines (B-6-b) provide that there should be only one level of intra-agency appeal. A large number of agencies, including some of the large departments like Health, Education and Welfare, or Interior, provide for only one level of appeal from an initial denial. Other agencies provide for two levels of appeal from the initial denial. The second level of appeal can operate as a delaying strategy and this charge has been made.<sup>108</sup>

It is clear that one agency, the Civil Aeronautics Board, adopted two levels of appeal not as a delaying tactic but as a device to weed out frivolous requests.<sup>109</sup> The initial decision to deny a record is made at decentralized points within the CAB at the level of the office holding the record. This initial decision is made largely on the basis of established practice. The requester must appeal to the Executive Director for a decision to release a record of the kind regarded as exempt by the agency and traditionally withheld from the public. It is at this stage that discretion is first exercised in applying fixed policy to border-line cases. If a requester wishes to achieve a change in basic policy he must appeal to the Board itself. But a safeguard against delay is built into the regulations. The Executive Director must render a decision within seven working days after receiving the appeal.<sup>110</sup>

This appellate structure is designed to obviate unnecessary expenditure of time on a discretionary decision at the initial denial stage in cases where the requester would not have enough interest to file an appeal. The fact that so many agencies, including large ones, have only one level of appeal would indicate that this form of discouragement is not necessary. However, in a large agency the handling of requests may have to be

<sup>107</sup>General Services Administration, 41 C.F.R. § 105-60.403 (b) (1970) (agency-wide file); Department of Defense, 32 C.F.R. § 286a.6 (c) (1)-(7) (1970) (centralized control for the office of the Secretary).

<sup>108</sup>Nader, *A Status Report on the Responsiveness of Some Federal Agencies to the People's Right to Know about their Government*, statement released publicly on August 29, 1969, and reproduced in 115 Cong. Rec. H7400 (daily ed. September 3, 1969.)

<sup>109</sup>The reason given in the text for the adoption of two levels of appeals was provided in an interview with a CAB official.

<sup>110</sup>14 C.F.R. § 310.9 (d) (1970).

decentralized to such a degree that one cannot expect the exercise of discretion envisaged by the guidelines (B-4-e) at the initial reply stage. The ten-day extension for a reply provided by the guidelines can be used to refer the matter to a higher level for decision. Some agencies specifically provide that an initial denial based on a legal exemption must come from a higher administrative level than the office at which the request is made<sup>111</sup> or that knowledgeable legal personnel participate in the decision.<sup>112</sup> How the matter is handled internally is left up to each agency under the guideline as long as the requester has to deal with only one level of appeal.<sup>113</sup>

### B. Form of Final Denials

The proposed guidelines require a final denial to give written reasons for the discretionary withholding of exempt records. (B-6-c) They also require the denials to be collected in a file readily available to the public and indexed according to the exemptions asserted by the agency. A denial is agency action affecting the requester's legal rights under the Freedom of Information Act. In taking such action agency personnel should give sufficient consideration to the request to formulate and make available to the public its reasons for withholding specific records.

Some agency representatives who were interviewed questioned the advisability of having agencies bind themselves to giving reasons for the exercise of their discretion. They have suggested that such regulations invite judicial review of the agency's exercise of discretion. These critics assume that agency discretion in withholding exempt records is not subject to review. Although this assumption is warranted on a literal reading of the Act, it is not one that is universally accepted. At least one commentator assumes that the discretion is reviewable.<sup>114</sup> He points to the language in the Act requiring the agency "to sustain its action" in an enforcement proceeding. But the language introducing the exemption states that "this section [§ 552 in its entirety] does not apply" to exempt matters, implying that the judicial remedy set out in § 552(c) is not applicable to exempt records.

The legislative history is ambiguous on this point, although the Senate report has some language that might be stretched to imply judicial review

<sup>111</sup>E.g., Department of the Navy, 32 C.F.R. § 701.1 (j) (4)(ii) (1970).

<sup>112</sup>E.g., Department of the Army, 32 C.F.R. § 518.7 (a) (1970); Department of Housing and Urban Development, 24 C.F.R. § 15.52 (1970); Atomic Energy Commission, 10 C.F.R. § 910 (b), (c) (1970).

<sup>113</sup>It is possible that an agency might provide that lower level officials could grant requests raising no problems of confidentiality but denials could only come from higher level officials to whom questionable cases would be referred during the ten day extension.

<sup>114</sup>Nader, *supra* note 16, at 4.

of agency discretion. The report notes that the court review of a denial must be de novo in order to prevent it "from becoming meaningless judicial sanctioning of agency discretion."<sup>115</sup> Literally read, this language supports the conclusion that the court should review the agency's discretionary withholding of exempt records to see that clearly arbitrary decisions are not made. In context, the language may only be taking into account the fact that application of some of the broadly defined exemptions requires the exercise of judgment, as in the case of exemption five which relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency."<sup>116</sup> What the Senate report clearly has in mind is avoidance of judicial deference to agency determination of what is and what is not exempt under such a provision. If the Senate report meant to imply more than this, one would have expected it to be more explicit. The Attorney General's Memorandum adopts the more restricted interpretation of the scope of judicial review. It states: The "agency . . . has the burden to justify the withholding, which it can satisfy by showing that the record comes within one of the nine exemptions in subsection (e)."<sup>117</sup>

The decision in *General Services Administration v. Benson*, 415 F.2d 878 (9th Cir. 1969) might appear to point in the opposite direction since it advanced as an alternative holding the proposition that the defendant agency had the burden of showing a compelling reason for not producing even an exempt record. However, the court based this result on the General Services Administration's regulation that provides exemptions will not be asserted "unless there is a compelling reason to do so."<sup>118</sup> Absent such a regulation it is not at all clear that a court will review the exercise of an agency's discretion in invoking an exemption.

If the courts conclude that the exercise of discretion in withholding exempt records is generally unreviewable, an agency regulation calling for specification of the reasons for withholding such records need not have the consequence of subjecting the agency's discretionary action to judicial review, as occurred in the *Benson* case. It all depends on how the regulation is worded. The regulation may expressly provide that the decision to withhold is within the sole discretion of the agency,

<sup>115</sup>S. Rep. at 8.

<sup>116</sup>The fifth exemption raises some difficult problems of interpretation. See generally, Davis, *supra* n. 5, at 794-97. Even where courts have given this language a restricted reading, its application to the facts of a particular request requires an exercise of judgment. *E.g.*, Consumers Union v. Veterans Administration, 301 F. Supp. 796, 804-06 (S.D.N.Y. 1969).

<sup>117</sup>Att'y Gen. Memo. at 295.

<sup>118</sup>41 C.F.R. § 105-60.105-2 (1970).

notwithstanding the specification of reasons. In accord with the dominant purpose of the Freedom of Information Act<sup>119</sup> most agencies now expressly follow a policy of favoring disclosure of even exempt records.<sup>120</sup> Exemptions are only asserted where the reasons behind the exemptions, or similarly valid reasons, are served by non-disclosure. In most cases where this policy is embodied in regulations, the language used indicates that the agency means to retain sole discretion in dealing with exempt records.<sup>121</sup> A regulation clearly making this point would seem to run little risk of providing a basis for judicial review if it is finally determined that the Act itself does not call for it.

It might be suggested that agencies fully committed to the free information policy underlying the Act should be ready to submit their decisions to judicial scrutiny and should adopt regulations similar to that of the General Services Administration involved in the *Benson* case. Although such regulations are to be encouraged, the proposed guidelines do not recommend their uniform adoption. The various agencies face different problems in this area because of the wide diversity of their records. In some cases detailed justification of the assertion of an exemption in a lawsuit, as opposed to a general explanation to the requester, might compromise the confidentiality that should be accorded the records involved. It was thought more appropriate to have each agency decide this matter in light of its own particular problems.

Some deadline on appeals is necessary to give point to the elaborate deadlines at the initial request stage. The twenty working-day deadline proposed by the guidelines (B-6-b) amounts to about a full month. This period of time should be enough in even very difficult cases. It must be recalled that in a case involving any difficulty the agency can take at least an additional two weeks to decide at the initial refusal stage. In more complicated cases additional time can be taken at this point. The fruits of

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<sup>119</sup> *11'y Gen. Memo.* at 269.

<sup>120</sup> E.g. Office of Economic Opportunity, 43 C.F.R. § 1005.9 (b) (1970); Department of Defense, 32 C.F.R. § 286.4 (b) (1970).

<sup>121</sup> Compare OEO's regulation, which provides that "the office will invoke these exceptions (exemptions) as sparingly as possible, consistent with its obligation to administer the laws for which it is responsible fairly and effectively" (45 C.F.R. § 1005.9 (b)) and DOD's regulation, which provides that "information exempt from public disclosure . . . should be made available to the public . . . when component officials determine that no significant purpose would be served by withholding the information . . . (which determination) is within the sole discretion of the component" (32 C.F.R. § 286.4(b)) with the GSA's regulation, which provides that: "(A)uthority for nondisclosure will not be invoked unless there is a reason to do so. In the absence of such compelling reason, records and other information will be disclosed although otherwise subject to exemption." (41 C.F.R. § 105-60.105-2.).

the deliberations at this stage in framing and exploring the issue can be preserved for consideration on appeal. Therefore, even with a twenty-day deadline on appeal over two months of time can be devoted to a highly complicated case before final agency action will be taken. Finally, to cover novel and very complicated cases, the guidelines permit the agency to extend the deadline on the appeal for a reasonable period. But the agency must supply in writing the reasons necessitating such an extension.

As indicated above,<sup>122</sup> adoption of the proposed guidelines might accelerate judicial review. Where an agency does not take final action on an appeal within twenty days as required by its regulations, there is a good chance that a court may permit the requester to pursue his judicial remedy without further delay. The pressure felt by an agency because of this possibility will be salutary rather than detrimental in view of the total period of time available to it to consider the matter of an exemption.

#### VII. Fees

Regulations fixing fees for the production and copying of records vary widely from agency to agency, reflecting the wide discretion each one has in setting user charges. The primary source of agency authority to set user fees is found in 31 U.S.C. § 483(a) (1954 ed.) which provides:

It is the sense of Congress that any . . . service . . . document, report . . . or similar thing of value or utility . . . provided . . . by any Federal Agency . . . shall be self-sustaining to the full extent possible, and the head of each Federal Agency is authorized by regulations (which, in the case of agencies in the executive branch, shall be as uniform as practicable . . .) to prescribe therefore such fee . . . , if any, as he shall determine . . . 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, and any amount so determined . . . shall be collected and paid into the Treasury as miscellaneous receipts . . .

In *Aeronautical Radio, Inc. v. United States*, 335 F.2d 304 (7th Cir. 1964) the court upheld the statute, which was under attack as an unconstitutional delegation of authority because it expressly permits agencies to forego the charging of any fees and because the standards set out in it—i.e., cost to the government, value to the recipient and the public interest served—were too broad, diverse and conflicting. The court indicated that the wide discretion given agencies in this matter was necessary and appropriate in view of the diverse benefits and agencies covered.

<sup>122</sup>Supra text at notes 89 to 103.

The Attorney General's Memorandum stresses the language in the statute seeking to make such services self-sustaining and recommends charges based on total costs.<sup>123</sup> To support this position it also quotes from Bureau of the Budget Circular No. A-25, September 23, 1959, which provides that if "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 cover the full cost to the Federal Government of rendering that service." However, it is questionable whether production or copying of government records falls within the category of a "special benefit" as contemplated by the Circular, which sets forth three general illustrations of a special benefit: 1) services that enable the beneficiary to obtain more immediate or substantial gains or values than the general public, as with patents or business licenses; 2) services that provide business stability or assure public confidence in the business activity of the beneficiary, as with safety inspections of crafts; or 3) services performed at the request of the recipients above and beyond the services regularly received by others of the same group, as with passports or airmen's certificates.

The Circular goes on to contrast "special benefits" with services "primarily considered as benefitting broadly the general public," where the "ultimate beneficiaries . . . are obscure," as with the licensing of new biological products. These latter services should be rendered free of charge. Some requests for records fall more readily within this general benefit category than the special benefit one. For instance, records provided to a newspaper reporter or an author concerning a matter of wide interest ultimately benefit the general public.

A highly refined user fee policy would discriminate among requests on the basis of their intended use. Persons requesting records for private commercial gain would be charged the full direct and indirect costs; persons requesting records to inform the public about matters of general concern would be charged nothing. However, an attempt to apply such a policy faithfully in all cases would probably be unworkable administratively and hardly likely to lead to uniform practice within an agency, much less among agencies. Circular No. A-25 does suggest a limited number of distinctions that ultimately relate to use, but they are based primarily on the character of the user. Thus it recognizes the propriety of waiving fees in the case of groups engaged in nonprofit activities for the public safety, health and welfare. Except for such special cases of waiver it would be more feasible as a matter of administration

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<sup>123</sup>Att'y Gen. Memo. at 293-94.

and more desirable as a matter of policy to have all other fees set uniformly.

It is also desirable as a matter of policy to achieve uniformity between the fees set by the various agencies. The statute itself calls for as much uniformity among the agencies as is practicable, and Bureau of the Budget Circular No. A-25, setting forth general policies relating to user charges, reiterates this theme. Uniformity with regard to fees for disseminating government held information is particularly desirable since differences among agencies may reflect differing valuations of the public interest served by this function. The Freedom of Information Act implies that a high, uniform value should be given to this interest by all agencies.

Even if the agencies were to adhere to the Attorney General's recommendation of recovering full costs, the charges should be as uniform as possible. In many cases one expects that the process of retrieving and reproducing documents will be more or less standardized. However, there may be some variations in costs from agency to agency because of different methods of filing and storing documents. An even greater reason for variations in costs could be the differing salary levels of the employees engaged in searching. These costs might not only vary from agency to agency but might even vary within an agency for different kinds of records.

Because of these complexities, it may not be feasible to establish uniform fees for all agencies with regard to the various aspects of record production and duplication. For this reason, the proposed guidelines, instead of calling for uniform fees, call for the establishment of uniform criteria to be used in establishing fees. The matter is to be studied and the criteria are to be formulated by a committee composed of representatives from the Office of Management and the Budget, the Department of Justice and the General Services Administration. The guidelines go on to direct the committee to recommend adoption of uniform fees and policies "where feasible."

Examination of existing fee schedules reveals the need for at least uniform criteria. The present fee schedules show wide variations that cannot possibly be explained on the ground of differing labor or other costs. With regard to copying charges, they range from ten cents per page or less in some agencies<sup>124</sup> to forty<sup>125</sup> and even fifty cents<sup>126</sup> per page in others, with twenty-five cents the most popular charge.<sup>127</sup> Some agencies

<sup>124</sup>E.g., Office of Economic Opportunity, 45 C.F.R. § 1005.13 (1970); Securities and Exchange Commission, 17 C.F.R. § 200.80e (b)(1) (1970).

<sup>125</sup>Department of State, 22 C.F.R. § 6.8 (a) (3) (1970).

<sup>126</sup>Department of Transportation, 49 C.F.R. § 7.85 (b)(1) (1970).

<sup>127</sup>E.g., The Renegotiation Board, 32 C.F.R. § 1480.1 (1970); Equal Employment

have a special charge for the first page copied that goes up to \$1.00 per page.<sup>128</sup> There is just as great a variation among the agencies with regard to the scheduled fees for time spent on searching for documents, running from a low of \$2.50 per hour in the case of the Veterans Administration<sup>129</sup> up to \$8.00 per hour in the Post Office,<sup>130</sup> with the hourly charges of \$3.50<sup>131</sup> and \$5.00 showing about equal popularity.<sup>132</sup> The Department of Transportation has a uniform search charge for each record of \$3.00.<sup>133</sup>

In light of these variations there can be no doubt that the agencies differ in the extent to which they include indirect costs in their fees. Those agencies charging ten cents or less per page for the copying of documents are not recovering much more than direct costs, while the others are recovering in varying degrees such indirect costs as a proportionate allocation of rent, management and supervisory costs, maintenance, operation and depreciation of buildings and equipment, as well as for such personnel costs as retirement credits and employee insurance. Bureau of the Budget Circular No. A-25 suggests that indirect costs such as these be taken into account when a special benefit is involved. In the case of agencies with the highest fees it appears that some even take into account such elements as the average time that a secretary may have to wait in line at the duplicating machine.<sup>134</sup>

A policy of discouraging "frivolous requests" explains why some agencies favor a broad inclusion of indirect costs. The Attorney General's Memorandum suggests that such discouragement is an appropriate consideration in setting fees,<sup>135</sup> but neither the language of the Act nor its legislative history supports such a policy; if anything, they reflect a contrary spirit.

The published schedules do not reveal the full extent of the variation in fees actually charged by different agencies because of widespread

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Opportunity Commission, 29 C.F.R. § 1610.17 (a), (3) (1970); Atomic Energy Commission, 10 C.F.R. § 9.9 (b)(1) (1970); Economic Development Administration, 13 C.F.R. § 301.63(e) (iii) (a) (1970); Department of Labor, 29 C.F.R. § 70.6 (b) (1970); Internal Revenue Service, 26 C.F.R. § 601.702 (c)(5) (1970).

<sup>128</sup>E.g., Renegotiation Board, 32 C.F.R. 1480.12 (1969).

<sup>129</sup>38 C.F.R. § 1.526 (i)(2) (1970).

<sup>130</sup>39 C.F.R. § 113.5 (a)(2) (1970).

<sup>131</sup>E.g., Internal Revenue Service, 26 C.F.R. § 601.702 (c)(5) (1970); Department of State, 22 C.F.R. § 6.8 (a)(1) (1970).

<sup>132</sup>Department of Commerce, 15 C.F.R. § 4.8(b)(2) (1970); Department of Housing and Urban Development, 24 C.F.R. § 5.4(a)(2) (1970).

<sup>133</sup>49 C.F.R. § 7.85 (a) (1970).

<sup>134</sup>The officer who had set the fee in a particular agency indicated in an interview that he had taken secretarial time spent in waiting at the duplicating machine into account in setting the fee.

<sup>135</sup>*Att'y Gen. Memo.* at 294-95.

departure from them in practice. The interviews revealed that some agencies will provide free of charge copies of as many as twenty or thirty pages of documents, and perhaps more. Some make no charge for searches unless they run more than a few hours. There are two reasons for these departures from the published schedules. First, the agencies do not immediately benefit from the collections, which must go into the Treasury's general fund as miscellaneous receipts. As a result, the processing and collecting of fees only adds to the real costs incurred by the agencies without a directly compensating benefit. Some agencies, therefore, do not feel compelled to recover the costs incurred by the Government except in those cases where the requests make a substantial claim on agency time. Second, some agencies are disposed to make information as freely available as possible. A few have written this policy into their regulations by providing that, to the extent practicable, no charges will be made for locating or copying records.<sup>136</sup> Many others have adopted this policy in practice despite apparently contrary regulations.

The proposed guidelines also indicate some of the policy considerations that should guide the proposed committee in setting uniform criteria for fees generally and, where feasible, uniform specific fees and policies. These policy considerations can be inferred from the proposals in the guidelines calling for uniformity with regard to copying fees and for the absence of a fee for a routine search or for limited screening out of exempt records and material.

These proposals indicate that all agencies should depart from setting fees on the basis of a full cost policy with regard to most document requests. It recognizes that production of most kinds of government documents confers in many cases the general benefit of informing the public. Therefore, a uniform fee for producing and copying such documents should not be based on a full cost policy. A good case can be made for the recovery of only direct costs. Most of the indirect costs attributable to the production and copying of records would be incurred by the agencies even without the passage of the Freedom of Information Act. This is certainly true of the building depreciation and maintenance charges that are proportionally allocated to the production of records by some agencies. It could be true even of some of the direct fixed costs, such as the rental or depreciation charges for the duplicating equipment itself. It is likely that some agencies would have to purchase this equipment for

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<sup>136</sup>Office of Economic Opportunity, 45 C.F.R. § 1005.13 (1970). The Department of Housing and Urban Development does not charge for the first full hour of search time spent on a request. 24 C.F.R. § 15.14 (a)(1) (1970). The Securities and Exchange Commission does not charge for the first one-half hour of search time spent on a request. 17 C.F.R. § 200.80e (a) (1970).

their internal needs, and the copying or records for the public only has increased the rate of usage of the equipment. Because of this possibility, it would be difficult to come up with a direct cost attributable to the copying of records for the public if that cost were to be limited only to what is marginally incurred in duplicating records for the general public.

*Copying Fees.* In recognition of these policy considerations, where the copying of ordinary documents is concerned the guidelines turn away from average direct costs incurred by the agencies to the market place for a standard norm. The guidelines would have all agencies charge the going commercial rate for copying ordinary documents. The average commercial charge, of course, covers not only overhead costs like depreciation of duplicating equipment but also includes a profit factor. Consequently, one expects that this fee should cover at least the direct labor and material costs involved in copying documents. It may not be enough, however, to cover the fixed direct costs involved in copying documents or all direct handling costs related to such copying because the agencies are not primarily geared to the business of duplicating documents for the public as are private profit-making firms. Even though the going market rate may not cover all direct costs of copying, it is still appropriate to adopt it as the norm. The public interest served in making copies of government records available at no greater charge than in the case of private papers justifies a fee that covers less than all direct fixed and variable costs. Use of the going commercial rate for copying fees would allow agencies to contract out the duplication of requested records to private firms, as long as the fees charged were in line with the going rate. Several agencies utilize the contracting out procedure, but in some cases the fees charged are clearly excessive when measured against the proposed guidelines.<sup>137</sup> The FPC contracts out, but the fees charged are in line with the proposed guidelines.<sup>138</sup> A charge of seven cents is made for each page reproduced. There also is a minimum charge of one dollar for each order. Such a reasonable minimum charge would appear to be in order where work is subcontracted out.

*Searching Fees.* The guidelines recommend that all agencies not charge a fee in the case of a routine search for a specific document. This recommendation is based on existing practice. Some agencies by regulation omit a charge for initial search time. This period varies from fifteen minutes<sup>139</sup> to one hour<sup>140</sup> according to published schedules.

<sup>137</sup>In some cases the fee is twenty-five cents for each page copied.

<sup>138</sup>A fee of seven cents per page is charged for copying, with a minimum charge of \$1.00 for each order.

<sup>139</sup>Department of Justice, 28 C.F.R. § 16.4(b) (1970); however, a \$3.00 application fee is charged.

<sup>140</sup>Department of Housing and Urban Development, 24 C.F.R. § 15.14 (a)(1) (1970).

Variations in actual practice range more widely than this. It seems appropriate that some part of the search time be subsidized by the taxpayer in order to implement a free and open information policy. The guideline does not specify any number of minutes. It refers to "routine searches," for which there should be no charge. Search fees are limited to cases where the circumstances indicate that a substantial amount of time will be involved, as when the request asks for a number of documents.

The agencies also vary among themselves with regard to computing the time charge; some charge by the hour while others charge by a fraction thereof. Computation by the hour can result in a larger fee in some cases. Here again there can and should be uniformity among the agencies.

*Screening Out Exempt Documents.* One cost that is incurred by the agencies arises where competent staff must screen documents to determine whether they are exempt, and if so, whether they should nonetheless be disclosed. As a theoretical matter it would seem that these costs should be borne entirely by the agency in all cases. Certainly the requester is not deriving any benefit, special or otherwise, from this screening. Presumably the general public interest is being served when the exemptions are asserted and the agency time spent on these matters should be viewed as a public service. For this reason the guideline provides that in a routine case no charge shall be made for the time spent screening documents to protect exempt information.

However, where the screening process would be very burdensome, as in the case of very broad categorical requests, it would be appropriate to negotiate with the requester a fee to cover these costs. Such a charge would be particularly appropriate where the requester is seeking the records primarily for his own use and benefit. Where the intended use of the records would relate to the general public interest, there would be good reason not to charge for the screening out of exempt records. The proposed guidelines would permit the agencies in their discretion to omit charges for screening out in these cases.

## APPENDIX A

RECOMMENDATION 24: Principles and Guidelines for  
Implementation of the Freedom of Information Act

Adopted by the Administrative Conference of the United States  
May 8, 1971

The Freedom of Information Act, 5 U.S.C. § 552, expresses important policies with respect to the availability to the public of records of Federal agencies. To achieve free access to and prompt production of identifiable government records in accordance with the terms and policies of the Act, each agency\* should conform to the statutory policy encouraging disclosure, adopt procedural regulations for the expeditious handling of information requests, and review the fees charged for providing information.

## RECOMMENDATION

A. *General Principles*

Agencies should conform to the following principles in handling requests for information:

1. Each agency should resolve questions under the Freedom of Information Act with a view to providing the utmost information. The exemptions authorizing non-disclosure should be interpreted restrictively.

2. Each agency should make certain that its rules provide the fullest assistance to inquirers, including information relating to where requests may be filed. It should provide the most timely possible action on requests for information.

3. When requested information is partially exempt from disclosure the agency should, to the fullest extent possible, supply that portion of the information which is not exempt.

4. If it is necessary for an agency to deny a request, the denial should be promptly made and the agency should specify the reason for the denial. Procedures for review of denials within the agency should be specified and any such review should be promptly made.

5. Fees for the provision of information should be held to the minimum consistent with the reimbursement of the cost of providing the information. Provision should be made for waiver of fees when this is in the public interest.

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\* The term agency as used herein denotes an agency, executive department, or a separate administration or bureau within a department which has adopted its own administrative structure for holding requests for records.

**B. *Guidelines for Handling of Information Request***

Each agency should adopt procedural rules to effectuate the principles stated in Part A. To assist in this task the following guidelines are set forth as a model of the kinds of procedures that are appropriate and would accomplish this purpose.

**1. *Agency assistance in making request for records.***

Each agency should publish a directory designating names or titles and addresses of the particular officer and employees in its Washington office and in its various regional and field offices to whom requests for information and records should be sent. Appropriate means should be used to make the directory available to members of the public who would be interested in requesting information or records.

Each agency should direct one or more members of its staff to take primary responsibility for assisting the public in framing requests for identifiable records containing the information that they seek. The names or titles and addresses of these staff members should be included in the public directory referred to above.

**2. *Form of request.*****a. *No standard form.***

No agency should require the use of standard forms for making requests. Any written request that identifies a record sufficiently for the purpose of finding it should be acceptable. A standard form may be offered as an optional aid.

**b. *Categorical requests.***

i. Requests calling for all records falling within a reasonably specific category should be regarded as conforming to the statutory requirement of "identifiable records" if the agency would be reasonably able to determine which particular records come within the request and to search for and collect them without unduly burdening or interfering with agency operations because of the staff time consumed or the resulting disruption of files.

ii. If any agency responds to a categorical request by stating that compliance would unduly burden or interfere with its operations, it should do so in writing, specifying the reasons why and the extent to which compliance would burden or interfere with agency operations. In the case of such a response the agency should extend to the requester an opportunity to confer with it in an attempt to reduce the request to

manageable proportions by reformulation and by outlining an orderly procedure for the production of documents.

### 3. *Partial disclosure of exempt records and files.*

Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information.

### 4. *Time for reply to request.*

Every agency should either comply with or deny a request for records within ten working days of its receipt unless additional time is required for one of 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 additional time is required for one of the above reasons, the agency should acknowledge the request in writing within the ten-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

The ten-day time period specified above should begin to run on the day that the request is received at that office of the agency having charge of the records. When a request is received at an office not having charge of the records, it should promptly forward the request to the proper office and notify the requester of the action taken.

If an agency does not reply to or acknowledge a request within the ten-day period, the requester may petition the officer handling appeals from denials of records for appropriate action on the request. If an agency does not act on a request within an extended deadline adopted for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request without

additional delay. If an agency adopts an unreasonably long extended deadline for one of the reasons set forth above, the requester may petition the officer handling appeals from denials of records for action on the request within a reasonable period of time from acknowledgement.

An extended deadline adopted for one of the reasons set forth above would be considered reasonable in all cases if it does not exceed ten additional working days. An agency may adopt an extended deadline in excess of the ten additional working days (i.e. a deadline in excess of twenty working days from the time of initial receipt of the request) where special circumstances would reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

#### 5. *Initial denials of requests.*

##### a. *Form of denial.*

A reply denying a written request for a record should be in writing and should include:

i. A reference to the specific exemption under the Freedom of Information Act authorizing the withholding of the record and a brief explanation of how the exemption applies to the record withheld.

ii. An outline of the appeal procedure within the agency and of the ultimate availability of judicial review in either the district in which the requester resides or has a principal place of business, or in which the agency records are situated.

If the requester indicates to the agency that he wishes to have a brief written statement of the reasons why the exempt record is being withheld as a matter of discretion where neither a statute nor an executive order requires denial, he will be given such a statement.

##### b. *Collection of denials.*

A copy of all denial letters and all written statements explaining why exempt records have been withheld should be collected in a single central-office file.

##### c. *Denials; protection of privacy.*

Where the identity of a requester, or other identifying details relating to a request, would constitute an unwarranted invasion of personal privacy if made generally available, as in the case of a request to examine one's own medical files, the agency should delete identifying details from copies of the request and written responses to it that are made available to requesting members of the public.

## 6. *Intra-agency appeals.*

### a. *Designation of officer for appeals.*

Each agency should publicly designate an officer to whom a requester can take an appeal from a denial of records.

### b. *Time for action on appeals.*

There should be only one level of intra-agency appeal. Final action should be taken within twenty working days from the time of filing the appeal. Where novel and very complicated questions have been raised, the agency may extend the time for final action for a reasonable period beyond twenty working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response will be forthcoming.

### c. *Action on appeals.*

The grant or denial of an appeal should be in writing and set forth the exemption relied on, how it applies to the record withheld, and the reasons for asserting it. Copies of both grants and denials on appeal should be collected in one file open to the public and should be indexed according to the exemptions asserted and, to the extent feasible, according to the type of records requested.

### d. *Necessity for prompt action on petitions complaining of delay.*

Where a petition to an appeals officer complaining of an agency's failure to respond to a request or to meet an extended deadline for responding to a request does not elicit an appropriate response within ten days, the requester may treat his request as denied and file an appeal. Where a petition to an appeals officer complaining of the agency's imposition of an unreasonably long deadline to consider assertion of an exemption does not bring about a properly revised deadline, the requester may treat his request as denied after a reasonable period of time has elapsed from his initial request and he may then file an appeal.

## C. *Fees for the Provision of Information*

Each agency should establish a fair and equitable fee schedule relating to the provision of information. To assist the agencies in this endeavor, a committee composed of representatives from the Office of Management and Budget, the Department of Justice and the General Services Administration, should establish uniform criteria for determining a fair and equitable fee schedule relating to requests for records that would take into account, pursuant to 31 U.S.C. § 483a (1964), the costs incurred by

the agency, the value received by the requester and the public interest in making the information freely and generally available. The Committee should also review agency fees to determine if they comply with the enunciated criteria. These criteria might include the following:

1. *Fees for copying documents.* In view of the public interest in making government information freely available, the fee charged for reproducing documents in written, typewritten, printed or other form that permits copying by duplicating processes, should be uniform and not exceed the going commercial rate, even where such a charge would not cover all costs incurred by particular agencies.

2. *No fee for routine search.* In view of the public interest in making government held information freely available, no charge should be made for the search time and other incidental costs involved in the routine handling of a request for a specific document.

3. *No fee for screening out exempt records.* As a rule, no charge should be made for the time involved in examining and evaluating records for the purpose of determining whether they are exempt from disclosure under the Freedom of Information Act and should be withheld as a matter of sound policy. Where a broad request requires qualified agency personnel to devote a substantial amount of time to screening out exempt records and considering whether they should be made available, the agency in its discretion may include in its fee a charge for the time so consumed. An important factor in exercising this discretion and determining the fee should be whether the intended use of the requested records will be of general public interest and benefit or whether it will be of primary value to the requester.

## THE GAMES BUREAUCRATS PLAY: HIDE AND SEEK UNDER THE FREEDOM OF INFORMATION ACT\*

JOAN M. KATZ\*\*

*The purpose of the Federal Freedom of Information Act is to permit private citizens access to government files, access that the Act's legislative history indicates was intended to be quite broad. The Act provides that information is to be available unless covered by specific exemptions. Mrs. Katz notes that the broad interpretations placed on the Act's exemptions by federal agencies have virtually rendered the Act a nullity. She argues that courts should reject attempts to constrict public access to government files and should instead read the exemptions in light of the purpose of the Act: to make the inner workings of the Government more visible to the private citizen.*

The Freedom of Information Act<sup>1</sup> was passed to "pierce the paper curtain of bureaucracy" that shields federal government operations from public view.<sup>2</sup> Under its predecessor, the 1946 Administrative Procedure Act,<sup>3</sup> only persons "properly and directly concerned" could obtain access to agency records. Documents could be withheld from even this restricted group "in the public interest," or whenever "good cause [for confidentiality]" was shown. There was no provision for judicial review of agency refusals to disclose information.

Some who urged the adoption of new legislation simply believed that unclassified information should be available to private persons. Others, like Ralph Nader,<sup>4</sup> also sought an instrument to expose some of the internal workings of government agencies. The preliminary result desired of the Act was increased openness and greater honesty in the administrative process; the ultimate goal sought was substantial administrative reform, achieved in part through heightened public awareness of administrative deficiencies.

After three years of operation, the Freedom of Information Act

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<sup>1</sup> 5 U.S.C. § 552 (Supp. V, 1970).

<sup>2</sup> 112 CONG. REC. 13,647 (1966) (remarks of Congressman Laird).

<sup>3</sup> Ch. 324, § 3, 60 Stat. 238.

<sup>4</sup> Mr. Nader's views were obtained in private conversations with the author.

has not fulfilled its advocates' most modest aspirations. Assuredly, the Act provides for "any person[s]" right to obtain information and, in the event of a denial, to seek judicial redress.<sup>5</sup> Furthermore, the 1946 "public interest" and "good cause" phraseology has been eliminated, and the Act emphasizes that only information that it *specifically* exempts may be withheld.<sup>6</sup> Unfortunately, however, the nine purportedly "specific" exemptions are generally confusing and ambiguous.<sup>7</sup> The agencies have been able to convert these congressional limitations into administrative loopholes through which federal officials escape with records intact. By concealing their records, bureaucrats maintain their aura of governmental inviolability and shield the incompetence and corruption which often exist in administrative agencies.<sup>8</sup>

In this article, three of the exemptions frequently invoked by administrators will be discussed in detail. Legislative history and court decisions will be considered that reveal the agencies' tendency to assert the broadest possible view of the Act's exemptions. The same sources, however, buttressed by statutory language and common sense, will be presented as authority for the narrow interpretations placed on the exemptions by Freedom of Information Act supporters. The supporters' reasoning will evince a "functional" bent, an approach to the Act that tolerates only rational and necessary limitations on the overriding principle of access to government information. This approach will be advanced by the author as one with the potential for tightening many of the loopholes presently riddling the Act.

### I. CONFIDENTIAL INFORMATION

The fourth exemption states: "This section does not apply to matters that are . . . (4) trade secrets and commercial or financial in-

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<sup>5</sup> [E]ach agency, on request for identifiable records made in accordance with published rules . . . 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.

<sup>5</sup> U.S.C. § 552(a)(3) (Supp. V, 1970).

<sup>6</sup> "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c) (Supp. V, 1970).

<sup>7</sup> See 5 U.S.C. § 552(b)(1)-(9) (Supp. V, 1970).

<sup>8</sup> For more detailed introductory comparisons between the old and new legislation see Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967); Note, *The Freedom of Information Act: A Critical Review*, 38 GEO. WASH. L. REV. 150, 150-53 (1969).

formation obtained from a person and privileged or confidential."<sup>9</sup> Three of the ambiguities that abound in this exemption will be taken up in this discussion. The basic problem is to define, in substantive terms, the kind of information intended to be protected from disclosure by the phrase "privileged or confidential." A second issue concerns the designation of an appropriate, essentially procedural, test to determine whether particular agency records contain information recognized as privileged or confidential. A final question involves the exemption's coverage of documents prepared entirely from sources within the bureaucratic structure.

#### A. "Privileged or Confidential" Information

Different grammatical constructions of the fourth exemption have been offered to justify widely divergent views of the records covered. Under one reading, three classes of protected material are isolated—(1) trade secrets; (2) commercial or financial information; and (3) privileged or confidential information. Under an opposing analysis, only two classes are perceived—(1) trade secrets and (2) commercial or financial information which is privileged or confidential.<sup>10</sup> The conflict between these two views reduces to this question: Does the exemption cover only such commercial and financial information as is confidential or privileged, or does the provision extend on the one hand to commercial and financial information and on the other to any confidential or privileged matter?

If the latter interpretation is accepted, a loophole of cavernous dimensions is created. Business matter not otherwise entitled to secrecy is granted immunity, and the term "confidential information" is made available for any material administrators cannot shelter under one of the other exemptions. This interpretation, with its extreme consequences, has been rejected in two of the four judicial pronouncements on the subject.

In *Consumers Union of United States, Incorporated v. Veterans Administration*,<sup>11</sup> the court held the fourth exemption inapplicable to comparative ratings of hearing aids compiled by the Veterans Administration. The judge said, "The plain language of [exemption (4)] exempts only (1) trade secrets and (2) information which is (a) com-

<sup>9</sup> 5 U.S.C. § 552(b)(4) (Supp. V, 1970).

<sup>10</sup> Davis, *supra* note 8, at 787-89. Professor Davis raised the possibility of two additional grammatical constructions, which he recognizes as too implausible to be significant.

<sup>11</sup> 301 F. Supp. 796 (S.D.N.Y. 1969).

mercial or financial, (b) obtained from a person, and (c) privileged or confidential . . . ."<sup>12</sup> In the District of Columbia, the court of appeals remanded a case to the district court to determine whether commercial information held by the Renegotiation Board was submitted to the Board in confidence.<sup>13</sup> By its remand action, the court implicitly held that "confidential commercial or financial information" is exempt under the Act, but information that is merely "commercial" or merely "confidential" is not exempt.

*Barceloneta Shoe Corporation v. Compton*<sup>14</sup> is the only decision with a written opinion that purports to exempt "confidential" information without regard to its commercial or financial character. The court in *Barceloneta* held that statements of NLRB witnesses need not be disclosed until the witnesses had testified at a hearing. While the fourth exemption was alluded to as protecting "information of a confidential nature," the holding was first and most elaborately based on the seventh exemption and on an analogy with the Jencks Act.<sup>15</sup> The court observed, moreover, that it had had insufficient time to study fully the novel issues raised by the case. In *The Tobacco Institute v. Federal Trade Commission*,<sup>16</sup> the plaintiff was granted disclosure of the names and responses of persons who had completed an FTC questionnaire concerning smoking and health. The court, however, excepted the information submitted by persons who had originally requested confidential treatment despite the absence of any commercial or financial information.

While very little material was actually withheld in *The Tobacco Institute* case, legislative history does raise the potential for similar judicial interpretations in the future. First, and most obviously, it may be urged that had Congress so intended it could have written "commercial or financial information which is obtained from a person and which is privileged or confidential." But this argument may be turned upon itself. In order to read "privileged and confidential" without regard to "commercial and financial," the exemption would have to provide for "privileged or confidential information." Dang-

<sup>12</sup> *Id.* at 802 (emphasis added).

<sup>13</sup> *Grumman Aircraft Eng'r Corp. v. Renegotiation Bd.*, 425 F.2d 578 (D.C. Cir. 1970). See also *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970), in which the same court, citing *Grumman*, remanded another case to the district court for further evaluation of the "confidentiality" of the apparently commercial documents in question. The court stated only that "the exemption [should be] strictly construed in light of the legislative intent." 424 F.2d at 938.

<sup>14</sup> 271 F. Supp. 591 (D.P.R. 1967).

<sup>15</sup> 18 U.S.C. § 3500 (1964).

<sup>16</sup> Civil No. 3035-67 (D.D.C., Apr. 11, 1968) (no written opinion).

ling modifiers are more abhorrent to good grammar and common sense than absent pronouns and intransitive verbs.

Another argument derives from the House and Senate reports on the bills ultimately enacted into law.<sup>17</sup> The House Committee on Government Operations stated:

The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor-management mediations. It would include information customarily *subject to the doctor-patient, lawyer-client, or lender-borrower privileges* such as technical or financial data submitted by an applicant to a government lending or loan guarantee agency. *It would also include information which is given to an agency in confidence, since a citizen must be able to confide in its government.*<sup>18</sup>

Since the privileges between a doctor and his patient bear no relation to commercial or financial matters, the Committee appears to have recognized the existence of a self-contained category of exempt "confidential or privileged" information. Professor Kenneth Culp Davis,<sup>19</sup> however, is not convinced. He suggests that slight credence should be given this portion of the House Report, because much of its language is taken from previous reports explaining earlier versions of the Freedom of Information Act bill that did not include the words "commercial or financial." Senate Bill 1666,<sup>20</sup> for example, one of the predecessors of the bill finally enacted into law, was described in 1964 in terms almost identical to the quotation above. It exempted "trade secrets and other information obtained from the public and customarily privileged or confidential."<sup>21</sup> Under these circumstances, the final (1966) House Report<sup>22</sup> is arguably

[an unsatisfactory] basis for finding the meaning of the enacted version that did include [the words "commercial or financial"].

The problem here is to determine what the intent was. Committee reports not addressed to the enacted version of

17 H.R. REP. NO. 1497, 89th Cong., 2d Sess. (1966) (reporting H.R. 5012); S. REP. NO. 813, 89th Cong., 1st Sess. (1965) (reporting S. 1160). Professor Davis considers that these two committee reports contain ninety-five percent of the significant legislative history on the Act. Davis, *supra* note 7, at 762.

18 H.R. REP. NO. 1497, *supra* note 17, at 10 (emphasis added); S. REP. NO. 813, *supra* note 17, at 9, contains similar language.

19 See Davis, note 8 *supra*.

20 S. 1666, 88th Cong., 2d Sess. (1964).

21 S. REP. NO. 1219, 88th Cong., 2d Sess. 6 (1964).

22 H.R. REP. NO. 1497, *supra* note 17.

the bill do not show the intent of Congress in enacting the statute.<sup>23</sup>

It is conceivable that the authors of the 1966 Report were aware of the discrepancies between the language of the earlier report and the terms of the bill they were endorsing, and found the old language apposite to the meaning they sought to infuse into the bill. It seems more realistic to assume, however, as Professor Davis does, that the earlier description was incorporated with no thought for its applicability to the legislation's new terms.

In any event, the Davis position is reinforced by additional legislative history opposing the disjunctive view of the exemption. As the preceding discussion noted, "trade secrets and *other information* obtained from the public and customarily privileged or confidential"<sup>24</sup> were originally excluded. Presumably, "other information" was understood to be modified by "privileged or confidential," for were that not true, "other information," *i.e.* any and all information, would have been immune from disclosure. The Act would have been a nullity. With the substitution of "commercial or financial" for "other information," it appears that Congress simply recognized and rejected the unduly broad scope of "other [confidential or privileged] information." If the change were designed to enact a basic grammatical revision in the exemption and create a new category of protected information, there would seemingly be some legislative comment to that effect. There is none in the House or Senate Reports. However, in his *Memo- randum on the Public Information Section of the APA*, Attorney General Ramsey Clark offers an explanation.<sup>25</sup> He contends that the new language was specifically intended to cover commercial and financial data submitted with loan applications. But even if loan applications were granted special consideration in this manner, there is no indication that the protection afforded them was not to be limited by the same strictures of confidentiality that applied to the "other information" originally within the exemption.

Congressmen, witnesses, and administrators have variously expressed the opinion that "privileged or confidential" only modifies "commercial or financial information." Representative Dwyer re-

<sup>23</sup> Davis, *supra* note 8, at 790-91.

<sup>24</sup> S. 1666, 88th Cong., 2d Sess. (1964).

<sup>25</sup> Professor Davis comments generally on the Attorney General's Memorandum: "[It] is the law in the sense that it guides the government's practices under the Act, but it is not the law in the sense of binding the courts. Its quality is excellent but, quite legitimately, it reflects the point of view of the agencies, all of whom opposed the enactment." Davis, *supra* note 8, at 761.

ferred to the fourth exemption as "trade secrets and privileged business data."<sup>26</sup> An American Bar Association representative testifying at congressional hearings stated: "I think it is the intention of the committee and staff to exempt any trade secret or commercial or financial information which is of a privileged or confidential character."<sup>27</sup> Wilbur J. Cohen, then Assistant Secretary of Health, Education, and Welfare, complained to Congressman Moss that "there is no general exemption of information obtained by the government in confidence . . . ."<sup>28</sup> The viewpoint of these knowledgeable persons is more than credible: under the disclosure mandate of the Freedom of Information Act<sup>29</sup> there is simply no justification for excluding all business data or all confidential information.

### *B. Test for Privileged or Confidential Information*

Whatever grammatical construction is ultimately accepted, a more procedural question arises. Assuming that an agency possesses certain commercial or financial records, who is to decide if these records are privileged or confidential—the person who originally supplied the information, the agency by an objective standard, or the agency by its own predilections?

The third choice would constitute a near return to the unfettered administrative discretion that existed prior to the passage of the Act. Only the House Report discussed below recognizes this as a legitimate option. The first choice, which has received considerable support, would permit individual citizens, guided only by self-interest, to dictate matters of federal policy. Only the objective standard comports with the goal of maximum, nondiscretionary disclosure. In practice, this standard would have to be defined by the common law of privilege and confidentiality and, if necessary, by the promulga-

<sup>26</sup> 112 CONG. REC. 13,660 (1966). See also *Hearings on H.R. 5012 Before the Subcomm. of the House Comm. on Gov't Operations, 89th Cong., 1st Sess.* 176 (1965) (remarks of Congressman Gibbons).

<sup>27</sup> *Hearings on H.R. 5012, supra* note 26, at 99 (remarks of Chisman Hanes, Chairman of the Committee on Personal Injury of the ABA Section of Administrative Law).

<sup>28</sup> *Id.* at 524. See also *id.* at 235 (comments from the Atomic Energy Commission); *Hearings on S. 1160 Before the Subcomm. on Admin. Pract. and Proc. of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess.* 99 (1965) (remarks of L. Niederlehner, Acting General Counsel, Department of Defense); *id.* at 35-36 (statement of Edwin F. Rains, Assistant General Counsel, Treasury Department); *id.* at 383 (comments from the Department of Agriculture); *id.* at 426 (letter from D. Otis Beasley, Assistant Secretary of the Department of the Interior).

<sup>29</sup> "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." 5 U.S.C. § 552(c) (Supp. V, 1970).

tion of administrative guidelines on the meaning of "privileged" and "confidential."

Three courts appear to have endorsed the unfettered prerogative of persons submitting information to have it kept confidential. Dictum in *Benson v. General Services Administration*<sup>30</sup> appears explicit: The exemption is meant to protect information that a private individual wishes to keep confidential for his own purposes but reveals to the government—under the express or implied promise by the government that the information will be kept confidential."<sup>31</sup> But the issue in *Benson* was whether governmental as opposed to private sources of information should be protected. The court's statement does not preclude the possibility that agencies might not be empowered or required to promise confidentiality for every piece of commercial information that the contributor might want to protect. An assertion in *Grumman Aircraft Engineering Corporation v. Renegotiation Board*<sup>32</sup> is similarly ambiguous. Plaintiff subcontractor was seeking disclosure of performance reports in which it had been evaluated by prime contractors. The court stated: "After examining those documents, the District Court must decide whether they contain commercial or financial information *which the contractor would not reveal to the public* and therefore are exempt from disclosure or are subject to release only after appropriate deletions have been made."<sup>33</sup> The lower court was not instructed to discover whether in fact the reports were given to the agency on the condition that they be maintained in secrecy. Rather, the court—not some administrator—was charged with judging what the contractor "would" have withheld; a "reasonable contractor" test can almost be read between the lines. A truly clear distinction was drawn only in *The Tobacco Institute* case.<sup>34</sup> There, responses to a questionnaire that were returned with a request for confidentiality were withheld; those accompanied by no such demand were disclosed. The decision's clarity is remarkable in light of the confusion evidenced by legislative history.

While the Senate Report does not explicitly mention the issue, it implicitly supports an objective standard by describing the exempt commercial matter as information "customarily" considered privileged.<sup>35</sup> "Customarily" was also the word invoked on behalf of objec-

<sup>30</sup> 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

<sup>31</sup> *Id.* at 594.

<sup>32</sup> 425 F.2d 578 (D.C. Cir. 1970).

<sup>33</sup> *Id.* at 582 (emphasis added).

<sup>34</sup> Civil No. 3035-67 (D.D.C., Apr. 11, 1968) (no written opinion).

<sup>35</sup> S. REP. NO. 813, *supra* note 17, at 9.

tivity by Senator Long in 1964. Senator Humphrey had proposed an amendment to exemption (4) to provide that "trade secrets and information *obtained from the public in confidence* or customarily privileged or confidential" be free from disclosure. Senator Long, sponsor and floor manager of the bill, repudiated the suggestion asserting: "[It] might result in certain agencies taking much information from the public 'in confidence' in the future that has not customarily been considered confidential or privileged. This is something which we should seek to avoid . . ."<sup>36</sup>

On the other side of the Hill, authors of the House Report expressed a view more compatible with the Humphrey proposal. Although the Committee's description of information covered by exemption (4) includes references to records "customarily" withheld, the Report concludes:

[The exemption also covers] information which is given to an agency in confidence, since a citizen must be able to confide in its government. Moreover, where the government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.<sup>37</sup>

Commenting on this statement, Professor Davis notes: "Language in a committee report which is at variance with language in a bill tends to show that the sponsors of the committee language were unsuccessful, in their effort to put that language into the bill."<sup>38</sup> The court in *Benson v. General Services Administration* expresses similar skepticism:

The House Report accompanied the bill on its passage through the House of Representatives, after the bill had already passed the Senate. It therefore seems to me that it represents the thinking of only one house, and to the extent that the two reports disagree, the surer indication of congressional intent is to be found in the Senate Report which was available for consideration in both houses.<sup>39</sup>

The Attorney General's office has provided little assistance in resolving the issue. Alluding to the sentences quoted above from the House Report, Attorney General Clark claimed that "they underline the protection afforded by this exemption to information given to the government in confidence, whether or not involving commerce or

<sup>36</sup> 110 CONG. REC. 17,667 (daily ed. July 13, 1964).

<sup>37</sup> H.R. REP. NO. 1497, *supra* note 17, at 100.

<sup>38</sup> Davis, *supra* note 8, at 810.

<sup>39</sup> 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969).

finance."<sup>40</sup> The statement appears to support the House position, but the reference to "commerce or finance" indicates that the Attorney General was focusing on the substantive question of the Act's application to nonbusiness confidential information. At another point, however, he observed that the word "customarily" was deleted from earlier versions of the bill to "[negate] the possibility of a privilege created simply by agency custom."<sup>41</sup> The Attorney General thus rejected administrative discretion, but expressed no opinion on private election versus objective standards.

With judicial pronouncements uncertain and legislative authorities inconclusive, consideration must be given to the language and spirit of the law itself. Subsection (c) of the Freedom of Information Act states: "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section."<sup>42</sup> According to Professor Davis,

[t]he pull of the word "specifically" is toward emphasis on statutory language and away from all else . . . . Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habit in *narrowing* the ascertainable meaning of the words of an exemption, but in some degree they are restricted in following these habits in *broadening* that meaning. The "specifically stated" restriction operates in only one direction.<sup>43</sup>

While the Freedom of Information Act does not state an explicit policy on this issue, the relatively fixed guidelines that would be provided by an objective standard of confidentiality approximate most closely the goal of maximum nondiscretionary disclosure expressed in subsection (c).<sup>44</sup> Through application of traditional judicial principles of "confidentiality," an objective standard would also provide sufficient protection to individuals who supply the Government with information, and who may also be covered by the "informers' privilege" contained in the Act's seventh exemption.<sup>45</sup>

<sup>40</sup> ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE APA 34 (1967) [hereinafter cited as ATT'Y GEN. MEM.].

<sup>41</sup> *Id.* at 33.

<sup>42</sup> 5 U.S.C. § 552(c) (Supp. V, 1970).

<sup>43</sup> Davis, *supra* note 8, at 783-84; see *United States v. Aarons*, 310 F.2d 341, 347 (2d Cir. 1962) (exception to requirement of publishing rules in the *Federal Register* must not be widened by judicial fiat).

<sup>44</sup> Legislative history offers several constructions of subsection (c) that evince the intention to minimize discretion. See, e.g., S. REP. NO. 813, *supra* note 17, at 10; H.R. REP. NO. 1497, *supra* note 17, at 11, cited in ATT'Y GEN. MEM., *supra* note 40, at 39; 112 CONG. REC. 13,659 (1966) (remarks of Congressman Gallagher).

<sup>45</sup> See discussion of the seventh exemption at text accompanying notes 100-10 *infra*.

### C. Documents Prepared by an Agency

The third issue meriting brief discussion in connection with this exemption involves the phrase, "obtained from a person." Three cases have held that the exemption "condones withholding information only when it is obtained from a person *outside the agency*."<sup>46</sup> Thus, when the Veterans Administration conducted studies of various types of hearing aids, a court held the fourth exemption impotent to bar disclosures of the VA's test methods and results. Because of their origin within the bureaucracy, the records were not considered information "obtained from a person."<sup>47</sup>

There is some legislative history to dispute the distinction that the courts have been making. As first written, the Freedom of Information Act bill only protected information "obtained from the *public*."<sup>48</sup> During the 1965 hearings, at least two agencies urged a change in the bill's language to include information generated within the agencies.<sup>49</sup> Attorney General Clark's view is that the new phraseology, "obtained from a *person*," was adopted to serve this purpose.<sup>50</sup> The substitution of "person" for "public" has been more authoritatively explained, however, by the Senate Committee. Their Report states: "It was pointed out in statements to the Committee that agencies may obtain information of a highly personal and individual nature. To better convey this idea the substitute language is provided."<sup>51</sup> The Administrative Procedure Act, moreover, excludes government agencies from its definition of "person,"<sup>52</sup> and the examples of exempt records in both the Senate and the House Reports all indicate private sources of information.

If records of administrative origin were protected by the fourth exemption, commercial and financial information might be immunized merely by transferring records from one agency to another with a promise of confidentiality.<sup>53</sup> Yet those internal records that *do* require

<sup>46</sup> *Grumman Aircraft Eng'ring Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969); *Benson v. General Services Administration*, 289 F. Supp. 590, 594 (W.D. Wash. 1968), *aff'd*, 415 F.2d 878 (9th Cir. 1969) (emphasis added).

<sup>47</sup> *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 802-03 (S.D.N.Y. 1969).

<sup>48</sup> S. 1160, 89th Cong., 1st Sess. (1965) (emphasis added).

<sup>49</sup> *Hearings on S. 1160, supra* note 28, at 383 (letter from Dep't of Agriculture to Senator James Eastland); *id.* at 437 (Dep't of Labor comments).

<sup>50</sup> ATTY GEN. MEM., *supra* note 40, at 34.

<sup>51</sup> S. REP. NO. 813, *supra* note 17, at 2.

<sup>52</sup> U.S.C. § 551(2) (Supp. V, 1970). See *Grumman Aircraft Eng'ring Corp. v. Renegotiation Bd.*, 425 F.2d 578, 582 n.18 (D.C. Cir. 1970).

<sup>53</sup> *Grumman Aircraft Eng'ring Corp. v. Renegotiation Bd.*, 425 F.2d 578, 580-81 (D.C. Cir. 1970); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 803 (S.D.N.Y. 1969).

secrecy in the public interest are adequately shielded by a host of other exemptions at the Government's disposal and thus do not require the added protection of the fourth exemption. Federal agencies perform their functions at public expense and supposedly for the public's benefit. Taxpayers, therefore, have a strong claim to information derived wholly from sources within the bureaucracy.

## II. INTERNAL COMMUNICATIONS

One of the exemptions clearly directed to information generated within the Government is exemption (5): "This section does not apply to matters that are . . . (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."<sup>54</sup> The provision has two interrelated purposes—(1) to foster uninhibited discussion within the Government on legal and policy matters; and (2) to prevent premature disclosure of agency records when such disclosure might impede the proper functioning of the administrative process.<sup>55</sup>

All internal memoranda, however, are not protected. As the modifying phrase "which would not be available by law to a party other than an agency in litigation with an agency" indicates, only those documents traditionally privileged under discovery law are covered. This discussion thus begins with a brief outline of the common law privilege for intra-agency records. A second section identifies some of the exemption's temporal and functional limitations.<sup>56</sup>

### A. Common Law Privilege

Under Rules 34(a) and 26(b) of the Federal Rules of Civil Procedure, a party may obtain an order for the production of nonprivileged documents. Internal governmental communications were first recognized as "privileged" in *United States v. Morgan*.<sup>57</sup> The Supreme Court there invalidated an examination of the Secretary of Agriculture by deposition: "We have explicitly held in this very litigation that 'it is not the function of the court to probe the mental processes of the Secretary [citation]. Just as a judge cannot be subjected to such scrutiny [citation], so the integrity of the administrative process must be

<sup>54</sup> 5 U.S.C. § 552(b)(5) (Supp. V, 1970).

<sup>55</sup> S. REP. NO. 813, *supra* note 17, at 9; H.R. REP. NO. 1497, *supra* note 17, at 10.

<sup>56</sup> Other potential issues relating to this exemption are readily apparent—the meaning of "letters" or "memorandums" may be problematical and the relevance of the exemption to congressional correspondence with administrators may be brought into question. These issues, however, are beyond the scope of this analysis.

<sup>57</sup> 383 U.S. 409, 422 (1940).

equally respected."<sup>58</sup> Subsequent cases elaborated on the privilege in its application to Rule 34 orders to produce. Its invocation was said to depend on the nature of the documents as "internal working papers," not on the content of particular records.<sup>59</sup> Protection was said to focus on the "consultive functions of government."<sup>60</sup> A presumption of regularity in administrative decision-making was recognized as an underlying justification for the rule.<sup>61</sup>

In numerous cases citing *Morgan*<sup>62</sup> or invoking generally the internal communications immunity,<sup>63</sup> purely factual material contained in inter- or intra-agency letters or memoranda has been disclosed. In keeping with the basic purpose of protecting an agency's or an administrator's "mental processes," courts have restricted the common law privilege to matters of opinion or policy.

Legislative history under the Freedom of Information Act supports incorporation of this fact-policy dichotomy. When the first new information bill passed the Senate in 1964, it contained an exemption for "those parts of intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy."<sup>64</sup> The Senate Report underscored the fact that "all *factual* material in Government records [was] to be made available . . ."<sup>65</sup> While the change in exemption (5) to the discovery standard broadened the exemption, there is no evidence that it was intended to discard the fact-policy distinction. Rather, the new criterion was apparently invoked only to assure the nondisclosure of documents when facts and policy are inextricably intertwined.<sup>66</sup> Since passage of the law, at least four Freedom of Information Act cases have recognized the distinction and have accordingly sanctioned access to documents, or parts of documents, containing essentially factual material.<sup>67</sup>

<sup>58</sup> *Id.* at 422.

<sup>59</sup> *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

<sup>60</sup> *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

<sup>61</sup> *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 462 (D.C. Cir. 1967).

<sup>62</sup> *See, e.g., Davis v. Braswell Motor Freight Lines, Inc.* 363 F.2d 600 (5th Cir. 1966); *Unistrut Corp. v. United States*, 37 F.R.D. 478 (E.D. Mich. 1965); *Madden v. Milk Wagon Drivers Local 753*, 299 F. Supp. 490 (N.D. Ill. 1964); *SEC v. Shasta Minerals & Chemical Co.*, 36 F.R.D. 23 (D. Utah 1964).

<sup>63</sup> *See, e.g., Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960).

<sup>64</sup> S. 1666, 88th Cong., 2d Sess. (1964).

<sup>65</sup> S. REP. 1219, *supra* note 21, at 70.

<sup>66</sup> *See, e.g., Hearings on S. 1160, supra* note 28, at 266 (letter from the NLRB); *id.* at 46 (testimony of Treasury Department representative); *id.* at 406-07 (letter from the Department of Commerce); *id.* at 417 (letter from Department of Defense); *id.* at 450 (comments from the Federal Communications Commission).

<sup>67</sup> *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970); *General Services Administration v. Benson*, 416 F.2d 878, 880 (9th Cir. 1969); *Wellford v. Hardin*, Civil

### B. *Temporal and Functional Limitations*

The fifth exemption is restricted not only by the laws of discovery but also by certain temporal and functional limitations peculiar to the Freedom of Information Act. These limitations have arisen because of the Act's overriding goal of disclosure that has led some courts to hold the exemption inapplicable when its supporting policy reasons have no bearing on a particular case.<sup>68</sup> If neither internal governmental communications nor specific administrative programs will be hampered by disclosure of particular internal memoranda or letters, the fifth exemption, which might otherwise permit withholding of the records, may be held inapplicable.

In *American Mail Line Limited v. Gulick*,<sup>69</sup> the Maritime Administration Subsidy Board had ordered plaintiff steamship line to refund past subsidy payments. Plaintiffs requested a copy of the entire memorandum on which the Board's decision was based, the last five pages of which had been publicly set forth as the Board's findings and determinations. The district court refused disclosure; the appellate court reversed, stating:

We do not feel that appellee should be required "to operate in a fishbowl," but by the same token we do not feel that appellants should be required to operate in a darkroom. If the Maritime Subsidy Board did not want to expose its staff's memorandum to public scrutiny it should not have stated publicly in its April 11 ruling that its action was based on that memorandum, giving no other reasons or basis for its action. When it chose this course of action, "as a matter of convenience," (Brief for Appellee at 9) the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants.<sup>70</sup>

An internal communication that once was entitled to immunity thus lost its privileged status. The implication of *American Mail Line* is that other kinds of agency action, similarly externalizing agency working papers, could also divest the papers of their exempt status. This potential was realized in *General Services Administration v. Benson* when internal memoranda to be used as guidelines for and

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No. 21551 (D. Md., June 26, 1970) (slip opinion at 7); *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796, 805-06 (S.D.N.Y. 1969).

<sup>68</sup> Other exemptions are similarly affected by such limitations. See, e.g., *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968) (fourth exemption), and cases cited in Part III(A) of this article concerning functional limitations on the seventh exemption.

<sup>69</sup> 411 F.2d 696 (D.C. Cir. 1969).

<sup>70</sup> *Id.* at 703.

explanations of agency conduct were found transformed into "statements of policy and interpretations which [had] been adopted by the agency," and were therefore held subject to disclosure.<sup>71</sup>

Similar functionalism appears in some pre-Freedom of Information Act cases. In at least two instances, grand jury minutes were divulged because the dissolution of the investigative body and the exposure of the identity of all witnesses had removed all reasons for secrecy.<sup>72</sup> Internal documents of a municipal board of trade were made available in another case; the information involved activity which had transpired four to six years earlier and could in no way compromise the position of persons currently trading.<sup>73</sup>

The only debatable issue at this time is the extent to which the fifth exemption is restricted by these sorts of limitations. In the Freedom of Information Act cases cited above, the limitations on the fifth exemption were imposed when administrators supported admittedly public actions on the basis of documents that previously had been considered internal memoranda. *American Mail Line* involved explicit incorporation of part of the document sought. *Benson* concerned undisputed reliance on the requested information. Furthermore, inferences drawn from congressional preoccupation with the premature release of administrative records raise the possibility of still broader applications of functional and temporal limitations. The House Report states: "[A] . . . government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation."<sup>74</sup> Attorney General Clark states: "The Congress did not intend to require the production of such documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used."<sup>75</sup> The implication of these two statements is that once the decision, order, or regulation has been issued, or the contract has been granted, secrecy is no longer necessary. Even if little or no reliance has been placed on the papers involved, the disposition of the matter renders the issues moot and confidentiality inappropriate.

<sup>71</sup> 415 F.2d 878, 881 (9th Cir. 1969). See 5 U.S.C. § 552(a)(2)(B) (Supp. V, 1970).

<sup>72</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J. 1955).

<sup>73</sup> *Rosee v. Board of Trade*, 36 F.R.D. 684 (N.D. Ill. 1965).

<sup>74</sup> H.R. REP. NO. 1497, *supra* note 17, at 10.

<sup>75</sup> ATT'Y GEN. MEM., *supra* note 40, at 36.

This interpretation is supported by the theory that democratic government should not generally sanction decisions reached on the basis of secret recommendations that are never unveiled for public comment.<sup>76</sup> It is dubious, however, that Congress intended to suggest quite so far-reaching an interpretation. In the Senate Report on an earlier version of the Act, the Committee's comments concluded with the definitive assertion that "All . . . final agency determinations on legal and policy matters which affect the public [are to be made available.]"<sup>77</sup> No such declaration appears in the Committee reports accompanying the ultimate version of the bill. Moreover, while Congressman Moss, who chaired the House Committee, expressly approved of the notion that "[O]nce . . . action is taken, we should be able to examine the material that went into the decision," he also stated regretfully, "I don't think it possible at this time to go that far in drafting language."<sup>78</sup>

The Act itself does not, unfortunately, address this issue. While there are clearly genuine interests to be protected in frank intra- and inter-agency discussion, whenever agency action cannot be explained without disclosure of particular documents the interest in open government operations would seem to override the concern with uninhibited dialogue. If, however, the courts accept this position, the agencies might argue that functional and temporal considerations should be applied in their behalf as well. They might contend that the discovery cases, which focus on the nature of the documents as "internal working papers" and not on the content of the documents themselves,<sup>79</sup> should apply to the Freedom of Information Act. Thus when the release of any record would hamper an agency's program or hinder internal communications the agency might claim it should be privileged under the fifth exemption.

This argument has been raised implicitly in a case now pending before the district court for the District of Columbia. In *Wellford v. Hardin*,<sup>80</sup> the Government is contending that because certain, primarily factual, indices maintained by the Agriculture Department are used in the internal deliberative processes of the Department, they must therefore be "intra-agency memorandums" within the purview

<sup>76</sup> See *Hearings on S. 1663 Before the Subcomm. on Admin. Pract. and Proc. of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. (1964).

<sup>77</sup> S. REP. NO. 1219, *supra* note 21, at 7.

<sup>78</sup> *Hearings on H.R. 5012*, *supra* note 26, at 149.

<sup>79</sup> *Walled Lake Door Co. v. United States*, 31 F.R.D. 258 (E.D. Mich. 1962).

<sup>80</sup> Civil No. 22,277 (D.D.C., filed Mar. 12, 1970).

of the fifth exemption. Presumably, however, most if not all of the documents in an agency's possession are "used" in its internal processes. Plaintiffs in the *Wellford* case are arguing that the precise nature of the document itself, *i.e.* whether it is in fact a "memorandum" containing policy recommendations, must be considered for purposes of exemption. The Freedom of Information Act "does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memorandum."<sup>81</sup> Nor did Congress intend to make a game out of the Act with equal handicaps on the sides of agencies and citizenry. Subsection (c) of the Act, which restricts the withholding of documents to those cases which fit within the specific statutory exemptions, makes this clear. The functional and temporal limitations are and should be biased in favor of public access to agency records for such is the bias and end of the Act itself.

### III. INVESTIGATORY FILES

The seventh exemption provides for the protection of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."<sup>82</sup> The statutory language suggests three prerequisites to withholding information on this basis. The records must be: (1) part of an investigative file; (2) used in law enforcement; and/or (3) barred from access under discovery practice. Because the meaning of "law enforcement purposes" is central to an understanding of the whole exemption, this second factor will be considered initially. Brief distinctions between some of the possible contents of an "investigatory file" will follow, succeeded by an analysis of the precise relation of the discovery cases to this statutory provision.

#### A. "Law Enforcement Purposes"

The House Committee and the Attorney General have asserted that "law enforcement purposes" relate to regulatory as well as judicial enforcement proceedings.<sup>83</sup> While the statutory language and its legislative history leave room for doubt,<sup>84</sup> several courts have adopted this view.<sup>85</sup> The issue appears to be conclusively decided.

<sup>81</sup> *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970).

<sup>82</sup> 5 U.S.C. § 552(b)(7) (Supp. V, 1970).

<sup>83</sup> H.R. REP. NO. 1497, *supra* note 17, at 11; ATT'Y GEN. MEM., *supra* note 40, at 37.

<sup>84</sup> *See, e.g.*, S. REP. NO. 813, *supra* note 17, at 9.

<sup>85</sup> *E.g.*, *NLRB v. Clement Brothers Co.*, 407 F.2d 1027 (5th Cir. 1969); *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

The substantive meaning of "law enforcement purposes" remains to be fully explored. There is considerable case law and legislative history to support the view that the exemption applies only to investigatory material gathered for pending or imminent adjudicatory proceedings, and that the exemption's own term, "law enforcement purposes," imposes a functional limitation on the exemption's application. In *Bristol-Myers Company v. FTC*,<sup>86</sup> in which documents were sought which comprised or contributed to an FTC investigation resulting in the institution of rule-making proceedings, the FTC invoked the seventh exemption and the court said:

At one time the Commission apparently intended to deal with the subject of its proposed rule by proceeding against Bristol-Myers and other companies for misleading advertising practices. Thus, there is some basis for the view that the items sought are "investigatory files compiled for law enforcement purposes." Nevertheless, the complaint was withdrawn more than two years prior to the Notice of Rulemaking that precipitated the company's present request for documents. If further adjudicatory proceedings are imminent, then the company's request may fall within the category the exemption was designed to control . . . . But the agency cannot, consistent with the broad disclosure mandate of the Act, protect all its files with the label "investigatory" and a suggestion that enforcement proceedings may be launched at some unspecified future date.<sup>87</sup>

The case was remanded with orders that the district court determine whether there was a realistic prospect of enforcement proceedings.

In *Cooney v. Sun Shipbuilding & Drydock Company*,<sup>88</sup> a wrongful death action in which the plaintiff subpoenaed government agents for a four and one-half year old accident report (as opposed to the recently compiled investigatory files in *Bristol-Myers*), the court required that most of the report be produced since the time for enforcement action had long passed. The court described the effect of the seventh exemption: "[F]iles or portions thereof, need not be disclosed during the investigative stages of a *contemplated litigation* or enforcement *proceeding*; and statements of witnesses need not be disclosed prior to the time that these witnesses have testified in the

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<sup>86</sup> 424 F.2d 935 (D.C. Cir. 1970).

<sup>87</sup> *Id.* at 939.

<sup>88</sup> 288 F. Supp. 708 (E.D. Pa. 1968).

formal proceedings.”<sup>89</sup> Cases such as *Barceloneta Shoe Corporation v. Compton*<sup>90</sup> and *Clement Brothers v. NLRB*,<sup>91</sup> in which application of the exemption had been allowed, were distinguished on the ground that they involved *ongoing* enforcement proceedings. The controlling factor in *Bristol-Myers* and *Cooney* was not the date on the investigatory files but the date or prospect of enforcement action.

Legislative history supports this emphasis on the imminence of adjudicatory proceedings. The House Report depicts the exemption as including “files prepared in connection with related Government litigation and adjudication.”<sup>92</sup> The Senate Report explains the danger to be averted by the exemption as “harm [to] the Government’s case in court.”<sup>93</sup> Once litigation is concluded, disclosure is impliedly required. Professor Davis explicitly approves this view, stating: “[I]t should be kept in mind that public surveillance can help to increase agency efficiency. It seems that such investigation files could be made available after the enforcement activity in question has been completed.”<sup>94</sup>

The common law precedents are similarly in accord.<sup>95</sup> In *Campbell v. Eastland*,<sup>96</sup> the court refused disclosure to a civil litigant by analogy with the Jencks rule, but said pointedly:

We are not talking about some vague suspicions that might in the future lead to a criminal charge. We are talking about a case the Department of Justice has decided should be instituted, and one that would have been submitted to the grand jury but for the urgent pleas of the taxpayer.<sup>97</sup>

The necessity for a real prospect of enforcement activity was en-

<sup>89</sup> *Id.* at 712 (emphasis added).

<sup>90</sup> 271 F. Supp. 591 (D.P.R. 1967).

<sup>91</sup> 282 F. Supp. 540 (N.D. Ga. 1968), *aff’d*, 407 F.2d 1027 (5th Cir. 1969).

<sup>92</sup> H.R. REP. NO. 1497, *supra* note 17, at 11.

<sup>93</sup> S. REP. NO. 813, *supra* note 17, at 9.

<sup>94</sup> Davis, *supra* note 8, at 914.

<sup>95</sup> Instead of the reference to common law, the seventh exemption was originally limited by the proviso that investigatory files would be privileged only “until they were [used] in or affect[ed] an action or proceeding or a private party’s effective participation therein.” S. 1666, 88th Cong., 2d Sess. (1964). However, agencies criticized the provision as giving insufficient protection to informers’ identities and other confidential information. *See, e.g., Hearings on S. 1663, supra* note 76, at 212-13 (Department of Justice comments); *id.* at 177D (Treasury Department statement); *id.* at 102-03 (statement of Abe McGregory Goff, Chairman, Interstate Commerce Commission). The discovery standard was substituted for the previous language, but as the cases cited in the text reveal, the new criterion left the functional-temporal approach substantially intact, only removing the quality of absolutism that attended the earlier phraseology.

<sup>96</sup> 307 F.2d 478 (5th Cir. 1962).

<sup>97</sup> *Id.* at 488; *accord*, *Capitol Vending Co. v. Baker*, 35 F.R.D. 510, 511 (D.D.C. 1964).

dorsed. In *Royal Exchange Assurance v. McGrath*,<sup>98</sup> reports from investigations concluded some time in the past were made available.

As discussed in connection with exemption (5), when the grounds for the privilege, through the passage of time or otherwise, no longer apply to the circumstances of the case, the Act should not be interpreted as requiring continued secrecy. In *American Mail Line Limited v. Gulick*,<sup>99</sup> a memorandum was converted into a final order, thereby losing its immunity as an internal communication. Similarly, once an investigation has ceased and adjudication or the realistic prospects thereof have ended, investigatory files should lose their "law enforcement" character.<sup>100</sup>

### *B. Contents of an "Investigatory File"*

Assuming that information is requested in connection with "live" investigations, the purposes of the exemption and the discovery cases require that distinctions be made between those records within an investigatory file that for valid reasons must be kept confidential and those for which no need for secrecy is apparent.

The exemption's focus on adjudicatory proceedings fulfills two purposes that indicate the kind of records covered by the exemption. First, there is the interest in preventing parties against whom the Government is proceeding from gaining premature access to the Government's records and, in the process, to the Government's litigation strategy. The Senate Report's reference to "harm to the Government's case in court" has already been cited; the House Report states that the exemption prevents a litigant from using the Act to achieve "any earlier or greater access to investigatory files than he would otherwise have."<sup>101</sup>

The converse appears to be applicable: if the Government's case cannot be harmed by disclosure of particular records, the exemption does not apply. In *Wellford v. Hardin*<sup>102</sup> the court held:

Disclosure of material already in the hands of potential parties

<sup>98</sup> 13 F.R.D. 150 (S.D.N.Y. 1952).

<sup>99</sup> 411 F.2d 696 (D.C. Cir. 1969).

<sup>100</sup> Admittedly, it may sometimes be difficult for the agency itself to know whether an enforcement action will be brought in the near future. As long as there is a realistic prospect that such an action will be instituted, and as long as administrators endeavor to make the enforcement decision as quickly as possible, the exemption should apply. But the exemption should not avail an agency that claims only that its investigatory files are "open" and therefore always subject to use in hypothetical future enforcement proceedings.

<sup>101</sup> H.R. REP. NO. 1497, *supra* note 17, at 11, cited in *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939 (D.C. Cir. 1970) and *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967).

<sup>102</sup> Civil No. 21,551 (D. Md., June 26, 1970).

to law enforcement proceedings can in no way be said to interfere with the agency's legitimate law enforcement functions. This conclusion is based on this court's reading of the legislative history surrounding this exception, which reveals that its purpose was to prevent premature discovery by a defendant in an enforcement proceeding.<sup>103</sup>

The second purpose of the exemption is preservation of the "informers' privilege." Both the Senate and House Reports refer to FBI files as models of the investigatory records to which the exemption applies.<sup>104</sup> FBI files have traditionally been privileged on the ground that revelation of the identity of informers would seriously jeopardize the Government's information-gathering process.<sup>105</sup> The informers' privilege clearly provided one basis for the decisions reached in *Barceloneta Shoe Corporation v. Compton*<sup>106</sup> and *Clement Brothers v. NLRB*,<sup>107</sup> in which statements of witnesses who had not yet testified at ongoing NLRB hearings were not released. In *Barceloneta* the court said:

It cannot be denied that if disclosure . . . is allowed, persons interviewed by Board agents in future investigations will not be as cooperative as they are now if they know that the information they give to the Board agents would be subject to public disclosure at any time before they have actually testified at a public hearing. The hampering effect which this would have upon the Board's investigation is obvious.<sup>108</sup>

Discovery cases have included similar statements of the purpose of the informers' privilege. They often stress, however, that since the rationale underlying the privilege is to protect the informer from harassment, only the *identity* of the informer need be concealed. Thus in *McFadden v. Avco Corporation*,<sup>109</sup> the court stated that as long as the Army was willing to make persons who had written certain reports available for depositions, the more accurate sources (the reports prepared while the information was fresh) could be divulged. Even FBI files have been disclosed on the ground that the informer's identity was known.<sup>110</sup> Investigatory records requested under the Freedom of Information Act must be released under similar circumstances.

<sup>103</sup> *Id.* at 6.

<sup>104</sup> S. REP. No. 813, *supra* note 17, at 3; H.R. REP. No. 1497, *supra* note 17, at 2.

<sup>105</sup> See 40 OP. ATT'Y GEN. 46-47 (1941).

<sup>106</sup> 271 F. Supp. 591 (D.P.R. 1967).

<sup>107</sup> 282 F. Supp. 540 (N.D. Ga. 1968), *aff'd*, 407 F.2d 1027 (5th Cir. 1969).

<sup>108</sup> 271 F. Supp. 591, 594 (D.P.R. 1967).

<sup>109</sup> 278 F. Supp. 57 (M.D. Ala. 1967).

<sup>110</sup> *Clark v. Pearson*, 238 F. Supp. 495 (D.D.C. 1965).

The discovery cases have also considered additional factors in determining whether particular investigatory files are privileged. For instance, information usually must be divulged if it does not contain confidential business data,<sup>111</sup> or privileged internal communications.<sup>112</sup> *Cooney v. Sun Shipbuilding & Drydock Company*,<sup>113</sup> moreover, endorses the familiar fact-opinion dichotomy. The court follows the lead of *Machin v. Zuckert*,<sup>114</sup> which established that investigative reports need not be treated as units:

[C]ertain portions of the report could be revealed without in any way jeopardizing the future success of Air Force accident investigations.

We refer to the factual findings of Air Force mechanics who examined the wreckage. Their investigation and reports would not be inhibited by knowledge that their conclusions might be made available for use in future litigations. . . .<sup>115</sup>

*Machin* further observed that a mechanic's opinion or conclusion might well come within the broad category of "factual" information that would be revealed. Not a policymaker and identity unknown, the mechanic could not be inhibited through disclosure.<sup>116</sup>

This functional approach suggests other material contained in investigatory files which might safely be divulged. Consumer complaints (except in instances in which harassment is a realistic possibility) and notices of violations sent to persons who have contravened statutes and/or administrative rules and regulations should be made available. "Commingling," *i.e.* placing documents not compiled for law enforcement purposes or otherwise not privileged in an investigatory file with properly exempt records, should provide no shield for the ingenious bureaucrat.

### C. Application of Discovery Law

Perhaps the most ingenious of bureaucrats, Attorney General Clark, contended that the phrase, "except to the extent available by law to a party other than an agency," opens up otherwise exempt in-

<sup>111</sup> See, *e.g.*, *United States v. Kohler Co.*, 9 F.R.D. 289 (E.D. Pa. 1949).

<sup>112</sup> See, *e.g.*, *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir. 1963); *Boeing Airplane Co. v. Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960).

<sup>113</sup> 288 F. Supp. 708 (E.D. Pa. 1968).

<sup>114</sup> 316 F.2d 336 (D.C. Cir. 1963).

<sup>115</sup> *Id.* at 340. Other investigation cases espousing the *Machin* distinction include *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Evans v. United States*, 10 F.R.D. 255 (W.D. La. 1950); *Lanser v. Transcontinental & Western Air*, 97 F. Supp. 458 (D.D.C. 1949).

<sup>116</sup> *Machin v. Zuckert*, 316 F.2d 336, 341 (D.C. Cir. 1963).

vestigatory files only to *parties* involved in *litigation*. To be understood, this none-too-obvious argument must be quoted in full:

It should be noted that the language "except to the extent available by law to a private party" is very different from the phrase "which would not be available by law to a private party in litigation with the agency," used in exemption (5). The effect of exemption (5) is to make available to the general public those internal documents from agency files which are routinely available to litigants, unless some other exemption bars disclosure. The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain a prior statement given to an FBI agent or an S.E.C. investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks Act, does not permit the statement to be made available to the public.<sup>117</sup>

In light of the Act's general policy to increase disclosure to the public at large, the validity of this position is extremely dubious. No case has addressed the question directly. In *Bristol-Myers v. FTC*<sup>118</sup> the court did say that

[C]ongress intended to limit persons charged with violations of the federal regulatory statutes to the discovery available to persons charged with violations of federal criminal law. The exemption prevents a litigant from using the statute to achieve indirectly 'any earlier or greater access to investigatory files than he would have directly. . . .'<sup>119</sup>

But, as noted above, the court was merely establishing that imminent adjudicatory proceedings are a prerequisite to application of the exemption. In fact, only rule-making proceedings were contemplated in *Bristol-Myers*, and the court did not find that the plaintiff company's lack of involvement in adjudicatory proceedings barred it from applying the pertinent discovery law principles.

While the Jencks Act was alluded to in Congressional debate, it was only agreed that litigants should have no *greater* access to infor-

<sup>117</sup> ATT'Y GEN. MEM., *supra* note 40, at 38.

<sup>118</sup> 424 F.2d 935 (D.C. Cir. 1970).

<sup>119</sup> *Id.* at 939.

mation under the Freedom of Information Act than criminal defendants previously enjoyed under the Jencks Act.<sup>120</sup> No distinction was made between parties and nonparties. The different terms in exemptions (5) and (7), moreover, simply do not convey the opposing meanings that the Attorney General would attribute to them. Parallelism is not a legislative forte, and the two provisions were executed separately with different problems in mind. The varied terminology may reflect the fact that internal memoranda are usually requested in the context of litigation with an agency, while investigatory materials are sought most frequently in private litigation in which the Government is not involved.

#### IV. CONCLUSION

The detailed analysis of various sections and the suggestions presented in this analysis should not be construed as manifestations of confidence in the potential of the Freedom of Information Act. In all likelihood, the ambiguities and deficiencies of this statute will be remedied, if at all, only by the passage of new and improved legislation. For the moment, however, a string of loopholes is all that exists to pull administrative agencies into line on information practices. Unless lawyers and courts fill some of these loopholes with rational disclosure policies, the Freedom of Information Act will provide less than a straw for the public to grasp while awaiting better information disclosure laws.

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<sup>120</sup> 110 CONG. REC. 17,667-68 (1964) (colloquy between Senators Long and Humphrey). The Jencks Act, 18 U.S.C. § 3500 (1964), provides that a defendant in a United States criminal prosecution may examine relevant statements of government witnesses after the witnesses have testified on direct examination.

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## THE FREEDOM OF INFORMATION ACT: SUGGESTIONS FOR MAKING INFORMATION AVAILABLE TO THE PUBLIC

CHARLES H. KOCH, JR.\*

Free and current information about the operations of the government is the keystone of a democracy. Without it, visions of impropriety and intrigue lead to mistrust. Without it, conjecture replaces knowledge as the basis for electoral decisions. Yet the whole structure of the federal bureaucracy sits, seemingly immovable, upon the public records of the government.

Two major congressional efforts have been undertaken to lift this mass of bureaucratic diffidence from the public records. The first of these efforts was section 3 of the Administrative Procedure Act, which was passed in 1946.<sup>1</sup> That provision directed agencies to make available more information about the law developing within them, but left the bureaucrats as the final judge of their own compliance. For this reason, section 3 as then worded did not significantly open the workings of government even to those directly affected by the administrative process. Therefore, Congress enacted the Freedom of Information Act in 1966.<sup>2</sup> Promulgated as an amendment to section 3, it was intended to make disclosure the rule — permitting records to be withheld only if they fell within one of nine exemptions.<sup>3</sup>

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1. Act of June 11, 1946, ch. 324, 60 Stat. 237. The Federal Administrative Procedure Act (the "APA") was passed for the purpose of establishing uniform standards and procedures for the activities of all administrative agencies. Section 3 of the APA was the public information section.

2. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250, *as amended*, Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54, *amending* Act of June 11, 1946, ch. 324, 60 Stat. 237 (codified at 5 U.S.C. § 552 (1970)). The Freedom of Information Act was enacted July 4, 1966, to become effective July 4, 1967. The codification contained some changes in the internal structure from the original enactment.

3. See 5 U.S.C. § 552(b) (1970).

The Act provides for judicial review of agency denial of access to identifiable records; it also specifically requires the agency to bear the burden of justifying the denial. Furthermore, it empowers the courts to enjoin agencies from wrongfully withholding records.<sup>4</sup>

However, more than added effectiveness separates the Act from the original section 3, for Congress held out the hope with its enactment that the mechanisms of this democratic government would become visible. Congress intended the Act to provide the means by which the electorate could obtain meaningful information with which to judge the performance of those operating the government. Thus, while consideration of the original section 3 focused upon the law-making function of each agency, in the contemplation of the new legislation the emphasis was placed on the right of the public to know how the government was performing. Unfortunately, despite this clear intent, utilization of the Act has been limited to providing those directly involved in the administrative process with some means of obtaining the information necessary to protect their special interests. The failure of the Act to accomplish its goal stems more from congressional misdirection and ad hoc interpretations by the courts than from conscious efforts by the bureaucracy.

This article will seek out<sup>11</sup> interpretations of the Act which will transcend the needs of individual applicants and provide effective ways to open the government both to parties involved in its proceedings and to the electorate.<sup>12</sup> In addition, the article will venture more ambitious revisions, less closely related to the present Act, which should implement the goals of a public information system.<sup>5</sup>

## I. DEVELOPMENT AND IMPLEMENTATION OF A PUBLIC INFORMATION SYSTEM

The 1930's saw an increase in the breadth of activities performed by administrative agencies which was so great that it became necessary to investigate possible procedures for controlling these activities. Of

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4. 5 U.S.C. § 552(a)(3) (1970).

5. The Act has already been the subject of some very learned critiques. Chief among them is the prophetic work by Professor Davis following on the heels of its enactment. See Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761 (1967) [hereinafter cited as Davis]. See also Giannella, *Agency Procedures Implementing the Freedom of Information Act: A Proposal for Unfair Regulations*, 23 AB. L. REV. 217 (1970) [report prepared for the Administrative Conference of the United States; hereinafter cited as Giannella]; Katz, *The Games Bureaucrats Play: Hide and Seek Under the Freedom of Information Act*, 48 TEXAS L. REV. 1261 (1970) [hereinafter cited as Katz].

primary concern was the secrecy with which agencies could operate. In 1935, Congress enacted the Federal Register Act<sup>6</sup> to provide for publication of administrative regulation in the same manner as other laws.

Late in the decade, President Roosevelt appointed a blue ribbon committee headed by the Attorney General<sup>7</sup> to develop procedures for the administrative agencies.<sup>8</sup> This committee found that one necessary reform was the elimination of the secrecy with which law was being created by federal agencies. The Committee stated that "[a]n important and far-reaching defect in the field of administrative law has been simple lack of adequate public information concerning its substance and procedure."<sup>9</sup> The Committee pointed to the natural distrust for secret government decision making as a major source of the criticism of the administrative process.<sup>10</sup> Although it praised the Federal Register Act, it proposed even broader disclosure of the law created in varied forms within the federal government. Its recommended legislation would have required the publication of policies and interpretations, and the promulgation of rules for making materials available to the public.<sup>11</sup>

6. 44 U.S.C. § 15 (1972) (originally enacted as Act of July 26, 1935, ch. 417, 49 Stat. 500).

7. On February 24, 1939, Attorney General Murphy, at the direction of the President, appointed "The Attorney General's Committee on Administrative Procedure" to investigate the need for procedural reform in the various administrative tribunals and to suggest improvements in administrative procedure. The Report of the Committee was transmitted to the Senate on January 29, 1941. ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, REPORT, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 213 (1941) [hereinafter cited as ATTORNEY GENERAL'S REPORT].

8. SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, S. Doc. No. 248, 75th Cong., 2d Sess. 245 (1946) [hereinafter cited as APA LEGISLATIVE HISTORY].

9. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 25.

10. The report states:

Such a state of affairs will at least partially explain a number of types of criticisms of the administrative process. Where necessary information must be secured through oral discussion or inquiry, it is natural that parties should complain of 'a government of men.' Where public regulation is not adequately expressed in rules, complaints regarding 'unrestrained delegation of legislative authority' are aggravated. Where the process of decision is not clearly outlined, charges of 'star-chamber proceedings' may be anticipated. Where the basic outlines of a fair hearing are not affirmatively set forth in procedural rules, parties are less likely to feel assured that opportunity for such a hearing is afforded. Much has been done in recent years to alleviate these difficulties. But much more can readily be done by the agencies themselves.

*Id.*

11. *Id.* at 195.

Although the majority report of the Committee seemed to focus its efforts upon exposing secret law, the minority report developed a position more sensitive to the needs of the democratic system for information concerning the interworkings of the government. Its recommendation for a public information section was that "matters of record shall be made available to all interested persons," except that "personal data" which the agency finds based upon good cause and statutory authorization should be treated as confidential.<sup>12</sup> The key words are "interested persons;" the use of the phrase "[t]he press and other interested persons"<sup>13</sup> indicates that the term "interested persons" was to be given a broad meaning intended to open access to others besides those directly affected by a specific agency decision.

### *Section 3 of the APA*

Final action on the original APA proposals was delayed by the Second World War. When Congress returned to reforming the administrative process, the public information section was again considered to be of great importance. However, a change in emphasis appeared in the legislative comments on the value and purpose of the public information section. At this point, Congress seemed more concerned with opening the workings of the government to the electorate in general than it had been previously.<sup>14</sup> Despite this concern, the public information system finally adopted, section 3 of the APA, pro-

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12. *Id.* at 221. The minority proposal also permitted agencies to withhold "publicity . . . during the preliminary or investigative phases of adjudication." *Id.*

13. *Id.*

14. The report of the Senate Judiciary Committee stated:

The public information requirements of section 3 are in many ways among the most important, far-reaching and useful provisions of the bill. . . . [T]hese provisions require agencies to take the mystery out of administrative procedures by stating it. The section has been drawn upon the theory that administrative operations and procedures are *public property* which the general public, rather than a few *specialists or lobbyists*, is entitled to know or to have the ready means of knowing with definiteness and assurance.

SENATE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, S. REP. NO. 752, 79th Cong., 1st Sess. 12 (1945) (emphasis added). The report of the House Judiciary Committee stated:

The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency 'housekeeping' arrangements may be involved.

HOUSE COMM. ON THE JUDICIARY, REPORT ON THE ADMINISTRATIVE PROCEDURE ACT, H.R. REP. NO. 1980, 79th Cong., 2d Sess. 17-18 (1946).

vided a method of disclosure only for those persons properly and directly affected by the agency action.<sup>15</sup>

Proposals to amend section 3 appeared soon after enactment of the APA. These proposals were precipitated by the realization that section 3 had not become a disclosure provision, but rather a statutory excuse for withholding government records.<sup>16</sup> Section 3 permitted numerous excuses for nondisclosure. Agencies could withhold information if secrecy was required "in the public interest" or if the records related "solely to the internal management of an agency." Information could also be held confidential "for good cause found," and even where no good cause could be found for secrecy or confidentiality the records were available only to persons "properly and directly concerned." These broad phrases were not defined in the section nor

15. Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237. Section 3 provided: Except to the extent that there is involved (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—

(a) RULES. — Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization 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; (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; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed and served upon named person in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) OPINIONS AND ORDERS. — 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 precedent) and all rules.

(c) PUBLIC RECORDS. — 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. (emphasis added)

16. "Section 3 of the Administrative Procedure Act . . . though titled 'Public Information' and clearly intended for that purpose, has been used as an authority for withholding, rather than disclosing, information. Such a 180° turn was easy to accomplish given the broad language of [Section 3]." HOUSE COMM. ON GOVERNMENT OPERATIONS, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, H.R. REP. NO. 1497, 89th Cong., 2d Sess. 4 (1966) [hereinafter cited as H.R. REP. NO. 1497]. See also ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT (1967), reprinted in 20 AD. L. REV. 263 (1963) [hereinafter cited as ATTORNEY GENERAL'S MEMORANDUM, page references to the AD. L. REV.].

in its legislative history.<sup>17</sup> There was no provision for review of an agency's wrongful denial of access to the records. In sum, section 3 was a public information statute only to the extent agencies desired that it be, and they didn't.<sup>18</sup>

### *Freedom of Information Act*

The failure of section 3 to provide access to government records even to those directly affected by agency action resulted in the congressional effort which culminated in the Freedom of Information Act.<sup>19</sup> One of the key changes was to require disclosure of all information in government records not specifically defined in the nine exemptions.<sup>20</sup> Hence, it is said that the Act was intended as a disclosure statute, not a withholding statute.<sup>21</sup>

The new legislation established a review procedure which provides judicial enforcement of the disclosure policy established by Congress. The district courts were authorized to grant de novo review of denials of access to records and empowered to enjoin agencies from improper denials. The agencies were required to bear the burden of

17. See Bennett, *The Freedom of Information Act, is it a Clear Public Record Law?*, 34 BROOKLYN L. REV. 72, 73 (1967).

18. The intent of Congress was clearly to direct agencies to make more information available: "The public information section is basic, because it requires agencies to take the initiative in informing the public." APA LEGISLATIVE HISTORY, *supra* note 8, at 251. Congress apparently felt that their direction would be enough. Of course, the bureaucracy virtually ignored the public information section. Sherwood, *The Freedom of Information Act: A Compendium for the Military Lawyer*, 52 MILITARY L. REV. 100, 104 (1971).

19. 5 U.S.C. § 552 (1970). See generally 80 HARV. L. REV. 909 (1967).

20. 5 U.S.C. § 552(b) (1970) sets forth the nine exemptions as follows:

- (1) matters specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy;
- (2) matters related solely to the internal personnel rules and practices of an agency;
- (3) matters specifically exempted 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;
- (6) personnel and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory files compiled for law enforcement purposes;
- (8) matters 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;
- (9) geological and geophysical information and data.

21. *Getman v. NLRB*, 450 F.2d 670, 679 (D.C. Cir.), application for stay denied, 404 U.S. 1204 (1971); See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971).

showing that denials were "specifically" permitted by one of the nine exemptions.<sup>22</sup>

In the most important change, however, access to government records was broadened under the Act by permitting "any person" to request government records, rather than only those persons "properly and directly concerned" as under prior section 3. This change in language indicates a shift of emphasis from providing access to citizens directly affected by an agency action to establishing a more informed electorate — an opening of the bureaucracy to any interested citizen.

In this new legislative effort the intent was to provide the public with ready access to government information. The Senate Judiciary Committee found that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information."<sup>23</sup> Thus, Congress set out to bring into the open "the hundreds of departments, branches, and agencies."<sup>24</sup> Looking into the full history of the Act, the Second Circuit later found that "the ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal government activities."<sup>25</sup> It is the electoral process and not just the administrative process for which the information was to be provided. It is the informed electorate as well as the informed party to an agency proceeding which occupied the foreground in the Act's legislative history.

### *The Act and the Informed Electorate*

Although the expressed purpose of the Act was to provide the electorate with information, it is not well suited for the task.<sup>26</sup> It is,

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22. 5 U.S.C. § 552(a) (3) (1970).

23. SENATE COMM. ON THE JUDICIARY, CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89TH CONG., 1ST SESS. 3 (1967).

24. *Id.* In signing the bill into law, President Johnson stated that "a democracy works best when the people have all the information that the security of the nation permits." Statement by President Johnson Upon Signing Public Law 89-487 on July 4, 1966, as reproduced in ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 263.

25. *Frankel v. SEC*, 460 F.2d 813, 816 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972). The court stated: "[F]or the great majority of different records, the public as a whole has a right to know *what its Government is doing*." 460 F.2d at 816, quoting S. REP. NO. 813, *supra* note 23, at 5-6 (emphasis added by the court).

26. The Act is universally considered to be the product of poor draftsmanship. Professor Davis announced on the heels of its enactment: "The Act is difficult to

of course, unrealistic to suppose that citizens in general will have the interest or the time to examine agency records to make themselves better informed voters. But two groups who digest information for mass consumption, researchers and the media, have not been sufficiently accommodated by the Act.

### Researchers

A study reported by Ralph Nader found that "most agencies have a two-pronged information policy — one towards citizens and one towards the special interest groups that form the agency's regulated constituency."<sup>27</sup> A survey conducted by the Administrative Conference<sup>28</sup> generally supports the conclusions of the Nader study.<sup>29</sup> This bias, however, is not the result of a conspiracy between special interests and the agencies but is rather the natural result of the Act.

Reliance on judicial enforcement is one reason for this bias. Judicial review is more realistically available to agency clientele than to most researchers. There is usually a tangible benefit in compelling disclosure to a party in an agency proceeding. Hence, the possibility of court action by a disappointed member of an agency's clientele is far greater than that of action by a disappointed private citizen engaged in research.

In addition, compliance with the Act requires considerable resource allocation. Because the Act permits some documents to be withheld, and because most agency statutes or rules require certain documents to be confidential, a large amount of staff resources must be committed to the segregation of documents before release. Agency officials are understandably reluctant to commit resources to such tasks. They become more reluctant where the request is not directly related

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interpret, and in some respects it is badly drafted." Davis, *supra* note 5, at 761. Although courts have differed in interpretation, they have agreed, if sometimes implicitly, with Davis' observations: "Unquestionably the Act is awkwardly drawn." Epstein v. Resor, 421 F.2d 930, 932 (9th Cir.), cert. denied, 398 U.S. 965 (1970). "The Information Act leaves a good many things not clearly defined." Nichols v. United States, 325 F. Supp. 130, 138 (D. Kan. 1971).

27. Nader, *Freedom from Information: The Act and the Agencies*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 2 (1970) [hereinafter cited as Nader].

28. The Administrative Conference was created by the Administrative Conference Act, 5 U.S.C. §§ 571-76 (1970). It is composed of representatives of the heads of the many administrative agencies who meet to discuss and recommend uniform changes in administrative procedure. See generally Prettyman, *Some Broader Aspects of an Administrative Conference of the United States*, 17 AN. L. REV. 48 (1964); Note, *The Administrative Conference Act*, 53 GEO. L.J. 457 (1965).

29. Giannella, *supra* note 5, at 221.

to an agency's function. This problem is aggravated by the fact that requests from researchers are generally broader and less exact, and hence require significant expenditures of resources. For these reasons, student groups engaged in general research, for example, will not find agency officials sympathetic to their requests.

The alleged two-pronged approach is also the result of the belief held by most government officials that the Act should not be used for "fishing expeditions." The Attorney General's memorandum on the Act expressed this view.<sup>30</sup> This opinion is not consistent with the history and purpose of the Act; the Act was no doubt intended to assist in permitting searching inquiries into the administrative process.<sup>31</sup> However, the absence of direction and advice, except to the limited extent provided by judicial review, makes it unlikely that bureaucrats will be disabused of this notion.

For these reasons, the Act often fails to promote disclosure to the researchers who in turn might help create a more informed electorate. Only the threat of judicial review by those few researchers who have the capability can force the system to make the Act perform this function.<sup>32</sup>

### The Media

More troublesome than the difficulty researchers experience in obtaining information is the fact that the media has gained very little from the Act despite its contribution to the enactment.<sup>33</sup> The media is the major conduit through which general information reaches the vast majority of the electorate, and therefore it can best provide the electorate with quick insight into government operations. Even Nader-type research groups must depend on the media to reach the private citizen.

At a symposium on the Act conducted by the Administrative Law Section of the American Bar Association one newspaperman, familiar with administrative agencies, testified as to the reasons the media has

30. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 292, states:

The requirement is thus not intended to impose upon agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize 'fishing expeditions.'

31. Giannella, *supra* note 5, at 231; Katz, *supra* note 5, at 1261.

32. See *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir.), *application for stay denied*, 454 U.S. 1204 (1971).

33. HOUSE COMM. ON GOVERNMENT OPERATIONS, ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT, H.R. REP. No. 92-1419, 92d Cong., 2d Sess. 8 (1972); Giannella, *supra* note 5, at 219.

not been a particularly prominent user of the Act.<sup>34</sup> The reporter pointed out that the media cannot wait for the grant of access; this is a process which takes even the speediest agency time in excess of ordinary deadlines. Second, because of the defenses of agencies, the media has developed alternate means for obtaining information about newsworthy occurrences, despite the fact that this information may be less complete and accurate than information from the agencies themselves. Third, it is simply bad business for one member of the media to invest money in a lawsuit to obtain information which will be public knowledge.<sup>35</sup>

Therefore, the Act has not provided the electorate with information because it has not adequately opened government operations to researchers and media. The public information system established by the Act fails to take cognizance of the practical problems of permitting access to these two groups of applicants.

### *Secret Law*

Although the Act was intended to do more, it has been somewhat successful in dealing with the problem of secrecy in agency law, making. Professor Davis, upon passage of the Act, recognized the dichotomy between secret law and public information. He prophesied this result in his statement: "Although the bar played a minor role in getting the Act enacted, members of the bar and their clients will be the principal beneficiaries. Unlike the Act's accomplishments in opening up information, its accomplishments in opening up secret law are impressive."<sup>36</sup>

The diminution of secret lawmaking is brought about by two provisions. First, the Act requires an agency to make available for public inspection and copying four classes of information: (1) "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;" (2) "those statements of

34. L. Kohlmeier, *Freedom of Information Act and the Agencies, The Journalist's Viewpoint*, 23 AD. L. REV. 129, 143 (1971). Mr. Kohlmeier is a reporter for the Wall Street Journal and author of *The Regulators: Watchdog Agencies and the Public Interest. Accord*, Statement of Ward Sinclair, Washington Bureau, Louisville Courier-Journal, *Hearings on U.S. Government Information Policies and Practices — Administration and Operation of the Freedom of Information Act Before the Foreign Operations and Government Information Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 4, at 1279 (1972) [hereinafter cited as *1972 Hearings*].

35. *But cf.* Statement of John Seigenthaler, Editor, Nashville Tennessean, *1972 Hearings* at 1302; Statement of James Steele, Writer, Philadelphia Inquirer, *Id.* at 1294.

36. Davis, *supra* note 5, at 804.

policy and interpretations which have been adopted by the agency and are not published in the Federal Register;" (3) "administrative staff manuals and instructions to staff that affect a member of the public;" and (4) "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."<sup>37</sup> Failure to comply with this provision disables the agency from relying on, using or citing as precedent such material unless the party has actual notice.<sup>38</sup> Thus, decisions and opinions of the agency and the affected party now are available to anyone having business with the agency.

Second, secret lawmaking is diminished under the Act by providing parties with access to agency records. The APA contains no provision for pretrial discovery in the administrative process.<sup>39</sup> The Administrative Conference found that "most federal agencies do not provide in their rules for any significant amount of discovery against the agency."<sup>40</sup> Since the provisions of the Federal Rules of Civil Procedure for discovery do not apply to administrative agencies, there is a gap with respect to the discovery available in an administrative proceeding. Moreover, even those agencies which do provide some pretrial discovery techniques in an adjudicative context may not have discovery procedures in other types of proceedings, such as rulemaking.

The major use of the Act to date has been to fill this void and to provide new discovery tools where none existed before.<sup>41</sup> The great

37. 5 U.S.C. § 552(a)(2) (1970).

38. 5 U.S.C. § 552(a)(2)(C) (1970) states in part:

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 . . . 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.

39. 1 K. DAVIS, ADMINISTRATIVE LAW § 8.15 at 588 (1958).

40. K. DAVIS, ADMINISTRATIVE LAW § 8.15 at 392 (Supp. 1970).

41. One example of the use of the Act as a form of discovery is found in *Shakespeare Co. v. United States*, 389 F.2d 772 (Ct. Cl. 1968), *appeal dismissed*, 419 F.2d 839 (Ct. Cl. 1969), *cert. denied*, 400 U.S. 820 (1970). Shakespeare was locked in a dispute with the IRS over the amount of excise tax it owed. It sought discovery of the private rulings of the IRS. As an alternative approach, Shakespeare claimed that access should be granted under the Act. The court found that Shakespeare could not obtain discovery under any traditional discovery theory. It dismissed the claim under the Act because the records were not relevant to the proceeding and because the documents were not specifically defined. The relevancy holding is clearly wrong because there is no requirement of relevancy under the Act. The holding that the party failed to properly define the documents is too restrictive. The restrictive decision probably resulted because the court recognized the claim under the Act as just another discovery ploy and wished to avoid giving records under the Act which it found un-

bulk of access requests received by federal agencies concern requests for information to be used by private interests in proceedings before the agencies.<sup>42</sup>

It can be predicted that the major use of the Act will continue to be by private parties to gain discovery of agency records. Where there is no discovery in an agency's adjudicative proceedings, the Act will be the only method of gaining access to agency documents. Where there are alternatives, a party to an agency proceeding may well have a choice of tactics. Parties will certainly attempt to utilize the Act as a discovery tool where the information may be or has been held to be irrelevant for the purposes of actual discovery.<sup>43</sup> It will also

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available under ordinary discovery. Ordinarily, an appellate court will uphold the use of the Act for discovery purposes, particularly where no other discovery exists in the agency's proceeding. *See, e.g.,* Bannerkraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345 (D.C. Cir. 1972).

42. Ralph Nader found that from the effective date of the Act to early 1969, there were forty cases brought under the Act: "Thirty-seven of these cases involved actions by corporations or private parties seeking information relating to personal claims or benefits. In only three cases did the suits involve a clear challenge by or for the rights of the public at large to information." Nader, *supra* note 27, at 13.

Review of the reported cases under the Act to date shows fifty-five cases, forty-one of which involve, to some degree, access to records. Of these, thirty-three involve corporate or private interests. (The cases brought under the Act which involve validity of a rule under the publication provision are excluded, but they all involved private interests). Six cases could be termed public information cases. *See* Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (access to "Excelsior" lists of employees for the purpose of studying labor elections); Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971) (access to President's Commission Report on the SST); Epstein v. Resor, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970) (access to war papers for scholarly study); Skolnick v. Parsons, 397 F.2d 523 (7th Cir. 1968) (access to report to the President from the President's Crime Commission); Nichols v. United States, 325 F. Supp. 130 (D. Kan. 1971) (access to exhibits relating to Kennedy assassination); Consumers Union v. Veterans Admin., 301 F. Supp. 796 (S.D.N.Y. 1969) (access to government test data for hearing aids). One would expect the requests to reflect similar ratios.

43. The use of the Act as a discovery tool may delay an enforcement proceeding if the adjudicative proceeding must be suspended by the agencies until all the material is supplied. One solution to this problem might be to adopt the doctrine that since a request under the Freedom of Information Act is a separate matter from the pending adjudicatory proceeding the pendency of such a request is not a ground for postponing the hearing in the proceeding. However, resort to this remedy may be foreclosed as a result of a recent opinion by the District of Columbia Circuit. *See* Bannerkraft Clothing Co. v. Renegotiation Bd., 466 F.2d 345 (D.C. Cir. 1972), affirming the district court's decision to enjoin the proceedings until the request under the Act was completed. The court concluded that the Act was intended to mitigate the problems of those forced to litigate with agencies on the basis of incomplete information, and that the parties involved in the proceeding would suffer irreparable injury if the proceeding were continued pending completion of the request. *But cf.* Sears, Roebuck & Co. v. NLRB, 433 F.2d 210, 211 (6th Cir. 1970) (*per curiam*).

be used in this fashion in nonadjudicative proceedings, such as rule-making, where the right to discovery against the agency may not exist.

The access provision of the Act has been largely limited to providing additional discovery because of inherent weaknesses in the congressional approach to implementing a public information policy. Knowledge of the agency and the law is almost essential to framing a request under the Act. Only special interests have both the incentive and the resources to test denial in the courts; hence, where an agency denies a request in the nature of discovery by an affected party, the basis for that denial will in all likelihood be tested. Not only has this factor led to court opinions and orders limiting agency discretion to withhold such records, but bureaucrats have treated requests more generously where the threat of court action exists.<sup>44</sup>

In fairness, there is nothing particularly wrong with this result.<sup>45</sup> Indeed, the advantages of a better informed bar outweigh any disad-

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*See also* Missouri Portland Cement Co. v. FTC, CCH TRADE REG. REP. ¶ 74.124 (D.D.C. 1972) (no irreparable injury shown).

If the *Bannerkraft* opinion is limited to instances in which no other method of discovery is available, it is sound and will no doubt have a beneficial result. If it is applied to proceedings where discovery against the agency is provided by the agency, then this decision will do great damage to agencies' law enforcement efforts, due to the delay entailed in halting the proceedings while discovery is conducted.

44. "The mere threat of . . . an action under the act has often released documents that have been earlier withheld." Statement of Benny L. Kass, 1972 *Hearings, supra* note 34, at 1414.

45. However, the increased publication and access might well have been accomplished under old section 3 but for the absence of judicial enforcement. Of the four classes of documents which must be made available for public inspection, the two most important — adjudicative orders and opinions, and statements of policy and interpretation — could have been available under section 3. Section 3(b) makes available the first class by the language: "All final opinions and orders in the adjudicative cases" with an exception which is maintained in the exemption in the Act. The second class, statements of policy and interpretation, would also be included in the section 3(b) requirement of availability of "all rules." The term "rules" is defined by the APA as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4) (1970). The phrase in the Act — "statement of policy or interpretation" — is no more inclusive than this definition. The term "rules" is much broader than the rules referred to in the Federal Register provision. 5 U.S.C. § 552(a)(1) (1970). It can be assumed that the use of the term in (b) was not intended to be a redundancy and hence meant everything included in the definition of rules but not covered by the Federal Register provision. In addition, this definition of "rules" might well have been held to include the third class of "staff manuals and instruction to staff that affect a member of the public."

The second assault on secret law, the discovery mechanism, could also have been developed by judicial enforcement of section 3. Section 3(c) required a grant of access to anyone "properly and directly concerned." One who could claim to be affected by an agency determination certainly would fall within this definition. Thus,

vantages of opening the decisional process to private interests. In addition, the efforts of "public interest" attorneys are surely aided by the Act because of the likelihood that they would be denied access to records more often than the representatives of agency clientele. Any resulting diminution in secret lawmaking is desirable even if the process remains obscure or unavailable to the general public.<sup>46</sup>

Yet, even in this regard, the Act has not been totally effective. Access has been incomplete and inequitable. Regular members of the agencies' clientele with experienced and specialized counsel have found the Act more useful than those with less understanding, resources, and influence.<sup>47</sup>

### *Reasons for Agency Evasion*

Since the effective date of the Act, criticizing the agencies for the failures of the Act has been a popular sport.<sup>48</sup> The tendency has been to impute ill will to bureaucrats for their reluctance to comply.<sup>49</sup>

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broad discovery could have resulted under this provision. There are a few exceptions, but none of these are any broader than those in the present Act.

Consequently, had the public information section of the APA been obeyed, little would have been accomplished by an amendment such as the Act in the diminishing secret law. More agency law would have been available for inspection and the absence of discovery in some instances would have been cured. If this were the sum total of the goal of the Act, an amendment to grant court jurisdiction could have cured the problem.

46. There is a merging of both the secret law and public information problems which should be recognized in order to interpret the Act to assist citizens in dealing with the government. The Act should be interpreted to require publication of rules and interpretations of broad application developed in an individual adjudicative context on the same basis as such broadly applicable determinations are now published when promulgated in a rulemaking proceeding. Individual adjudicative opinions generally contain so much opinion relevant only to the case at hand that broad policy decisions are hidden. In *British Auto Parts, Inc. v. NLRB*, 405 F.2d 1182 (9th Cir. 1968), *cert. denied*, 394 U.S. 1012 (1969), a rule promulgated by adjudication was not required to be separately published. The right of the agency to make rules in adjudication, although criticized, has been upheld. *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969). However, it would greatly assist those who are not in continual contact with the agency if such rules were separated from the individual opinion and published as rules.

47. H.R. REP. No. 92-1419, *supra* note 33, at 8.

48. *See, e.g.*, Giannella, *supra* note 5; Katz, *supra* note 5; Nader, *supra* note 27.

49. *See, e.g.*, Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 345 (1969); Katz, *supra* note 5; Statements of Messrs. Robertson, Wellford and Schuck for the Center for the Study of Responsive Law, 1972 *Hearings*, *supra* note 34, at 1251. Indeed, there have been certain allegations of conscious avoidance of the Act which

However, an objective reading of the Act leads to the conclusion that the poor performance of the agencies is largely the result of inherent defects within the Act.

The significant resource allocation required by the Act for the release of information necessarily causes bureaucrats to attempt to avoid or mitigate compliance. Providing information to the public is a primary task in very few agencies. Public information considerations must be balanced in every agency against its primary role, and there is no federal agency which envisions itself as having the resources to carry out the full extent of its function. In this milieu, public information activities find little support.<sup>50</sup>

The agencies are left with the difficult task of applying ambiguous language in specific circumstances. Therefore, it is not surprising that agencies resolve the ambiguities in a way which is most favorable to them or which requires the least commitment of resources. The propensity to withhold documents increases because of the unresolved conflict between the disclosure compelled by the Act and the nondisclosure directed by the specific statutes which control the activities of the agency.<sup>51</sup> These conflicts are most easily resolved by withholding all documents arguably covered by the specific statutory direction.<sup>52</sup> Unfortunately, the practical problems which the Act creates for agencies are largely ignored by the courts.<sup>53</sup>

A significant drain on the administrative process is the inevitable result of the present draconian approach of the judiciary. Courts interpret the Act so that agencies must not only review and justify withholding each individual document, but are also often required to edit documents so that individual portions can be released.<sup>54</sup> Although it

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seem so elaborate that it seems improbable that most bureaucrats would actually take the trouble. This sort of activity does not seem to be very widespread, and certainly is not the cause of a significant amount of the failure to make records available.

50. See Statement of Robert Beatty, Assistant Secretary for Public Affairs, Department of Health, Education and Welfare, 1972 Hearings, *supra* note 34, at 1666-67.

51. Sherwood, *supra* note 18, at 119.

52. See Giannella, *supra* note 5, at 221.

53. See *Wellford v. Hardin*, 444 F.2d 21, 24 (4th Cir. 1971). Indicative of this attitude is the court's statement: "The Freedom of Information Act was not designed to increase administrative efficiency. . . ."

54. See, e.g., *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970). *But see* *Environmental Protection Agency v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973), holding that "in camera inspection . . . to sift out so-called 'non-secret components'" [41 U.S.L.W. at 4204] is not permissible where exemption one (documents specifically required by Executive Order to be kept secret in the interest of defense) is concerned.

is inconceivable that Congress intended the Act to cripple agencies' efforts to fulfill their primary duties,<sup>55</sup> courts do not generally consider the possibility of that result in their interpretations of the Act.

The notable exception to the typical myopic judicial decisions is Judge Holtzoff's opinion in *Bristol-Myers Co. v. Federal Trade Commission*.<sup>56</sup> In that case, the applicant requested numerous documents compiled in connection with a law enforcement investigation. Judge Holtzoff found that the definition of available documents under the Act must be susceptible to use by lower level staff so that the release of documents constitutes merely a ministerial function. He surmised that, if information was to be released to "any person," the mechanics for obtaining access could not involve agency officials on a regular basis.<sup>57</sup> Unfortunately, the D.C. Court of Appeals, in reviewing Judge Holtzoff's opinion, found unacceptable anything other than tedious review and editing of individual documents.<sup>58</sup> Ignoring the rationale of the lower court, the court simply found that the lower court had committed error because it had "failed to examine the disputed documents, and to explain the specific justification for withholding particular items."<sup>59</sup> Thus, the unworkability of the Act has not been cured, but instead has been aggravated by the courts. Agencies certainly need prodding to release information, but there is a difference between prodding and the unrealistic compulsions which are now imposed upon them.

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55. Giannella, *supra* note 5, at 234-35.

56. 284 F. Supp. 745 (D.D.C. 1968), *aff'd*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

57. *Id.* at 747.

58. *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

59. *Id.* at 938. It is interesting to note that the judicial approach has also placed significant burdens on reviewing courts. In *Bristol-Myers* the appellate court returned the case to the district court for review of all the documents. If every review is to necessitate the court reading all the documents, then a significant drain on the already overworked judicial system will result. Subsequent to the appellate court's direction in *Bristol-Myers* the district court again refused access without inspecting the documents. See *Irons v. Schuyler*, 321 F. Supp. 628 (D.D.C. 1970). The court said:

This Court is not required to examine every manuscript decision of the past 100 or more years to decide in each case if there is trade secret or other material which should be excluded. The legislative history of the Act indicates that it was not the intent of Congress to add materially to the burden of overworked courts.

*Id.* at 629. This may be good reading of congressional intent and good sense, but it does not appear to be the law. Another possible method of avoiding this overwhelming burden is found in the approach of the court in *Wechsler v. Shultz*, 324 F. Supp. 1084 (D.D.C. 1971), where the court only inspected samples of the numerous records in question.

## II. MAKING THE ACT WORK

The assignment for those who are dissatisfied with implementation of the Act is not to lay blame but to remold the Act so that ready access to government records can be a reality. The primary requisite for all interpretations of the Act must be the practicality of implementation, not just in the case at issue, but in relation to every potential access request similar to that in the case at issue.

A major effort to enable agencies to leave compliance in the hands of lower level staff is necessary; hence, distinctions cannot be too sharply drawn or too complicated. Moreover, it must be possible to make categorical decisions as to whether or not to release documents. Compliance with the Act breaks down where every document covered by a request must be read and edited by members of the agencies' professional staff.

Implementation of the Act must be equitable. Every request must stand or fall on the same test. Major resource commitments or nice distinctions necessarily lead to a value judgment as to the worth of a particular request. The possibility of an enforcement proceeding becomes a key factor in such a situation. Finally, the more complicated the implementation, the slower access will come. The imposition of time limits upon agencies is an easy and unthinking approach to delay which is unacceptable.<sup>60</sup> The reasons behind the delay must be examined and cured.

The first effort in making the Act work must be made by the courts. The courts must take a more practical approach to interpreting the Act. Even though the Act permits exemptions only where "specifically stated," its ambiguity gives the courts a broad range of discretion in its implementation. Courts have unfortunately followed an ad hoc approach. At present, the decision in every case involves a balancing of the equities of the parties before the court. The Act will become a public information statute only if the courts take a pragmatic look into the agencies' recordkeeping and limit themselves to broad pronouncements as to the categories of information which must be released.

The two statutory exemptions which have raised the most questions are investigatory files and internal documents. These exemptions are particularly susceptible to practical interpretation. Perhaps this susceptibility is a result of the fact that they grew out of concern for the continued functioning of the agencies without significant interfer-

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60. H.R. REP. NO. 92-1419, *supra* note 33, at 83.

ence from the Act.<sup>61</sup> Suggested below are interpretations which both offer more public information and deal realistically with agencies' problems in releasing these types of records.

### *Investigatory Files*

Exemption seven,<sup>62</sup> the investigatory file exemption, has been one of the most controversial. This exemption protects from disclosure investigatory files compiled by the agency for the purpose of pursuing its law enforcement functions, whether civil or criminal. By the inclusion of the phrase "except to the extent available by law to a private party," Congress intended to foreclose use of the exemption to deny access to documents which otherwise have been made available by Congress and the courts, such as Jencks Act statements.<sup>63</sup> The exemption's purpose is to assure that the Act does not interfere with the law enforcement responsibilities of the agencies.

The language of the exemption seems to create a blanket exemption for any records compiled for law enforcement purposes, and some courts have so read it.<sup>64</sup> However, the fact situations presented to the courts have compelled them to legislate some limitations. The courts now stand at the crossroads between two related interpretations of the investigatory file exemption. One interpretation requires

61. See Note, *Freedom of Information: the Statute and the Regulation*, 56 GEO. L.J. 18, 39-40, 47 (1967).

62. 5 U.S.C. § 552(b) (1970); "This section does not apply 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 . . ."

63. The Attorney General interpreted 5 U.S.C. § 552(b) (1970) as follows: The effect of the language in exemption (7) . . . seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example, litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500 [1970]) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other person, the new law, like the Jencks statute, does not permit the statement to be made available to the public.

ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 307. The Jencks statute was enacted in response to the Supreme Court's grant of access to government witness interview reports in *Jencks v. United States*, 353 U.S. 657 (1957). For an interpretation of the statute see *Palermo v. United States*, 360 U.S. 343 (1959).

64. In *Frankel v. SEC*, 460 F.2d 813 (2d Cir.), *cert. denied*, 93 S. Ct. 125 (1972), the court found that the exemption was indeed unlimited. It read the legislative history as expressing a congressional intent that any investigatory file compiled for law enforcement purposes is exempt forever. *Accord*, *Cowles Communication, Inc. v. Department of Justice*, 325 F. Supp. 726 (N.D. Cal. 1971), holding that "investigatory files compiled for law enforcement purposes' need not be produced whether proceedings be contemplated or not." 325 F. Supp. at 727.

release of files when they are no longer current, or for some other reason have ceased to be useful for law enforcement purposes; the other requires release of that portion of the records, whether inactive or current, that will not prematurely disclose the government's case. While one of these interpretations is workable, the other has the potential effect of interfering with the administrative process.

In *Cooney v. Sun Shipbuilding and Drydock Co.*,<sup>65</sup> one of the earliest opinions to interpret the exemption, the court was faced with a fact situation which compelled it to limit the exemption. Plaintiff sought production of a report of an accident, which resulted in the death of plaintiff's decedent, prepared immediately after the accident by an investigator for the Department of Labor. The law enforcement file containing the report was four and a half years old, and no longer useful to the government for law enforcement. The court limited the exemption by looking beyond the language of the Act to the legislative purpose. The primary purpose, it found, was to avoid premature disclosure of the government's case in a law enforcement proceeding. Because the records were not only old but had served their public purpose, the court held that the purpose of the exemption was not furthered by applying it to these documents.

*Bristol-Myers Co. v. Federal Trade Commission*<sup>66</sup> suggested a similar limitation to the exemption. There the Federal Trade Commission sought to protect documents relevant to a rulemaking proceeding involving the analgesic drug industry. The Federal Trade Commission had originally compiled the documents for the purpose of possible cease and desist proceedings, but later decided to deal with the problem by an industrywide rulemaking proceeding. The documents sought were old and the original law enforcement purpose no longer existed. Therefore, the court found that the danger of premature disclosure was not present since no real concrete possibility of an adjudicative proceeding existed. It stated that the test was whether the possibility of adjudication was so unlikely that the records could not be said to be a law enforcement file.<sup>67</sup>

Although these cases involve files which were found to be no longer "law enforcement," the underlying "premature disclosure" rationale has been broadened to include current files. In *Wellford v. Harbin*,<sup>68</sup> the district court, citing both *Cooney* and *Bristol-Myers*, found that the test was not whether the file was still a law enforcement

65. 288 F. Supp. 708 (E.D. Pa. 1968).

66. 424 F.2d 935 (D.C. Cir.), cert. denied, 400 U.S. 824 (1970).

67. *Id.* at 939.

68. 315 F. Supp. 175 (D. Md. 1970), *aff'd*, 444 F.2d 21 (4th Cir. 1971).

file, but whether portions of the records sought from an investigatory file might prematurely disclose the government's case. Plaintiff sought four categories of documents from the Department of Agriculture: letters of warning sent to nonfederally inspected meat or poultry processors; information relating to detention of meat and poultry products; biweekly reports of the Director of Slaughter Inspection Division; and minutes of meetings of the National Food Inspection Advisory Committee. The court postponed consideration of the last two categories.<sup>69</sup> Finding that the first two categories of documents were already in the possession of the potential party to any proceeding, the court held that release could not result in premature disclosure of the government's case. The appellate court upheld the district court and agreed with its use of the "premature disclosure" rationale.<sup>70</sup>

The expansion of the "premature disclosure" rationale by *Wellford* is extremely impractical. Agencies may automatically release files when they are not current or for some other reason have ceased being useful for law enforcement purposes. But agencies cannot reasonably be expected to release documents contained in a working law enforcement file. Constant searches through law enforcement files would place an impossible burden on the law enforcement resources of every agency. More onerous is the prospect that after each new release of information to a party, such as pretrial conference, new documents would fall into the disclosable category by operation of their disclosure to respondent. Thus, constant new releases would be necessary throughout the law enforcement proceeding.

The premature disclosure reasoning is not only impractical to administer, but it is also not good law. The sole basis for the rationale is one sentence of the history of the exemption which reads: "The Act is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding."<sup>71</sup> To glean from this sentence the conclusion that premature disclosure was the *only* interference from which Congress intended to protect agency law enforcement seems somewhat intuitive. This sentence, in context, suggests *one* of the

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69. 315 F. Supp. 179. Upon reconsideration the court decided not to examine the biweekly reports and the minutes, determining that they were exempt under exemption five.

70. *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971). However, the court limited reliance on a premature disclosure rationale by its finding that the requested materials were not part of an investigatory file because they were the results of agency action which should have been released as such. 444 F.2d at 24.

71. H.R. REP. No. 1497, *supra* note 16, at 11; *see Wellford v. Hardin*, 315 F. Supp. 175, 177 (D. Md. 1970).

ways Congress did not wish the exemption to be used.<sup>72</sup> This language should not be read to indicate Congress' intent to limit the exemption solely to premature disclosure.<sup>73</sup>

Courts have recognized that the exemption was intended to assure that the Act was not used to interfere with law enforcement functions.<sup>74</sup> Although it is perhaps a better reading of both the language and the history of the Act to conclude that the exemption is blanket,<sup>75</sup> it is clear that, at the very least, no grant of access was intended where it might in any way interfere with law enforcement.

The need for some limitation on the exemption is evident.<sup>76</sup> A workable limitation is the test set down by the District of Columbia Circuit in *Bristol-Myers*: "Thus the District Court must determine whether the prospect of enforcement proceedings is concrete enough to bring into operation the exemption for investigatory files, and if so whether the particular documents sought by the company are nevertheless discoverable."<sup>77</sup> If a file is currently active then it should be given blanket protection. But if it has passed its usefulness, then it should be open to the public, excepting those records protected by another exemption. This "currently active" limitation has been found to comport with legislative intent in creating the exemption.<sup>78</sup> Such a limitation would be practical. It would permit the agencies undisturbed use of the working files while freeing the information in them when they are no longer serviceable to the agency.

72. In *Cooney v. Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708, 711 (E.D. Pa. 1968), the court found "a primary purpose" was to prevent premature disclosure. It did not suggest that it was the only purpose.

73. Indeed, in *Benson v. United States*, 309 F. Supp. 1144, 1146 (D. Neb. 1970), the court relied on the very same sentence of the House Report to reach an opposite conclusion.

74. The courts have tended to be sympathetic to agencies' legitimate need to protect information in their enforcement files, and have found that the Act should not be used to interfere with the law enforcement activities of administrative agencies. "The investigatory functions of the Agency may not be crippled by a requirement not commanded by the statute, certainly not by a requirement specifically exempted by the statute." *Evans v. DOT*, 446 F.2d 821, 824 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972). In *Clement Bros. v. NLRB*, 282 F. Supp. 540 (N.D. Ga. 1968), the court found that in addition to the legislative history, there is a "common sense necessity of protecting the investigatory function." *Id.* at 542.

75. *Benson v. United States*, 309 F. Supp. 1144 (D. Neb. 1970), found that: "The legislative history of this statute indicates that it is not the intent of the statute to hinder or in any way change the procedures involved in the enforcement of any law including 'files prepared in connection with related government litigation and adjudicative proceedings.'" *Id.* at 1146 (emphasis added).

76. See, e.g., *Nader*, *supra* note 27, at 6; *Sherwood*, *supra* note 18, at 128.

77. *Bristol-Myers Co. v. FTC*, 424 F.2d 935, 939-40 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

78. *Katz*, *supra* note 5, at 1279.

### Informants' Privilege

The one difficulty with this approach is the protection of informants. Nowhere in the Act is there articulated an "informants' privilege." However, courts have interpreted the investigatory file exemption as protecting those who assist the government since identification of informants may interfere with law enforcement.<sup>79</sup> The rationale behind the cases which apply the most restrictive readings of the investigatory file exemption has been the protection of informants.<sup>80</sup>

There is no reason that the two considerations cannot be separated. Informants could be protected by a limited exemption and the rest of the file could be released when it ceases to be active. To accomplish this, courts need only focus on the purpose of the exemption to protect the law enforcement function. They could release the file but protect information which would identify informants because release of the informant information would make citizens reluctant to inform and thereby severely impair government law enforcement.<sup>81</sup> Specific recognition of an informant privilege would lead to broader disclosure by limiting the "informant privilege" rationale to protection of informants only and not entire files.

#### Criminal law enforcement files

Another step which would open investigatory files would be to recognize the natural distinction between criminal investigatory files and civil files. The investigatory file exemption has been found not

79. *Evans v. DOT*, 445 F.2d 821 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972).

80. This rationale has been explained as follows:

For at least two reasons, of which Congress was undoubtedly aware, investigation files should be kept secret. The informant may not inform unless he knows that what he says is not available to private persons at their request, but more important in this day of increasing concern over the conflict between the citizen's right of privacy and the need of the Government to investigate it is unthinkable that rights of privacy should be jeopardized further by making investigatory files available to private persons. If these concerns are legitimate concerns, and I have no trouble in concluding that Congress regarded them as such, then at least a part of the purpose of enacting the investigatory file exemption is lost if the file ceases to be confidential as soon as the threat of a law enforcement proceeding disappears. Consequently, I hold that 'investigatory files compiled for law enforcement purposes' need not be produced whether proceedings be contemplated or not.

*Cowles Communication, Inc. v. Department of Justice*, 325 F. Supp. 726, 727 (N.D. Cal. 1971) (footnotes omitted).

81. Informants may also be protected by exemption four. However, since no one knows what that exemption means [ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 300-03] it might be wiser to rely on the law relating to government investigatory files to protect informants.

to be limited to criminal investigation.<sup>82</sup> This finding is supported by specific legislative statement.<sup>83</sup>

However, a more severe public policy rationale exists for the protection of criminal investigatory files.<sup>84</sup> Broader release of civil investigatory file information would be possible if a special interpretation of the exemption, as applicable only to criminal investigatory files was established. Criminal law enforcement files could thereby be given a more restrictive exemption than civil enforcement files.

Not only will this effect better protection for the government's criminal investigatory function, but it will protect the individual rights of those involved in criminal investigation. It is difficult to find any reason why the public should have access to the files compiled in the investigation of a possible individual criminal activity.

The difference in policy considerations for the releasing of civil investigatory files and criminal investigatory files is so great that it was a mistake for Congress to consider them together in the first place, and it remains a mistake to continue to consider them together.

#### *Internal Memorandum Exemption*

Inter-agency or intra-agency documents are protected by exemption five.<sup>85</sup> This provision exempts any internal document "which would not be available by law to a party . . . in litigation with the agency." Thus the preliminary test is whether a party in any conceivable context could discover the document. If not, then the document is protected by exemption five. The phrase "which would not be available by law to a party" was intended to incorporate the traditional privileges applied to such documents.<sup>86</sup> The purposes of the exemption are to protect an agency's staff from operating in a "fish bowl," so that the staff will freely express their opinions, and to prevent the premature disclosure of agency decisions.

The internal memoranda exemption has resulted in impractical ad hoc judicial interpretation. Although this exemption seems to be

82. *Clement Bros. v. NLRB*, 282 F. Supp. 540, 542 (N.D. Ga. 1968). *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D.P.R. 1967).

83. H.R. REP. No. 1497, *supra* note 16, stated: "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws." *Id.* at 11.

84. *Black v. Sheraton Corp.*, 50 F.R.D. 130, 132 (D.D.C. 1970).

85. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (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."

86. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 304.

a blanket exemption for internal papers, the courts have found occasion to attempt to limit its applicability. In *Consumers Union v. Veterans Administration*,<sup>87</sup> one court reasoned from the "available by law" phrase that an internal memorandum would be available under the Act if it were available through discovery under rule 26(b) of the Federal Rules of Civil Procedure. Consumers Union sought the results of hearing aid tests conducted by the Veterans Administration. The court, by superimposing upon the Act precedent developed under rule 26, found that the documents would ordinarily be made available under the Act. It relied on the traditional "government records" exception to discovery under rule 26. Government records had been held to be privileged where they were part of the "deliberative process that must precede any well taken decision or policy statement."<sup>88</sup> The court relied on the cases decided before passage of the Act to find that the exception did not extend to factual documents. It transferred the "policy vs. factual" document distinction to the fifth exemption and held that the exemption did not extend to factual material.<sup>89</sup>

The District of Columbia Circuit in *Bristol-Myers v. FTC*<sup>90</sup> went further and held that the exemption applied only to the opinion portions of internal documents and not to the entire document.<sup>91</sup> The court followed this expansion of the "purely factual" doctrine in *Sterling Drug, Inc. v. Federal Trade Commission*.<sup>92</sup> *Sterling* involved a request for documents relating to the Commission's investigation of a merger which was similar to the one which Sterling was defending but which the Commission had ultimately approved. The court held that not only purely factual documents but also purely factual portions of policy documents must be released. Thus, under these two cases, agencies must attempt to edit "policy" documents so that the factual portions of an otherwise exempted document could be disclosed.<sup>93</sup>

87. 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed*, 436 F.2d 1363 (2d Cir. 1971).

88. *Id.* at 804.

89. *Id.* at 805.

90. 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970).

91. After holding that portions of a document may be deleted to protect confidential information, the court moved on to exemption five where it found "[a] similarly detailed analysis is necessary." 424 F.2d at 939.

92. 450 F.2d 698 (D.C. Cir. 1971).

93. *Sterling* recognized that a document might be so opined that a deletion approach would not be practical, but did not rule out the deletion approach in all instances. This can be seen in the court's answer to Sterling's contention that the

This holding is impracticable. The segregation of fact from opinion in individual memoranda cannot be done by lower level staff personnel. Hence, trained professionals must read every internal memorandum and edit out "purely factual" material. The mass of records which would require such treatment would require a large resource allocation, both by the agency and later by a reviewing court.

Even as applied categorically to separate internal documents, the "purely factual" test places a significant burden on agencies. Request will not be limited to relevant discovery material as under rule 26, and hence, merely separating factual documents from policy documents will require professional staff to read and to segregate vast quantities of documents.

It would be more consistent with the underlying goals of the Act if all internal memoranda were released after a certain period of time. A theory analogous to the "currently active" theory developing under the investigatory file exemption would be the most rational way to limit this exemption. The "premature disclosure" rationale is more firmly rooted under the internal memorandum exemption than under the investigatory file exemption.<sup>94</sup> Internal memoranda could, based on the underlying theory of the exemption, lose their protection after they were no longer pertinent to a current decision.<sup>95</sup> Courts should be no more reluctant to incorporate such a limitation than they are to

lower court had not properly considered the possibility of deleting the opinion portions of the memorandum when it said:

we must agree, however, that there is no indication in the opinion below that the judge considered the possibility of deleting portions of the documents. It may well be that making deletions would not change the character of these documents, since they appear to consist primarily of the thoughts and recommendations of the Commission and its staff. . . . We must therefore remand the case so that the District Court judge can consider this possibility and state in his opinion that he has done so.

*Id.* at 704. The *Sterling* court cited *Soucie v. David*, 448 F.2d 1067 (D.D.C. 1971), which held that: "Factual information may be protected only if it is inextricably intertwined with policy-making processes." 448 F.2d at 1077-78. However, the court in *Soucie* seemed to limit this holding to separate documents and not portions of documents, and hence, it seems that both *Bristol-Myers* and *Sterling* go beyond the holding of that case.

94. ATTORNEY GENERAL'S MEMORANDUM, *supra* note 16, at 304 states: "The above [legislative] quotations make it clear that the Congress did not intend to require the production of [internal memoranda] where *premature disclosure* would harm the authorized and appropriate purpose for which they are being used." (emphasis added).

95. Documents involving national security would not be automatically released after a period of time but perhaps would be periodically subject to review. *Epstein v. Resor*, 421 F.2d 930 (9th Cir.), *cert. denied*, 398 U.S. 965 (1970).

release "purely factual" documents. Faced with such a limitation, agencies at least would be able to develop specialized internal rules for coping with it.<sup>96</sup>

The nondisclosure of policy memoranda is supported by the desire to allow a free and frank exchange of ideas and to prevent bureaucrats from operating in a "fish bowl."<sup>97</sup> However, this nondisclosure rationale is contrary to the disclosure bias of the Act. Moreover, the necessity for protection of all internal memoranda, either factual or opinion, is overstated. The rationale loses its vitality as time passes after the final determination for which the document was drafted is made. Furthermore, if the staffs of the agencies realized that some time in the future their work product would go on the public record, they would do a more careful, workmanlike job.<sup>98</sup> If they knew that their work could be questioned in the future, even though the relevant decision was irrevocable, they would be more accurate and unbiased, and perhaps would avoid bowing to the special interests who, under the present system, would be the only ones likely to know their role in the decisionmaking. The decisionmaking process as a whole may benefit from criticism of the internal work product or the decisional process which resulted in an official decision. Staffs will continue to give agency officials their opinions because they must. The worst that can happen is that agency staff and agency officials would communicate orally more often; which may be a beneficial result from another point of view.

In sum, the electorate would be better informed as to the factors behind a decision if all internal documents were subject to disclosure at some time. And agencies would find such a requirement workable

96. One point worthy of mention is the oversight in the Act in not defining the term "agency" differently than it is used in the rest of the Administrative Procedure Act. Section 551(1) excludes Congress from coverage of the APA and state and local governments are excluded by lack of authority over their administrative procedure. For the purposes of the Act, particularly exemption five, congressional, state and local government communications with federal agencies should also be exempt but subject to ultimate release as prescribed.

97. "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" H.R. REP. No. 1497, *supra* note 16, at 10. The District of Columbia Circuit agreed: "In the Federal Establishment, as in General Motors or any other hierarchical giant, there are enough incentives as it is for playing it safe and listing with the wind; Congress clearly did not propose to add to them the threat of cross-examination in a public tribunal." *Ackerly v. Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

98. *Tennessean Newspaper, Inc. v. FHA*, 464 F.2d 657, 660-61 (6th Cir. 1972).

in contrast to the present "purely factual" limitation on the exemption. The problems of bureaucrats operating in a "fish bowl" are overstated. Thus, the limitation placed on the fifth exemption should be founded, not on the type of document, but on the current relevancy of the document to government policymaking.<sup>99</sup>

### *Privileges*

The goal of providing readily available information cannot be permitted to steamroll legitimate concern for the protection of information obtained from outside the government which demands privileged treatment. Clear demarcation of privileged information is also a necessary part of a public information system.

In this regard, it is unfortunate that the most unfathomable provision of the Act is exemption four, relating to privileged and confidential information.<sup>100</sup> This exemption seems on its face to refer

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99. The internal memorandum exemption presently protects the most numerous types of law made by an agency — decisions not to prosecute or to take action. The decision not to act is rarely accompanied by an agency opinion, and hence, the most important decisions reached by agencies are given no background reasons. See K. DAVIS, *DISCRETIONARY JUSTICE* 103-06 (1969). In *American Mail Lines, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969), the agency was required to disclose internal memoranda which were incorporated into a final determination by the agency. This opinion does not go far enough, and does not deal with instances where an agency makes a final determination, such as a decision not to proceed in an investigation, but does not incorporate a staff opinion. Where no agency opinion is adopted for any final agency action, all internal memoranda which were involved in that decision should be released to the public. *Sterling Drug, Inc. v. FTC*, 450 F.2d 698, 714 (D.C. Cir. 1971) (dissenting opinion). See also *United States v. Leichtfuss*, 331 F. Supp. 723 (N.D. Ill. 1971). The purpose of this is twofold: (1) It will encourage agencies to develop opinions in formal no-action situations and; (2) it will permit those affected by the agency decision some glimpse into the input for that decision. One should be cautioned that, as the court in *Sterling* found, a released staff opinion may well confuse those outside the process as to what actually caused the agency to reach its final determination. Bearing this in mind, perhaps a more straightforward solution to this problem would be to require an opinion in every final agency action.

100. Discussing exemption four, Davis stated:

The *Attorney General's Memorandum* never acknowledges that the statutory words of the fourth exemption have a plain meaning. Instead, the *Memorandum* says that the words are

. . . susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., 'matters that are \* \* \* [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential.' . . . Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain

only to documents of a commercial nature.<sup>101</sup> The legislative history demonstrates that it was not to be so limited and was intended to include traditional privileges.<sup>102</sup>

Clearer articulation of what constitutes privileged information is necessary. The government has a duty to hold certain information in confidence, and this information should be carefully protected. Moreover, clear definition of privileged information will permit full use of clerical personnel to handle access. Although total cure for the Act's deficiencies in guarding confidential information can only be accomplished by amendment, courts must take cognizance of these deficiencies in releasing information. Courts must recognize that those who deal with the government do not lose their rights because they submit information to the government.

### Corporations

There must be a distinction between the rights of an individual citizen and those of a corporation. Corporate rights to deal with the government in secret should be severely limited. Where information is obtained from a corporation, there seem to be very few instances where there will be reason to maintain its confidentiality. Trade secrets should not be disclosed by the government.<sup>103</sup> Sensitive financial and commercial information obtained from a company under no statutory or administrative compulsion and with assurance of confidentiality explicitly given should be withheld from disclosure.<sup>104</sup>

meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Especially fascinating is this sequence: The Attorney General (1) says the statute is susceptible of several readings, (2) he lists those readings, and (3) he then reaches a conclusion different from any he lists! If what he says implies that the statute is not susceptible of the reading he adopts, then I agree! Yet I am in basic sympathy with the Attorney General in all this because I fully agree with the fundamental idea that underlies what he says in the passage quoted — that no reading of which the Act is susceptible can feasibly govern what the agencies will do. The fault is that of Congress, not that of the Attorney General.

Davis, *supra* note 5, at 788.

101. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential."

102. "It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges." S. REP. NO. 813, *supra* note 23, at 9.

103. If the information is readily available through independent research then it is not a trade secret. Gellhorn, *Business Secrets in Administrative Agency Adjudication*, 22 AD. L. REV. 515, 516 (1971).

104. The Environmental Protection Agency has promulgated a rule to this effect. See 40 CFR § 2.107a(b) (1972).

### Information Specifically Given in Confidence

Information freely given with specific assurance by the government that it will be kept in confidence should be exempt. In *Tobacco Institute v. Federal Trade Commission*,<sup>105</sup> the court found that the controlling factor was whether confidentiality had been requested. The Tobacco Institute sought access to the answers to questionnaires sent to persons and organizations actively engaged or interested in the subject of smoking and health. About half of those responding requested confidential treatment. The court refused to order disclosure of those questionnaires which were received in confidence.

The court in *Nichols v. United States*<sup>106</sup> went so far as to hold that even where the information was not obtained by a specific grant of confidentiality the material would be protected if the assurance was given later. The case involved a request from a pathologist for material connected with the assassination of President Kennedy. The material was given to the government by the estate of President Kennedy without any request that it be protected from public disclosure. Later the Kennedy family was asked if it wished confidential treatment and it responded affirmatively. Thus, at least in a sensitive fact situation, combined with an explicit request for confidentiality, courts will not require disclosure. Regardless of whether the information was given on the assurance of confidential treatment or the expression was received after the information is in the possession of the government, it appears that courts will generally protect information specifically given in confidence.

### Citizens' Privilege in Dealing With the Government

The legislative history of the Act suggests that it is necessary to balance the disclosure requirement against the right of privacy.<sup>107</sup> Nevertheless a right should accrue to an individual citizen who must deal with the government that information he supplies will be used only for the purpose for which he supplied it and no other. Meticulous care should be taken to avoid any danger of staff discretion infringing on individual rights of privacy. Certain traditional privileges, such as doctor-patient and attorney-client, should be spelled out. But more importantly, a general privilege should be established for communication between the government and private individual — a government-citizen privilege.

105. Civil No. 3035-67 (D.D.C. April 11, 1968).

106. 325 F. Supp. 130 (D. Kan. 1971), *aff'd*, 460 F.2d 671 (10th Cir. 1972).

107. S. REP. No. 813, *supra* note 23, at 7.

A new sensitivity to the protection of the individual privacy when dealing with the government has been emerging.<sup>108</sup> At present, the Act does not afford this protection.<sup>109</sup> Exemption four does not go far enough to assure privacy for those dealing with the government. Exemption six<sup>110</sup> permits withholding personal and medical information, but is severely limited by the phrase "clearly unwarranted invasion of personal privacy."<sup>111</sup> It is true that courts may hold that agencies are not required to release personal information.<sup>112</sup> But the *Getman v. NLRB*<sup>113</sup> decision severely limits this exemption and suggests that minor invasions of privacy should give way to the public right to know. In that case, Getman, a law professor, attempted to gain access to the "Excelsior" lists of employees filed with the Board by employers.<sup>114</sup> Since the list contained names and addresses of individual employees, the Board argued that release of the information would interfere with the privacy of the employees. The court suggested that the employees' rights were not as important as the public interest value of the academic study. It found that legislative history indicated that only disclosure of intimate details was foreclosed.<sup>115</sup>

Balancing of this sort seems both unnecessary and unwarranted. The public does not have a need to know private information, and

108. This new sensitivity is evidenced by the numerous bills to limit the sale or distribution of mailing lists by federal agencies. See, e.g., H.R. 327, 92d Cong., 1st Sess. (1971); H.R. 393, 92d Cong., 1st Sess. (1971); H.R. 9738, 92d Cong., 1st Sess. (1971); H.R. 121, 92d Cong., 1st Sess. (1971).

109. "In essence, [the Act] reverses the traditional presumption in favor of personal privacy and places the burden on the information-holding agency to find a specific statutory ground for refusing to honor a request for disclosure. In some instances the Act not only has shifted the burden of proof, it apparently has increased it as well." Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1089, 1194 (1969) (footnotes omitted).

110. 5 U.S.C. § 552(b) (1970) states: "This section does not apply to matters that are . . . (6) personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

111. "The statute requires an invasion of personal privacy . . . so long as it is not 'clearly unwarranted.' The use of the word 'clearly' is a legitimate expression of a policy judgment, although one may wonder about its wisdom." Davis, *supra* note 5, at 798 (emphasis added).

112. *Tuckinsky v. Selective Serv. Sys.*, 294 F. Supp. 803 (N.D. Ill.), *aff'd*, 418 F.2d 155 (7th Cir. 1969), held that a draft counsellor could not have personal information about members of the selective service system and appeal board unless consent was given to release the information.

113. 450 F.2d 670 (D.C. Cir. 1971).

114. In accordance with a rule announced in *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966), employers must furnish the Board with a list of the names and addresses of all employees eligible to vote in an upcoming labor election.

115. 450 F.2d at 674-75.

even if it did the individual has the right to have the information used for the purpose for which the government obtained it and for no other. He either has a right to privacy or does not, and no balancing is necessary. However, the *Getman* conclusion is correct in one sense; it is difficult to find protection within the Act, and information about an individual may well be freely available.<sup>116</sup>

This situation is aggravated by the fact that there is no requirement that exempt material be protected by agencies. Thus, even exempt personal information will not be protected unless an agency wishes to protect it.<sup>117</sup> In *LaMorte v. Mansfield*,<sup>118</sup> a witness in a Securities and Exchange Commission proceeding attempted to claim the investigatory file exemption for testimony given by him in an agency proceeding. Access was sought to the testimony in connection with a litigation in which he was a defendant. The court held that a private individual could not claim an exemption granted an agency under the Act. Therefore, the private individual has no more protection than an agency wishes to afford him even with respect to exempt material.

An unambiguous exemption for personal privacy should be established to cover any information supplied to the government by an individual citizen, and application of the exemption by the agency should be mandatory. A private individual should be protected from the harassment which may emanate from the release of personal information by the government. Bureaucrats should not be permitted any latitude in releasing private information.<sup>119</sup>

### III. MORE AMBITIOUS MODIFICATIONS

Despite the possible adjustments through judicial interpretations which have been suggested above, the undeniable truth is that the Act is not well suited for the task of providing public information. Judicial legislation may provide a partial remedy if the courts begin to take a pragmatic approach to providing public information. But if easily and quickly obtainable information is to be supplied to the public, administrative or legislative innovations must be forthcoming. Two innovations are appropriate. First, active administrative enforcement must replace passive judicial enforcement. Second, greater efforts must be made to make everything not exempt available for public inspection and copying.

116. *But cf.* Giannella, *supra* note 5, at 219.

117. *See* Miller, *supra* note 109, at 1195-96.

118. 438 F.2d 448 (2d Cir. 1971).

119. Miller, *supra* note 109, at 1199.

*Administrative Enforcement*

Judicial enforcement in a public information system has not been effective.<sup>120</sup> The courts are not equipped to handle this problem. They can only sit passively and wait for cases to come to them. Thus, judicial enforcement has not provided most citizens with the benefits of the Act.<sup>121</sup> Courts cannot provide the leadership and supervision required for a comprehensive public information system.<sup>122</sup> Indeed, judicial enforcement is not only inadequate, but also aggravates the problem by increasing delay. Judicial enforcement is also made inadvisable by the overwhelming burden it places on the already overburdened courts.

A recommendation made in 1940 by the Attorney General's Committee on Administrative Procedure may provide the type of enforcement necessary for a viable public information system. The Committee recommended the creation of a Director of Administrative Procedure — an administrative agency to oversee administrative agencies.<sup>123</sup> One of the Proposed tasks of the Director was that of policing the public information policies of the various agencies.<sup>124</sup> In the area of public information, this idea has even greater value today than it did in the 1940's, because judicial enforcement has been given a test and has failed.

Government information will be made generally available only if an executive entity is vested with sole responsibility for making it available. A public information agency must be established that will assume an active role. It must act both as an inspector general — policing agencies' information policy — and as an ombudsman — dealing with complaints through administrative procedures.

The Justice Department has set up "The Freedom of Information Committee" which reviews agency denials of access from the point of view of defending the denial in court.<sup>125</sup> There is no doubt that this group does a great deal to loosen the access policies of the agencies. But it is passive in approach, and tends to weigh success in the courts and resource allocation of trial staff more than it does the policy of

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120. Giannella, *supra* note 5, at 225.

121. Nader, *supra* note 27, at 2.

122. Courts also are unable to cure deficiencies in agencies' staff work. Giannella, *supra* note 5, at 225; *Pharmaceutical Mfrs. Ass'n v. Gardner*, 381 F.2d 271, 282 (D.C. Cir. 1967) stated: "The courts sit to assure substantial fairness, not to discipline agencies for awkwardness in their staff work."

123. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 123-26 — This proposal is a touch of genius and continues to be a worthwhile proposal.

124. Proposed Bill, § 7, ATTORNEY GENERAL'S REPORT, *supra* note 7, at 194.

125. H.R. REP. NO. 92-1419, *supra* note 33, at 66-69.

freeing access to information. The experience of this body does demonstrate, however, that an oversight group will assist in releasing information and that such an organization could be created by the executive without further resort to Congress.<sup>126</sup>

### *Public Inspection*

The present scheme for obtaining access to government information consists of a request, with varying degrees of specificity, administrative search and determination, and often judicial review, before access is granted. This procedure cannot provide free and fast information. Most of the six common complaints with respect to the implementation of the Act found by the Administrative Conference<sup>127</sup> can be attributed to the technique established by the Act for releasing information.

The inherent defects in the system of the Act cannot be overcome merely by developing guidelines that a clerk can follow. The information which is to be made available must be made available quickly and in a useful manner. There will be no free and fast public information until the available records can simply be pulled off a shelf upon a request to clerical personnel.

All nonexempt documents should be available for public inspection at a convenient location.<sup>128</sup> All agencies have public record rooms where certain documents are available "across the counter." Records available under this procedure need only be expanded to include all information to which access is required under the Act. Because screening and segregating of the documents will be done beforehand, no cumbersome administrative determinations or clerical decisions will be required.

In implementing this policy, it would be desirable to establish an official in each agency whose duty it is to make information available. Anything that is developed in a final form within the agency — excluding *current* internal memoranda and material in a *working*

126. "This committee also is convinced that the FOI Committee and the Office of Legal Counsel [of the Department of Justice] 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." *Id.* at 68.

127. These were: (1) equality of access; (2) evasive and obstructive practices — overly formal requirements; (3) delay; (4) commingling of exempt and nonexempt information; (5) resistance to disclosure by lower level staff; and (6) lack of uniformity for locating and copying. Giannella, *supra* note 5, at 221-25.

128. See Nader, *supra* note 27, at 15.

investigatory file<sup>129</sup> — should pass through this official before they are included in a permanent file. This official should be responsible for setting up the procedure. He and his staff should review all these records. If the material does not come under an exemption, then it should be indexed and placed on public display. If it does come within an exemption, and a decision is made to withhold it, then it should be described in an index and reasons given for withholding.

This procedure will permit the media the quick access which they require. It will permit researchers the latitude to make searching expeditions in agencies' records using primarily their own resources and only a small amount of the agencies' resources. Most importantly, this procedure will provide access indistinguishably as to interest involved.<sup>130</sup>

This procedure will also solve one problem which unsuccessful applicants now face. At present, there is no immediate requirement that withheld information be identified or reasons given for denial. Documents are withheld without the requesting party knowing what he has not seen or why he has not seen it.

This method of disclosure would take advantage of the fact that those inside an agency understand the records and can organize and compile the information in a useable form.<sup>131</sup> It is vital that information be well organized and retrievable, and only agency personnel can successfully manage the records.

It is also hoped this procedure will change the attitude of the agencies' staff towards disclosure. At present, it is easier to withhold documents than to release them, and hence agency personnel find that to deny access is in their own best interest.<sup>132</sup> It is predicted that imposing a greater burden for withholding documents, while making it relatively easy to release them, will do much to encourage release.<sup>133</sup>

As the Senate Report said, "[f]or the great majority of different records, the public as a whole has a right to know what its Govern-

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129. These would, of course, be placed in the process for release immediately upon loss of "current" status.

130. APA LEGISLATIVE HISTORY, *supra* note 8, at 198 states: "The section [section 3] has been drawn upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with definiteness and assurance."

131. ATTORNEY GENERAL'S REPORT, *supra* note 7, at 26.

132. See Giannella, *supra* note 5, at 224.

133. Statement of John R. Quarles, Jr., Assistant Administrator for Enforcement and General Counsel, Environmental Protection Agency, 1972 Hearings, *supra* note 34, at 1877: "Thus, staff personnel must go to some trouble to deny a request, while granting a request is less troublesome since high-level clearance is not needed. We hope and expect that this procedure will encourage staff personnel to respond promptly and affirmatively to requests for information."

ment is doing."<sup>134</sup> When motivated away from seeing danger in every exposure, agencies will find that most documents can be made public as a matter of course without doing injury to their function.

The Administrative Conference considered greater use of public inspection and rejected that approach. It suggested that use of that approach would result in mechanical insertion of material into closed files rather than true exercise of agency discretion.<sup>135</sup> However, this result does not necessarily follow from a public inspection system. First, if the agencies honestly try to comply with the Act, very little information will not be made public, assuming that the recommendations earlier made as to investigatory files and internal memoranda are implemented. Second, there is no reason an agency cannot exercise its discretion in special cases under a public inspection procedure. Indeed, the index of withheld documents will facilitate special requests for nonpublic information.

The agencies generally resist giving specific reasons for withholding documents,<sup>136</sup> but the reasons will facilitate the auditing and enforcement of the Act. Moreover, as mentioned above, the extra burden of giving reasons for withholding each document will provide incentive to resist the temptation to withhold questionable documents.

To universally accomplish this policy will require congressional or executive action. However, there are examples of judicial orders requiring agencies to grant public inspection of nonexempt material and to index material which cannot be disclosed.

In *Irons v. Schuyler*,<sup>137</sup> the applicant sought all the unpublished manuscript opinions of the Patent Office. The court found that the request was so broad as to be burdensome since the opinions contained some information which would be protected by the Act and release would require unreasonable effort to segregate disclosable material. Although it refused to order the agency to disclose the information, it did require indexing in compliance with § 552(a)(2)(c).<sup>138</sup> This section is limited to matters formally considered by the agency and cannot be read to extend to all records required by the Act to be disclosed. However, the rationale of *Irons* is worth noting. The court held that it could not require disclosure under so broad a request but

134. S. REP. No. 813, *supra* note 23, at 5.

135. Giannella, *supra* note 5, at 242-43.

136. *Id.* at 255.

137. 321 F. Supp. 628 (D.D.C. 1970).

138. 5 U.S.C. § 552(a)(2)(C) (1970) states ". . . 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."

ordered the agency to index the documents so a reasonable request could be fashioned. An index of documents which are in the possession of the agency, but not to be released, permits everyone — the requesting party, the courts, and probably the agency itself — to focus any controversy on information actually available. Indexing should be considered by courts more frequently when they are faced with questions of overly broad requests rather than upholding denial of access or putting the agency to an impossible burden.

In *United States v. Leichtfuss*,<sup>139</sup> the applicant requested access to Selective Service directives and manuals. The court found that the documents should have been made available under the Act. But the court went further, and found that the applicant and others like him should not be required to file a formal request under the Act each time disclosure of the documents was desired. It found that such a procedure would serve no purpose; in addition it would burden the agency and the applicant, and would inject unnecessary delay into the granting of access to documents already designated for release. Therefore, the court ordered the records to be made available in a convenient place for anyone to inspect and copy. Courts could so order where the same information is likely to be requested repeatedly.

Realistically, easily and quickly obtainable public information can only result from a major modification in the public information system. An administrative agency assigned to enforce the Act is the only means which will assure adequate enforcement and active leadership in implementing a public information system. Only an "over the counter" access system will make information realistically available to all users.

#### IV. CONCLUSION

The problems inherent in the effort to achieve fair and effective administration of a public information policy transcend the needs of individual applicants. These problems must be considered within the broad spectrum of the administrative process. Unfortunately, Congress did not write a statute which lends itself easily to efficient implementation of a freedom of information system within the total administrative process. Moreover, the courts have followed a rather narrow and myopic approach to implementing the Act.<sup>140</sup>

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139. 331 F. Supp. 723 (N.D. Ill. 1971).

140. Recently, the Supreme Court in *Environmental Protection Agency v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 22, 1973) made an effort to rationalize the judicial approach to implementation of the Act. Although the major portion of the opinion relates to exemption one [see note 54 *supra* and accompanying text] its most interesting aspect is its approach to judicial scrutiny under exemption five. In direct conflict

The inherent deficiencies of the Act and the unrealistic decisions of the judiciary have resulted in continual criticism of the agencies. Although bureaucrats have not been overly enthusiastic in complying with the Act, it seems somewhat unfair to focus all adverse comment on them. Indeed, many agencies have labored diligently to carry out the congressional mandate as they see it. Moreover, one should not underestimate the effects of the guerilla activities of "public interest" bureaucrats.

This article has suggested that the task for the courts and the critics of the present public information system is to modify the approach of the Act and the information system in general in order to make it possible to realistically expect a free and fast flow of information from the federal government. The suggested interpretations of the Act attempt to indicate methods for avoiding the present ad hoc approach and for incorporating into decisions considerations of the practical difficulties in making records available. The suggested interpretations, while recognizing the burden on the agencies, are not intended to provide less access, and are indeed intended ultimately to provide more disclosure of agencies' records. Suggested also are modifications beyond the authority of the judiciary but within easy reach of others. These too represent an attempt to build workability into the public information system so that more information can reasonably be made available.

The constant flailings of those dissatisfied with implementation of the Act cannot produce any positive change and can only result in continued use of a frustrating and basically faulty system. It is simply time we moved off center and approached the problems of a public information system rationally.

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with the trend of circuit court decisions, the Court held that "*in camera* inspection of all documents is not a necessary or inevitable tool in every case." *Id.* at 4207. Thus, an agency by various means short of submission of all the documents may be able to show to a court's satisfaction that it has complied with the Act. For instance, an agency may by affidavit or oral testimony demonstrate that the "surrounding circumstances" support a finding that the withheld documents are "advisory" and contain no severable "purely factual" material or that the edited versions it voluntarily released contain the entire disclosable portion of the documents. The Court also sanctioned *in camera* inspection of a representative document only. This holding will absolve the district courts from performing many of the largely clerical functions previously required of them. It constitutes a clear recognition that methods utilized by courts in handling traditional discovery are not practical in reviewing access questions under the Act.

## ARTICLES

FREEDOM FROM INFORMATION:  
THE ACT AND THE AGENCIES

by Ralph Nader\*

*Although the Freedom of Information Act was intended to compel agency openness, Mr. Nader argues that the agencies are still unresponsive to citizen inquiry; they are, in effect, baronies beyond the law. This disparity between aim and achievement of the Act is discussed in the context of empirical studies led by the author and conducted by, in the poetry of journalism, "Nader's Raiders."*

A well informed citizenry is the lifeblood of democracy; and in all arenas of government, information, particularly timely information, is the currency of power. The critical role of information is illustrated by the reply of the Washington lawyer who was asked how he prevailed on behalf of his clients: "I get my information a few hours ahead of the rest."

In our polity, where the ultimate power is said to rest with the people, a free and prompt flow of information from government to people is essential to achieve the reality of citizen access to a more just governmental process. It is especially essential to provide this informational flow in the Washington regulatory agencies, which are essentially unaccountable to any electorate or constituency. With these truths in mind, Congress passed, after a decade of temporizing, the Freedom of Information Act in 1966.<sup>1</sup> When President Johnson signed the bill into law on July 4, 1966, he stated its moving principle: "I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted."<sup>2</sup>

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This article is adapted from a statement by Mr. Nader released publicly on August 26, 1969. Special acknowledgement is made to Gary Sellers, Reuben Robertson, John Esposito, Harrison Wellford, James Turner and Robert Fellmeth for the data they and numerous students collected while studying various agencies last summer; see *infra* note 5.

<sup>1</sup> 5 U.S.C. § 552 (Supp. II, 1967) [hereinafter cited as FOIA]. The Act became effective on July 4, 1967.

<sup>2</sup> Statement by President Lyndon Johnson upon signing Pub. L. No. 89-487, July 4, 1966.

"The law was initiated by Congress and signed by the President with several key concerns," says the 1967 Attorney General's Memorandum on the FOIA.<sup>3</sup> These were: "—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."<sup>4</sup>

It is important to remember that the FOIA is a unique statute, since its spirit encourages government officials to display an "obedience to the unenforceable." Insofar as the statute is enforceable, the duty devolves to the citizen; yet few citizens are able to engage an agency in court, the only recourse afforded by the Act. Those who can afford judicial recourse are special interest groups who need the protection of the FOIA least of all. Consequently, as a practical matter, the attitude of agency officials toward the rights of the citizenry overwhelmingly determines whether the FOIA is to be a pathway or a roadblock.

After three months of exploring the frontiers of the Freedom of Information policy of several federal agencies,<sup>5</sup> with one hundred students working in study groups coordinated by the writer, I have reached a disturbing conclusion: government officials at all levels in many of these agencies have systematically and routinely violated both the purpose and specific provisions of the law. These violations have become so regular and cynical that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access. There is a prevailing, official belief that these federal agencies need not tolerate searching inquiries or even routine inquiries that appear searching because of their infrequency.

The term "citizen" is used in this context to refer to any person or persons who are not regulated by the agency and who do not constitute an organized, special interest group. The distinction is important because most agencies have a two-pronged information policy—one toward citizens and one toward the special interest groups that form the agency's regulated constituency. For the latter, a pattern has emerged over the years of

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<sup>3</sup> Attorney General Ramsey Clark, U.S. Department of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967).

<sup>4</sup> *Id.*

<sup>5</sup> The agencies studied were: the Interstate Commerce Commission, the Department of Agriculture, the Food and Drug Administration (food regulatory responsibilities only), the National Highway Safety Bureau, National Air Pollution Control Administration, Federal Water Pollution Control Administration, and various agencies within the Departments of Health, Education and Welfare, Labor and Interior that administer federal occupational health and safety policies.

preferential access and treatment. The lobbyists, the trade associations, and the corporations have made the contacts,<sup>6</sup> have developed the institutions<sup>7</sup> and have generally compromised or intimidated agency personnel into affording them entry into the early decisional process prior to any public proceedings or policy pronouncements. And it is during this inner council discussion stage, the draft-report or draft-standard stage, that most decisions are made. The options for later public impact narrow rapidly when there is an established system of preferential access to industry or commercial groups.<sup>8</sup>

## I. THE FRAMEWORK OF DISCRETION

All of the agencies studied enjoy large discretionary power over the programs they administer. Under the agencies' legal structure, they can implement policy or not;<sup>9</sup> they can delay action; they can decide what portions of the law to enforce or not to enforce; and they can even adamantly refuse to carry out programs mandated by Congress.<sup>10</sup> These agencies are more agencies of discretion than they are of law. Within limits, this is often necessarily the case, but without free and fast information to the public, discretion more easily becomes an unbounded absolutism towards the common citizen.

Professor Kenneth C. Davis defined discretion in this way:

A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of

<sup>6</sup> One frequent mechanism for developing these contacts is the luncheon or conference speech. FTC Chairman Paul Rand Dixon (1961-1969) delivered over 100 speeches during his eight year tenure, almost all going to trade associations, while consumer bodies were virtually ignored as audiences for his policy statements.

<sup>7</sup> E.g., industry advisory councils, which often have decision-making powers or impact, as in the Departments of Interior, Agriculture and Commerce.

<sup>8</sup> As is well known to the Washington Press Corps, this process occurs in the Department of Interior with the oil and coal industries, and in the federal banking agencies with the banking industry—to name two of the more egregious wedlocks.

<sup>9</sup> Thus, the Food and Drug Administration can wait for four years after the 1962 Drug Amendments to begin testing potentially dangerous drugs, and can wait seven years until they move to recall and decertify the first allegedly dangerous drug after these amendments gave them the power. Yet, once it *does* move, as it has against Upjohn's combination antibiotic Panalba, it can do so with uncompromising speed; for example, in the Panalba situation, the FDA has refused to allow Upjohn a full hearing on the safety issue because it would delay the recall of a hazardous drug, thereby creating an immediate danger to the drug's consumers. See Mintz, *Public Swallows FDA's Mistakes*, Washington Post, Nov. 23, 1969, at B1, col. 3.

<sup>10</sup> In 1966 Congress ordered the development of experimental safety cars by the National Highway Safety Bureau. Highway Safety act of 1966, 23 U.S.C.A. § § 307, 403. More than three years later, however, only the most preliminary studies had been made. In addition, the General Accounting Office accused the Pesticide Regulation Division of the United States Department of Agriculture of an intentional non-enforcement of its regulations against violators, notwithstanding evidence of significant violations in the Division's files. REPORT TO CONGRESS ON THE NEED TO IMPROVE REGULATORY ENFORCEMENT PROCEDURES INCLUDING PESTICIDES by the Comptroller General, Sept. 10, 1968.

action or inaction. [D]iscretion is not limited to what is authorized or what is legal but includes all that is within 'the *effective limits*' on the officer's power. This phraseology is necessary because a good deal of discretion is illegal or of questionable legality. Another fact of the definition is that a choice to do nothing—or to do nothing now—is definitely included; perhaps inaction decisions are ten or twenty times as frequent as action decisions. Discretion is exercised not merely in final dispositions of cases or problems but in each interim step; and interim choices are far more numerous than the final ones. Discretion is not limited to substantive choices but extends to procedures, methods, forms, timing, degrees of emphasis, and many other subsidiary factors.<sup>11</sup>

The Act itself allows such abuse, as it explicitly provides for nine exemptions which offer a vast amount of discretion<sup>12</sup>—so vast that to call these exemptions loopholes would be to understate their avoidance potential. It must be emphasized that most of the exemptions in the FOIA are themselves discretionary; that is, with the exception of specific statutory restrictions and Executive Orders, the agency does not have to invoke the exemptions. It is still expected to produce the information and not to take advantage of the exemption without a strict shouldering of the burden of justification.<sup>13</sup> Instead, agencies are simply offering the particular exemption as a reason for denial and not producing the underlying facts which are a requisite to invocation of the exemption.<sup>14</sup>

The broad ambit of discretion, exercised by agencies which differ in their degrees of commitment to public and special interests, is also leading to a proliferation of differing and inconsistent practices and interpretations of the FOIA.<sup>15</sup> First, each agency has created its own unique "common law" in interpreting the Act and in developing a maze of confusing

<sup>11</sup> K. Davis, *DISCRETIONARY JUSTICE* 4 (1969).

<sup>12</sup> 5 U.S.C. § 552 (1964), *as amended* 81 Stat. 55 (1967).

<sup>13</sup> *Id.* at (a) (3): "[E]ach agency . . . shall make the records promptly available to any person. On complaint . . . the burden is on the agency to sustain its action." (emphasis added); this section goes on to place the burden of proof for an information denial, in a district court-de novo review, on the agency involved, not the inquirer.

<sup>14</sup> H.R. 1497, 89th Cong., 2d Sess. 25 (1966).

<sup>15</sup> *E.g.*, requests were made for records of advisory council meetings: the Department of Agriculture said yes; the National Highway Safety Bureau said no. The Federal Extension Service of the former Agency gave the students permission to ask the Inspector General to see the audits; the Farmers Home Administration did not. Within the Department of Transportation and National Highway Safety Bureau, accident reports can be used in civil and criminal litigation; the Federal Railroad Administration and Bureau of Motor Carrier Safety (BMCS) reports of motor carrier crashes cannot be similarly utilized. Until 1969, the public was even prevented from seeing the BMCS's detailed accident reports.

And finally, copying fees range from no charge in some agencies to \$1.00 a page in other agencies. Similarly, some agencies charge no search fees, while others charge up to \$7.20 per hour. Why the difference? In fact, why any charge above cost at all?

regulations. Information which is claimed to be exempt from disclosure in one agency is freely given in another agency. And second, agencies also differ in the depth of the "appeals tier" within the agency which a petitioner must exhaust before he can petition the courts for relief. Each appeals point on the tier increases the probability of exhausting the petitioner and mooting the quest, especially when each internal appeal takes weeks or months.<sup>16</sup>

Thus, the Freedom of Information Act, which came in on a wave of liberating rhetoric, is being undercut by a riptide of agency ingenuity. There is little doubt that if government officials display as much imagination and initiative in administering their programs as they do in denying information about them, many national problems now in the grip of bureaucratic blight might become vulnerable to resolution.

## II. AGENCY AVOIDANCE TECHNIQUES

It is important to acknowledge initially the many public servants in the federal government who have respect for the purpose of the FOIA and frequently bridle under upper level restrictions that they believe to be wholly unjustified. The openness of these civil servants, who often provided accurate information to the students as well as to any other interested persons, has furthered the interest in citizen involvement. Not only have the students been able to obtain a more comprehensive picture of the workings of their government, but agency personnel have in many cases received important insights and feedback from the dialogue they have established with the students. By a significant margin, the National Air Pollution Control Administration of the Department of Health, Education and Welfare has displayed the most open position on information access. Against this standard of performance, other agency restrictions appear by comparison even more offensive, as they protect incompetence and cloak surrenders to special interests.

The agencies probed this summer, it must be emphasized, were not in the "sensitive category." They do not deal with military or foreign affairs. They are entrusted with the most sympathetic missions in the government arena: health, safety, transportation and food purity and distribution. Yet even under daily approach and reasoned requests, these agencies refused to provide information. What follows are concrete examples of those agency acts which violate or misinterpret the FOIA.

### 1. *Investigatory Files.* The FOIA provides specific exemption from

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<sup>16</sup> The experience of the Consumers Union with the Veterans Administration is a lucid example of how much stamina and resources a petitioner requires to obtain test results of so mundane a product as hearing aids. *Consumers Union of United States, Inc. v. Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y., July 10, 1969), *appeal docketed*, No. 33978, 2d Cir., Sept. 3, 1969. See Case Comment, p. 121 *infra*.

mandatory disclosure for material which is an "investigatory file"; the text says:

[No disclosure is required of] investigatory files compiled for law enforcement purposes except to the extent available by law to a private party other than an agency.<sup>17</sup>

The intent of this exemption was to protect investigative material which if revealed would undermine law enforcement.<sup>18</sup> In order for material to qualify as an "investigatory file," it must be both investigatory in nature and capable of being used in law enforcement proceedings.<sup>19</sup> Therefore, even "investigatory" parts of the file are only exempt for so long as they can be used in a law enforcement proceeding. When any prosecution proceedings are completed or are precluded by other factors, such as a statute of limitations, then the entire file should be open—unless other investigatory files would be directly impaired by its disclosure. The foregoing is the broadest possible interpretation that should be taken of that provision in the Act, given the guiding purpose of providing the release of requested information.

Several agencies have not been satisfied, however, with even these broad limits on the "investigatory file" principle; they have therefore expanded and transmuted its character by altering the definition of what is an investigatory file. For example, the Department of Labor has denied public access to their records of past violations (five, ten, and fifteen years old), of the Walsh Healey Act which sets minimum wages and safety standards for businesses which have more than \$10,000 worth of sales to the Federal Government.<sup>20</sup> Thus, the Department keeps secret the nature of past violations which have ceased and are nearly two decades old on the theory that the Labor Department might get around to use these violations in some future law enforcement proceeding. The Department of Labor also restricts even their *record* of corporate violations of the Walsh Healey Act. In the selected industry reports, which showed what companies had been inspected, the Labor Department blocked out the names of all companies inspected before allowing the students access.<sup>21</sup> These denials, as if insufficient interferences in themselves, were then followed with a request that the students sign a pledge of non-revelation as a condition to receipt of the documents.

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<sup>17</sup> 5 U.S.C. § 552 (1964), as amended 81 Stat. 55 (1967).

<sup>18</sup> See H.R. 1497, 89th Cong., 2d Sess. 11 (1966) [hereinafter cited as House Report].

<sup>19</sup> See S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965); House Report 11; *Cf. Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593-594 (D. Puerto Rico 1967) (data gathered by NLRB investigations of unfair labor practice exempt as investigatory file compiled for law enforcement purposes).

<sup>20</sup> Walsh Healey Act, 41 U.S.C. §§ 35-45 (1936).

<sup>21</sup> Such deletions value the avoidance of corporation embarrassment over the deterrence of future violations.

Federal Trade Commission [FTC] officials have also discovered how to exploit this exemption: merely by instructing a Secretary to open an investigatory file and drop in the desired item serves to side-step the FOIA. And as more people are learning, FTC investigational files have every potential of lying, fossil-like, undisturbed by the concern of bureaucratic man.<sup>22</sup>

2. *Internal Communications.* The FOIA provides a specific exemption for internal governmental papers in order to preserve and encourage the freedom of internal communication within government and in order to prohibit premature disclosure. The text of the exemption reads:

[No disclosure is required of] inter-agency or intra-agency memorandums or letters which would not be available by law to a private party other than an agency in litigation with the agency.<sup>23</sup>

The legislative history of this exemption makes it clear that, in judging whether non-disclosure is to be allowed, the prime criterion is to be the relative finality of resolution of the issues in any such document. The evil to be prevented by the exemption was, in the words of the House Report, "premature disclosure."<sup>24</sup>

In practice, several agencies have illegally broadened this exemption to deny access to matters relating to *past* decisions within the Executive Branch.<sup>25</sup> The Department of Agriculture has gone further and denied access to the minutes of the National Food Inspection Advisory Committee and the Poultry Advisory Committee. Those committees are made up of non-federal personnel, including private members, and their alleged purpose is to suggest policy and discuss new hazards to the public safety. The Department wants to prevent the public from realizing, first, what an impact private interest groups and their state satellites have on meat and poultry inspection policy and, second, what conditions in the industry and new dangers to the public exist.

The Interstate Commerce Commission (ICC) has also invoked this exemption to deny public access to records of Congressional correspondence with the ICC. In addition, the ICC has declined to release both a six year old study of itself conducted by the Civil Service Commission and past evaluations of ICC performance prepared by ICC personnel. As a result, no information is released as to how the agency assesses its performance. The

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<sup>22</sup> Of the 4.17 years it takes the FTC, on the average, to open an investigation and issue an order, over two years is spent on the "investigation." One case has been on the docket since 1947. Another case was in process for more than five years before the FTC learned that the defendant company had been dissolved, one year after the start of the agency's investigation.

<sup>23</sup> 5 U.S.C. § 552 (1964), as amended 81 Stat. 55 (1967).

<sup>24</sup> See House Report 10.

<sup>25</sup> See INVESTIGATIVE REPORT ON BUREAU OF LABOR STANDARDS, DEPARTMENT OF LABOR, a study conducted in the Summer of 1969 by the Center for the Study of Responsive Law; to be published in early 1970.

public usefulness of a contrary policy was seen a few months ago when an internal FDA evaluation report was made public.<sup>26</sup>

The Department of Labor also misused this "intra-agency" exemption by denying public disclosure of their interpretations of the Walsh Healy Act, made in 1936, even though that Act has been amended several times since and the public need for this information is essential if any determination is to be made as how the law has been administered over the last thirty-three years.

3. *Delay.* A typical tactic is to delay replying for several weeks to a request for information and then reply that it was not sufficiently specific. If the agency does not permit the inquirer initial access to learn what specific information the agency possesses, he has no choice but to make a more general request. All agencies know that one level of secrecy can lead to more exquisite levels of secrecy. To complicate the problems of the researcher, the organization or filing of the information possessed by the agency is not revealed. Consequently, the citizen is often exposed to a charge of non-specificity. Yet the more knowledgeable and fraternally received lobbyists, on the other hand, have no such problems.<sup>27</sup> The Department of Agriculture, especially its Pesticide Regulations Division, has perfected this dismal science to such a degree that it may uproot itself by the excess of its success.<sup>28</sup>

The Department of the Interior (DOI) employed the delay technique through the person of the new Assistant Secretary of Interior, Carl Klein. He developed a hamstringing system of centralized appointments and a centralized room for interviews to be conducted under the watchful eye of his monitors. In the initial three weeks of the study, the Department repeatedly denied information by this monitoring device and by cancellation or delay of scheduled meetings. An appeal to Herbert Klein, Director of Communications, and Secretary Hickel was necessary to instruct Mr. Klein in his duties to the public. He withdrew his edicts promptly. But other delays emerged. For example, a memorandum of the Federal Water Pollution Control Administration's [FWPCA] assistant commissioner for enforcement, which outlined the enforceability of water quality standards, was released only after a 10-14 day delay following the initial request and an appeal to the DOI's information officer. The reason given for the delay was the assertion that this document was still in the working paper stage; however, the paper had already been completed and circulated. Since any work of man can always be perfected, the designa-

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<sup>26</sup> See N.Y. Times, Sept. 12, 1969, at 40, col. 3.

<sup>27</sup> *Infra* p. 12.

<sup>28</sup> See INVESTIGATIVE REPORT ON THE DEPARTMENT OF AGRICULTURE, a study conducted in the summer of 1969 by the Center for the Study of Responsive Law; to be published in early 1970.

tion of "working paper" can have no clear and provable limits, which is another way of saying that the agency which exploits this technique becomes a law unto itself.

A circumvention closely related to the "working paper" tactic is the statement that information is still not verified or is in incomplete form. The FWPCA gave the latter as the reason for refusing, following a ten day delay, a student request to see reports on the status of water pollution abatement programs at twenty federal installations. There is a written demand pending to see the information in whatever form it exists, since the agency's laxity in compiling this information is a self-serving and illegal basis for denial of access. This request for the status reports on twenty installations was made after FWPCA denied more detailed information about the entire problem on the ground that this general information would give the researcher a "warped impression."<sup>29</sup>

A corollary of delay is to deny the interviewer access to his potential interviewees, hoping to deter the intended interview at best or to delay it at the least. Often an interview with a relevant agency official is the only way to obtain certain information. One student group probing the practices of Washington law firms sought to interview attorneys at the Antitrust Division of the Department of Justice and at the Federal Trade Commission. Assistant Attorney General Richard McClaren took nearly three months to reply to the request, and then denied it, citing no provision of the FOIA, but stating, "[f]or reasons we think should be apparent, it would not be appropriate for this Division to characterize or compare the performance . . . of attorneys who represent individuals or corporations with which the Division has official business."<sup>30</sup> It took the FTC four weeks to reply to a similar request, after debating the issue before the *full commission* and before Senator Kennedy's Subcommittee on Administrative Practice and Procedure. Permission was finally granted, but not until *after* the student had returned to her school and not without the requirement that all questions be submitted in writing beforehand.<sup>31</sup>

4. *Commingling Technique.* Further illustrations reflect the variety of denials. The water pollution study group wanted information concerning oil dumping. The Department of Defense (DOD) denied them information on the quantity of oil being pumped from the bilges of naval ships on the

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<sup>29</sup> At another time this same researcher was told, perhaps facetiously, that release of information would endanger Interior's relationship with the Department of Defense (DOD) "because DOD is finicky about releasing figures on total sewage." Presumably, the enemy could then rush back to its abacus and calculate the manpower strength of the base. Sewage from domestic military bases is a national security matter, according to FWPCA. It could coincidentally be a national pollution problem which is the basis of the reluctance.

<sup>30</sup> Letter from Richard McClaren, Assistant Attorney General of the Antitrust Division of the Department of Justice, to Mark Green, Nov. 13, 1969.

<sup>31</sup> The Boston Globe, Sept. 13, 1969, p. 8, col. 3.

grounds that this data would be included in a report which contained operational data relative to military characteristics and was therefore classified. The Defense Department made no claim that the specific information requested is itself classified or in any way exempt from the FOIA. The Pentagon is a past master of the "contamination technique"—take several batches of unclassified material that may prove embarrassing and mix them with other batches of classified information and the result is that the sum is entirely classified. Civilian agencies have been quick to deploy this technique. For example, the Department of Labor has claimed that *all* material in *all* Walsh Healy files is "investigatory" even when the particular requested material is non-investigatory in nature.<sup>32</sup> Thus, the Department secures secrecy by its own commingling and subsequent refusal to separate.

### 5. *Disappearances, Fabrications and Favoritism.*

a) More primitive responses emerge as an agency loses its last rationalizing prop for withholding information. Relevant materials on pesticides in the Department of Agriculture<sup>33</sup> disappeared, on the action of a high official, after the students, with permission, began researching them at the Pesticides Regulations Library.

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<sup>32</sup> Statements of David Swoukin, Director of the Bureau of Labor Standards, and Lawrence Silberman, Solicitor of the Department of Labor, July 12, 1969.

<sup>33</sup> There were literally hundreds of information denials which occurred this past summer yet which would be unwieldy to describe in detail in this article. Yet to get a sense of the pervasiveness of this denial policy, some of problems encountered at *only* the Department of Agriculture are listed below:

a. Racial hiring charts for individual electric cooperatives financed by REA loans: although the REA's information office decided to give the information, the Department's Office of General Counsel removed it without telling REA. On appeal to the REA administrator, the charts were made available.

b. The Farm Credit Administration's record on the recipients of FCA-approved loans. The FCA must approve loans of more than \$100,000 made by federal land banks, and other large loans made by the production credit boards. The FCA has refused several times to reveal the names or locations of the recipients, or the size or terms of the loans.

c. Minutes of meetings of the National Food Inspections Advisory Committee and the Poultry Advisory Committee. Denied.

d. Minutes of meetings of the Citizens Advisory Committee on Civil Rights, whose members were private citizens. Denied.

e. Audits done by the Department's Inspector General on various agencies. After all our requests for audits were routinely turned down, we asked to see summaries of some of the audit findings. This was refused. In one case, both the audited agency (the Federal Extension Service) and the state director whose program was under study (Dr. Marshall Hahn of VPI) gave us permission to see the OIG audit of extension programs in Virginia. Even so, the OIG refused.

f. Copies of a proposal by the Department's Program Review and Evaluation Committee for a new system to keep track of civil rights progress. After the Department refused to give us the chart, we informally asked an administrator and got the chart immediately.

g. Records of any action the Department has taken to correct problems pointed out by a number of groups—the U.S. Civil Rights Commission, the Department of

b) Outright lies are not unknown. The National Highway Safety Bureau has denied any knowledge of preferential release to General Motors in late June, 1969 of an Army medical team report on offbase accidents involving servicemen in Europe; yet the report had been sent to General Motors privately. Since the company has recalled several million cars for a carbon monoxide hazard, it can be forgiven for its urgent interest in a medical report showing high carbon monoxide levels in the automobile crash victims' blood. But why not let all the people, including potential victims, know at the same time? The report was finally released in early September, 1969, over two months after the initial request and denial of its existence.

The study of the Civil Aeronautics Board [CAB] took as one of its primary areas of concern the ways in which the Board and the airlines industry deal with or fail to deal with complaints from members of the public. At the onset, statistical information was requested, in writing, concerning the total number of complaints received by the CAB, the volume of complaints lodged against particular airlines, and the major categories and sources of complaints. The CAB refused to give this information on the grounds that it had inadequate personnel to keep any records of this sort. Not until the very end of the summer did we learn, from another source, that the Board had made detailed studies of precisely the kind of information requested.

The CAB practiced an even more extreme deception. Early in the summer they were asked to supply the complaints received from the public and the responses of the Board. This request was denied on the ground that if the airlines learned the identities of the complainants, they might take retaliatory actions against them. The CAB finally allowed the inquiring student to examine selected complaint files, provided that he agree not to record the names and addresses of the complainants; this restriction made it impossible to correspond with them to gauge the effectiveness of any CAB response. Yet the study group later learned from the Senate Subcommittee on Administrative Practices and Procedures that it was standard CAB practice to forward all complaints from the public directly to the airlines involved.<sup>34</sup> Thus the agency, through Charles Kiefer, its execu-

Justice, private citizens, and the Department's own Inspector General and Citizens Advisory Committee on Civil Rights. Denied.

h. All records of action the Pesticide Regulation Division (PRD) has taken in a number of areas: seizing unsafe pesticide products; recalling products from the market; issuing citations to manufacturers of unsafe pesticides; and recommending prosecution of pesticide manufacturers. Denied.

i. Data that manufacturers submit to PRD when they have their products registered. The PRD claimed that all the information in the registration file is covered by the "trade secret" option, even though the specific product formula is contained in a brown envelope marked "confidential" and can be easily separated from the rest of the file.

<sup>34</sup> Letter from Reuben Robertson to Charles Kiefer, Executive Director of the Civil Aeronautics Board, October 30, 1969; See N.Y. Times, Nov. 26, 1969, p. 59, col. 4.

tive director, knowingly lied rather than grant citizen access to information relevant to legitimate study.

The Food and Drug Administration, which has been more cooperative than some of the other agencies in releasing information to the study group, claimed through an official spokesman that it maintained no brand name list of beverages containing cyclamates. Such a list, however, had been used repeatedly to answer specific inquiries about specific brand names. On learning that the inquirer was part of the summer study group, the agency made the list available. This illustrates that whatever difficulty we were having, one can imagine the even greater difficulty of a citizen writing in from Kansas or Oregon.

c) One classic, generic technique of preferential treatment is to compile the kinds of information that industry desires but decline to compile the information that a consumer or labor group could use. The Department of Interior compiles much information of use to the minerals industry but very little benefits consumers or workers. This agency had to be pushed and prodded to develop a report on the environmental depletions of the coal industry after half a century of such conditions, and then was reluctant to make the report public. Consumer-related information about federal oil policy, from quotas to offshore leases, has been most hard to elicit from Interior. The same imbalance prevailed for information concerning hazards in off-shore drilling.

The clearest example of discriminatory information treatment involves the CAB. During the summer, numerous requests for basic statistical data were denied by the CAB on the grounds that it had inadequate staff and accordingly could not assemble such information or provide it for our study. Some of the records and statistics the CAB stated it does not bother to keep include the following:

- Speeches and personal appearances made by members of the CAB.
- Records of the costs of investigations conducted by the CAB.
- Travel allowances and budgetary allocations for individual Board members, the Executive Director and the Director of Community and Congressional Relations of the CAB.
- Enforcement actions by the CAB's Bureau of Enforcement against air carriers for violations of the law.
- Complaints charging racial discrimination by the airlines.
- The number of initial decisions of CAB hearing examiners appealed to the Board in accordance with its regulations.
- The number of interested parties seeking to intervene in CAB proceedings pursuant to its rules of practice.

A typical facet of corporate favoritism is agency effort to avoid embarrassment of industry groups at the expense of public knowledge and safety. Late in the summer, we learned of a recent report by the CAB on

the causes and handling of customer complaints received by the airlines industry. This important study, made at substantial public expense, demonstrated that citizen discontent with the airlines industry has hit a critical level, and it cited specific airlines for their apparent complete lack of interest in the problems of inconvenienced air travellers. Nevertheless, the CAB has suppressed this report from the public, which has every right to know which airlines are concerned with resolving legitimate complaints and which ones are not. The report was denied on the specious reasoning that it "mentions names of airlines," gives numbers of complaints received by some of the airlines and was compiled from the records of the airlines regulated by the CAB. In addition, *both* because "secrecy was necessary to protect complainants from harrassment and retaliation by the airlines,"<sup>35</sup> *and* because the CAB feared that the findings might be competitively detrimental to the deficient airlines, the CAB officials concluded—apparently without the benefit of legal advice from the CAB legal staff—that release of the survey to us was precluded by a statutory section<sup>36</sup> prohibiting the Board from divulging certain classes of confidential financial and commercial data obtained in CAB audits of the airlines' books. This argument, however, utterly ignores the fact that much of the information requested had *already* been released to several of the airlines as well as to their trade association. The legitimacy of the CAB's rationale is further shattered by the fact that detailed information on the number and types of complaints is readily exchanged among the airlines themselves, a practice which destroys the shibboleth of pretended confidentiality.

### III. CONCLUSION

The remedies that exist to compel enforcement of this Act have been largely unsuccessful. The Freedom of Information Act is not being used by the public to secure relief in the courts. Since the effective date of the FOIA on July 4, 1967, court records reveal that forty cases were brought under the FOIA through March, 1969. Thirty-seven of these cases involved actions by corporations or private parties seeking information relating to personal claims or benefits. In only three cases did the suits involve a clear challenge by or for the right of the public at large to information. Even more significant is the fact that no records have come to my attention of any court actions initiated by the news media, who should be the prime public guardians and litigators under the FOIA. Patently, the effect of the FOIA cannot be measured solely by court cases. But just as patently, a

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<sup>35</sup> N.Y. Times, Nov. 26, 1969, at 59, col. 4. This CAB denial has become the basis of an FOIA suit brought in the United States District Court in the District of Columbia by the law student and attorney who sought the withheld information. *Id.* at col. 5.

<sup>36</sup> 18 U.S.C. 1905 (1948).

mere forty cases in the first twenty months of the Act's history are shocking. There need to be institutions, be they universities, law reviews, public interest law firms, citizen groups, newspapers, magazines, or the electronic media, who systematically follow through to the courts on denials of agency information. The individual citizen simply lacks the resources.

1. The FOIA will remain putty in the hands of government personnel unless its provisions are given authoritative and concrete interpretation by the courts. Such litigation then feeds back a deterrence that radiates throughout an agency. Many general counsels of agencies are straining the Act to its utmost and beyond because of the improbability of judicial review. Until recently the Federal Highway Administration (FHWA) prevented disclosure of manufacturers' violations of automotive safety standards to the public.<sup>37</sup> Yet these violations have been relayed promptly by FHWA to the manufacturer involved. The auto companies have had the right to receive the information but not the motorist who may become a casualty due to his ignorance of the safety violations in his car or tires.

2. Congress is not exercising adequate oversight over the extent of agency compliance with the FOIA. There have been no Congressional hearings since the Act was passed, although there is abundant material for worthwhile hearings.<sup>38</sup> Two reports, one from the House and one from the Senate, have been published compiling the agency regulations resulting from the FOIA and containing responses to some inquiries from the respective committees.<sup>39</sup> Comprehensive Congressional hearings are a prerequisite to effective enforcement.

3. A Presidential review group should be constituted to eliminate the inconsistencies which now exist, and are increasing among the FOIA compliance regulations of the various federal agencies. This group should also

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<sup>37</sup> See Morris, *Auto Components Failed 10% of U.S. Safety Tests*, N.Y. Times, Nov. 11, 1969, at 1, col. 6.

<sup>38</sup> Jack Matteson of House Committee on Government Operations on November 18, 1969 indicated that Congressman Moss has not yet decided whether to have hearings on the enforcement of FOIA.

Tom Susman of the Senate Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee indicated on November 18, 1969, that no hearings were planned. However, Senator Edward Kennedy, chairman of this subcommittee, has indicated that his staff will be compiling information relating to the operation of the FOIA for future publication and as a basis for possible legislative revisions of the Act. Letter from Senator Edward Kennedy to Ralph Nader, Dec. 15, 1969.

<sup>39</sup> House Committee on Government Operations—Reports on the Freedom of Information Act (compilation and analysis of Departmental Regulations Implementing 5 U.S.C. 552) 90th Cong., 2nd Sess. (1968).

Subcommittee on Administrative Practice and Procedures to the Senate Judiciary—The Freedom of Information Act (Ten Months Review) May, 1968, 90th Cong., 2nd Sess. (1968).

establish uniform ground rules which will makẽ it exceedingly difficult to achieve devious and illegal circumventions of the FOIA. For example, there should be a clearcut injunction against the commingling tactic, and agencies should be required to segregate public information from information which may be legitimately withheld. For another example, there should be a one-stop appeal in the agency before judicial review. Stacking up layers of appeals within the agency is a strategy of attrition and facilitates divergent policies within the department or agency.

4. Each agency should be specifically required: (a) to respond in some manner to all information requests within seven days of the receipt of such request<sup>40</sup> or give a specific reason to justify further delay; (b) to have available in the Washington office, and elsewhere as needed, a public information reading room with access to copying machines; (c) to prepare in advance and have available in the public reading room that data most typically requested of the agency and all relevant data showing workload, productivity, law enforcement activities and similar agency evaluation information, as well as agency-Congress and agency-public records. There should also be files available to the public containing all denials of information and eventual grants after initial denials, effected by the agency to date. Such systems will not only encourage added citizen interest—which should be a frontline policy of all agencies—but also will improve the efficiency of response to citizen requests.

5. Specific procedures should be developed for taking corrective actions when federal officials resort to harrassment, delay, or other techniques contrary to the FOIA. The establishment of a Director of Communications earlier this year offers the opportunity to develop effective sanctions on agency leaders who generate or condone illegal secrecy. Without such review and sanctions from the White House, agencies will continue to thwart or violate the Act with impunity. The most important distinction between agency responses toward information requests stemmed from differences in the quality of the agencies' leadership. Clearly then, the most important factor in the Executive Branch for freedom of information is the appointive power of the President himself.

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<sup>40</sup> See 5 U.S.C. 552 (a) (3) (1964), as amended 81 Stat. 55 (1967): "[E]ach agency, on request for identifiable records . . . shall make the records *promptly* available to any person." (emphasis added).

## PART IV—CONTENTS

Freedom of Information Regulations of the Department of Justice\* (below).

### JUSTICE DEPARTMENT FOI REGULATIONS

[Title 28—Judicial Administration]

#### CHAPTER I—DEPARTMENT OF JUSTICE—PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

##### SUBPART A—PRODUCTION OR DISCLOSURE UNDER 5 U.S.C. 552(A)

This order revises the regulations of the Department of Justice which prescribe the procedures for making and acting upon requests from members of the public for access to Justice Department records under the Freedom of Information Act (5 U.S.C. 552).

By virtue of the authority vested in me by 28 U.S.C. 509, 510, 5 U.S.C. 301, 552, and 31 U.S.C. 483a, Subpart A of Part 16 of Chapter I of Title 28, Code of Federal Regulations, is revised, and its provisions renumbered, to read as follows:

Sec.

- 16.1 Purpose and scope.
- 16.2 Public reference facilities.
- 16.3 Requests for identifiable records and copies.
- 16.4 Requests referred to division primarily concerned.
- 16.5 Prompt response by responsible division.
- 16.6 Responses by division: Form and content.
- 16.7 Appeals to the Attorney General from initial denials.
- 16.8 Maintenance of files.
- 16.9 Fees for provision of records.
- 16.10 Exemptions.

AUTHORITY: 28 U.S.C. 509, 510; 5 U.S.C. 301, 552; 31 U.S.C. 483a.

#### § 16.1 Purposes and scope.

(a) This subpart contains the regulations of the Department of Justice implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all divisions within the Department of Justice. Official records of the Department of Justice made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this subpart. Officers and employees of the Department may continue to furnish to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. Persons seeking information or records of the Department of Justice may find it useful to consult with the Department's Office of Public Information before invoking the formal procedures set out below. To the extent permitted by other laws, the Department also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

(b) The Attorney General's Memorandum on the Public Information section of the Administrative Procedure Act, which was published in June 1967 and is available from the Superintendent of Documents, may be consulted in considering questions arising under 5 U.S.C. 552. The Office of Legal Counsel after

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\*Note: Each agency of government promulgates its own regulations governing the handling of requests under the Freedom of Information Act. In some cases, as with the Departments of Agriculture and Health, Education, and Welfare, sub-units of the department promulgate their own FOIA regulations. Copies of these regulations can be found in the Code of Federal Regulations or the Federal Register, or obtained by writing the agency directly.

appropriate coordination is authorized from time to time to undertake training activities for Department personnel to maintain and improve the quality of administration under 5 U.S.C. 552.

§ 16.2 Public reference facilities.

Each office listed below will maintain in a public reading room or public reading area, the materials relating to that office which are required by 5 U.S.C. 552(a)(2) and 552(a)(4) to be made available for public inspection and copying:

- U.S. Attorneys and U.S. Marshals—at the principal offices of the U.S. Attorneys listed in the U.S. Government Organization Manual;
- Bureau of Prisons and U.S. Board of Parole—at the principal office of each of those agencies at 101 Indiana Avenue N.W., Washington, D.C. 20537;
- Community Relations Services—at 550 11th Street N.W., Washington, D.C., 20530;
- Internal Security Division (for registrations of foreign agents and other pursuant to 26 CFR Parts 5, 10, 11, and 12)—at Room 458, Federal Triangle Building, 315 Ninth Street N.W., Washington, D.C. 20530;
- Board of Immigration Appeals—at Room 1138, 521 12th Street N.W., Washington, D.C. 20530;
- Immigration and Naturalization Service—*see* 8 CFR § 103.9;
- Law Enforcement Assistance Administration, 683 Indiana Avenue N.W., Washington, D.C. 20530, and Regional Officer as listed in the U.S. Government Organization Manual;
- All other Offices, Division, and Bureaus of the Department of Justice—at Room 6620, Department of Justice, 10th Street and Pennsylvania Avenue N.W., Washington, D.C. 20530.

Each of these public reference facilities will maintain and make available for public inspection and copying a current index of the materials available at that facility which are required to be indexed by 5 U.S.C. 552(a)(2).

§ 16.3 Requests for identifiable records and copies.

(a) *Addressed to Office of Deputy Attorney General.* A request for a record of the Department which is not customarily made available, which is not available in a public reference facility as described in § 16.2, and which is not a record maintained by the Immigration and Naturalization Service, the Bureau of Prisons, or the Board of Immigration Appeals shall be addressed to the Office of the Deputy Attorney General, Washington, D.C. 20530. Requests for records of the Bureau of Prisons or of the Board of Immigration Appeals shall be sent directly to the Director, Bureau of Prisons, 101 Indiana Avenue N.W., Washington, D.C. 20537, or the Chairman, Board of Immigration Appeals, Department of Justice, Washington, D.C. 20530, respectively. Requests for records of the Immigration and Naturalization Service, including aliens' record files temporarily in the possession of the Board of Immigration Appeals shall be made and processed pursuant to the provisions of Part 103 of Title 8 of the Code of Federal Regulations.

(b) *Request should be in writing and for identifiable records.* A request for access to records should be submitted in writing and should sufficiently identify the records requested to enable Department personnel to locate them with a reasonable amount of effort. Where possible, specific information regarding dates, titles, file designations, and other information which may help identify the records should be supplied by the requester. If the request relates to a matter in pending litigation, the court and its location should be identified.

(c) *Form may be requested.* Where the information supplied by the requester is not sufficient to permit location of the records by Department personnel with a reasonable amount of effort, the requester may be sent and asked to fill out and return a Form D.J. 118, which is designed to elicit the necessary information.

(d) *Categorical requests—(1) Must meet identifiable records requirement.* A request for all records falling within a reasonably specific category shall be regarded as conforming to the statutory requirement that records be identifiable if it can reasonably be determined which particular records come within the requests, and the records can be searched for, collected, and produced without unduly burdening or interfering with Department operations because of the staff time consumed or the resulting disruption of files.

(2) *Assistance in reformulating non-conforming requests.* If it is determined that a categorical request would unduly burden or interfere with the operations of the Department under paragraph (d)(1) of this section, the response denying the request on those grounds shall specify the reasons why and the extent to

which compliance would burden or interfere with Department operations, and shall extend to the requester an opportunity to confer with knowledgeable Department personnel in an attempt to reduce the request to manageable proportions by reformulation and by agreeing on an orderly procedure for the production of the records.

(e) *Requests for records of other agencies.* Many of the records in the files of the Department are obtained from other agencies for litigation or other purposes. Where it is determined that the question of the availability of requested records is primarily the responsibility of another agency, the request will be referred to the other agency for processing in accordance with its regulations, and the person submitting the request will be so notified.

#### § 16.4 Requests referred to division primarily concerned.

(a) *Referral to responsible division.* The Deputy Attorney General shall, promptly upon receipt of a request for Department records, ascertain which division of the Department has primary concern with the records requested. As used in this subpart, the term "division" includes all divisions, bureaus, offices, services, administrations, and boards of the Department, the Pardon Attorney and Federal Prison Industries except as otherwise expressly provided. He shall then promptly forward the request to the responsible division and notify the requester of his action. The Deputy Attorney General shall maintain or be furnished with a file copy of each request received, and records to show the date of its receipt from the requester, the division to which it was forwarded, and the date on which it was forwarded. For all purposes under this subpart the Board of Immigration Appeals and the Bureau of Prisons shall be considered the responsible division with respect to requests sent directly to them pursuant to § 16.3 hereof.

(b) *Deputy Attorney General shall assure timely response.* The office of the Deputy Attorney General shall periodically review the practices of the divisions in meeting the time requirements set out in § 16.5 hereof, and take such action to promote timely responses as it deems appropriate.

#### § 16.5 Prompt response by responsible division.

(a) *Response within 10 days.* The head of the responsible division shall, within 10 working days of its receipt by the division and more rapidly if practicable, either comply with or deny a request for records unless additional time is required for one of the following reasons:

(1) The requested records are stored in whole or in part at other locations than the office in receipt of the request;

(2) The request requires the collection of a substantial number of specified records;

(3) The request is couched in categorical terms and requires an extensive search for the records responsive to it;

(4) The requested records have not been located in the course of a routine search and additional efforts are being made to locate them;

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

(6) The requested records of some of them involve the responsibility of another agency or another division of the Department whose assistance or views are being sought in processing the request.

When additional time is required for one of the above reasons, the head of the responsible division shall acknowledge receipt of the request within the 10-day period and include a brief notation of the reason for the delay and an indication of the date on which it is expected that a determination as to disclosure will be forthcoming. A copy of each such acknowledgment shall be furnished to the Deputy Attorney General. An extended deadline adopted for one of the reasons set forth above will be considered reasonable in all cases if it does not exceed 10 additional working days. The head of the responsible division may adopt an extended deadline in excess of the 10 additional working days (i.e., a deadline in excess of 20 working days from the time of receipt) upon specific prior approval of the notice to the requester of the extension by the office of the Deputy Attorney General where special circumstances reasonably warrant the more extended deadline and they are stated in the written notice of the extension.

(b) *Petition if response not forthcoming.* If the head of the responsible division does not respond to or acknowledge a request within the 10-day period, if the head of the responsible division does not act on a request within an extended

deadline adopted for one of the reasons set forth in paragraph (a) of this section, or if the requester believes that an extended deadline adopted pursuant to paragraph (a) of this section is unreasonable, the requester may petition the Deputy Attorney General to take appropriate measures to assure prompt action on the request. In order for a requester to treat a failure to respond by the head of a division as a denial and file an appeal, he must have filed a petition with the Deputy Attorney General complaining of delay under this subsection.

(c) *Action on petitions complaining of delay.*—(1) *Prompt action.* Where a petition to the Deputy Attorney General complaining of a division's failure to respond to a request or to meet an extended deadline does not elicit a response to the request from the head of the responsible division within 10 days, or where a petition complaining of a division's adoption of an unreasonable deadline fails to elicit an acknowledgement of the petition within 10 days and a response to the request from the head of the division within a reasonable time, the requester may treat the request as denied, and he may then file an appeal to the Attorney General.

(2) *Copies maintained by Deputy Attorney General.* Copies of all petitions complaining of delay, and records of all actions taken upon them shall be supplied to or maintained by the Deputy Attorney General.

(d) *Removal by Deputy Attorney General.* The Deputy Attorney General may remove any request or class of requests from the division to which it is referable under these regulations and, in such event, shall perform the functions of the head of such division with respect thereto.

#### § 16.6 Responses by divisions : form and content.

(a) *Form of grant.* When a requested record has been identified and is available, the responsible division shall notify the requester as to where and when the record is available for inspection or copies will be available. The notification shall also advise the requester of any applicable fees under § 16.9 hereof.

(b) *Form of denial.* A reply denying a written request for a record shall be in writing signed by the head of the responsible division and shall include:

(1) *Exemption category.* A reference to the specific exemption under the Freedom of Information Act authorizing the withholdings of the record, to the extent consistent with the purpose of the extent consistent with the purpose of the exemption a brief explanation of how the exemption applies to the record withheld, and, if the head of the division considers it appropriate, a statement of why the exempt record is being withheld ; and

(2) *Administrative appeal and judicial review.* A statement that the denial may be appealed within 30 days to the Attorney General, and that judicial review will be thereafter available either in the district in which the requester resides or has a principal place of business or in which the agency records are situated.

(c) *Record cannot be located or does not exist.* If a request record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(d) *Copy of responses to Deputy Attorney General.* A copy of each grant or denial letter, and each notification under paragraph (c) of this section shall be furnished to the Deputy Attorney General.

#### § 16.7 Appeals to the Attorney General from initial denials.

(a) *Appeal to Attorney General.* When the head of a division has denied a request for records in whole or in part, the requester may, within 30 days of its receipt, appeal the denial to the Attorney General, Washington, D.C. 20530. The appeal shall be in writing.

(b) *Action within 20 working days.* The Attorney General will act upon the appeal within 20 working days of its receipt, and more rapidly if practicable, unless novel and difficult questions are involved. Where such questions are involved, the Attorney General may extend the time for final action for a reasonable period beyond 20 working days upon notifying the requester of the reasons for the extended deadline and the date on which a final response may be expected.

(c) *Form of action on appeal.* The Attorney General's action on an appeal shall be in writing. A denial in whole or in part of a request on appeal shall set forth the exemption relied on, a brief explanation consistent with the purposes of the exemption of how the exemption applies to the records withheld and the reasons for asserting it.

(d) *Copies to Deputy Attorney General.* Copies of all appeals and copies of all actions on appeal shall be furnished to the Deputy Attorney General.

### § 16.8 Maintenance of files.

(a) *Complete files maintained by Deputy Attorney General.* The Deputy Attorney General shall maintain files containing all material required to be retained by or furnished to him under this subpart. The material shall be filed by individual request; and shall be indexed according to the exemptions asserted; and, to the extent feasible, according to the type of records requested.

(b) *Maintenance of file open to public.* The Deputy Attorney General shall also maintain a file, open to the public, which shall contain copies of all grants or denials of appeals by the Attorney General. The material shall be indexed by the exemption asserted, and, to the extent feasible, according to the type of records requested.

(c) *Protection of privacy.* Where the identity of a requester, or other identifying details related to a request, would constitute an invasion of personal privacy if made generally available, the Deputy Attorney General shall delete identifying details from the copies of documents maintained in the public file established under paragraph (b) of this section.

### § 16.9 Fees for provision of records.

(a) *When charged.* User fees pursuant to 31 U.S.C. 483a (1970), shall be charged according to the schedule contained in paragraph (b) of this section for services rendered in responding to requests for Department records under this subpart unless the responding official of the Department determines, in conformity with the provisions of 31 U.S.C. 483a, that such charges or a portion thereof are not in the public interest. Such a determination shall ordinarily not be made unless the service to be performed will be of benefit primarily to the public as opposed to the requester, or unless the requester is an indigent individual. Fees shall not be charged where they would amount, in the aggregate, for a request or series of related requests, to less than \$3. Ordinarily, fees shall not be charged if the records requested are not found, or if all of the records located are withheld as exempt. However, if the time expended in processing the request is substantial, and if the requester has been notified of the estimated cost pursuant to paragraph (c) of this section and has been specifically advised that it cannot be determined in advance whether any records will be made available, fees may be charged.

(b) *Services charged for, and amount charged.* For the services listed below expended in locating or making available records or copies thereof, the following charges shall be assessed:

(1) *Copies.* For copies of documents (maximum of 10 copies will be supplied) \$.10 per copy of each page.

(2) *Clerical searches.* For each one quarter hour spent by clerical personnel in excess of the first quarter hour in searching for and producing a requested record, \$1.25.

(3) *Monitoring inspection.* For each one quarter hour spent in monitoring the requester's inspection of records, \$1.25.

(4) *Certification.* For certification of true copies, each, \$1.

(5) *Attestation.* For attestation under the seal of the Department, \$3.

(6) *Nonroutine, nonclerical searches.* Where a search cannot be performed by clerical personnel, for example, where the task of determining which records fall within a request and collecting them requires the time of professional or managerial personnel, and where the amount of time that must be expended in the search and collection of the requested records by such higher level personnel is substantial, charges for the search may be made at a rate in excess of the clerical rate, namely for each one quarter hour spent in excess of the first quarter hour by such higher level personnel in searching for a requested record, \$3.57.

(7) *Examination and related tasks in screening records.* No charge shall be made for time spent in resolving legal or policy issues affecting access to records of known contents. In addition, no charge shall ordinarily be made for the time involved in examining records in connection with determining whether they are exempt from mandatory disclosure and should be withheld as a matter of sound policy. However, where a broad request requires Department personnel to devote a substantial amount of time to examining records for the purpose of screening out certain records or portions thereof in accordance with determinations that material of such a nature is exempt and should be withheld as a matter of sound policy, a fee may be assessed for the time consumed in such examination. Where such examination can be performed by clerical personnel, time will be charged for at the rate of \$1.25 per quarter hour, and where higher level personnel are required, time will be charged for at the rate of \$3.75 per quarter hour.

(8) *Computerized Records.* Fees for services in processing requests maintained in whole or part in computerized form shall be in accordance with this section so far as practicable. Services of personnel in the nature of a search shall be charged for at rates prescribed in paragraph (b) (6) of this section unless the level of personnel involved permits rates in accordance with paragraph (b) (2) of this section. A charge shall be made for the computer time involved, based upon the prevailing level of costs of governmental organizations and upon the particular types of computer and associated equipments and the amounts of time on such equipments that are utilized. A charge shall also be made for any substantial amounts of special supplies or materials used to contain, present, or make available the output of computers, based upon prevailing levels of costs to governmental organizations and upon the type and amount of such supplies or materials that is used. Nothing in this paragraph shall be construed to entitle any person, as of right, to any services in connection with computerized records, other than services to which such person may be entitled under 5 U.S.C. 552 and under the provisions, not including this paragraph (b), of this subpart.

(c) *Notice of anticipated fees in excess of \$25.* Where it is anticipated that the fees chargeable under this section will amount to more than \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In appropriate cases an advance deposit may be required. The notice or request for an advance deposit shall extend an offer to the requester to confer with knowledgeable Department personnel in an attempt to reformulate the request in a manner which will reduce the fees and meet the needs of the requester. Dispatch of such a notice or request shall toll the running of the period for response by the Department until a reply is received from the requester.

(d) *Form of payment.* Payment should be made by check or money order payable to the Treasury of the United States.

#### § 16.10 Exemptions.

(a) 5 U.S.C. 552 exempts from all of its publication and disclosure requirements nine categories of records which are described in subsection (b) of that section. These categories include such matters as national defense and foreign policy information; investigatory files; internal procedures and communications; materials exempted from disclosure by other statutes; information given in confidence; and matters involving personal privacy. The scope of the exemptions is discussed generally in the Attorney General's memorandum referred to in § 16.1.

(b) The Attorney General will not withhold any records of the Department over 10 years old on the ground that they are classified pursuant to Executive Order No. 11652 or its predecessors without notification from the Department review committee established in accordance with the Executive order and Subpart G of Part 17 of this chapter, by its Chairman, that continued classification is required by the Executive order.

*Previous regulations superseded.* This order supersedes order No. 381-67 of July 5, 1967, as amended, 28 CFR Part 16, Subpart A (1972), effective March 1, 1973.

Dated: February 9, 1973.

RICHARD G. KLEINDIENST,  
Attorney General.

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