

LETTER FROM RALPH F. FUCHS, INDIANA UNIVERSITY, SCHOOL OF LAW

BLOOMINGTON, IND., March 30, 1965.

Hon. JOHN E. MOSS,
House of Representatives,
Washington, D.C.

MY DEAR CONGRESSMAN MOSS: I have read with interest your letter of March 15 and the memorandum of the staff of the Foreign Operations and Government Information Subcommittee, dated February 1, 1965, which accompanied it. It is good to know of the present status of the measure which is now H.R. 5012. Bills to the same general effect have been quite thoroughly explored previously, of course, and I doubt whether I can add significantly to what has been said.

There is no doubt, I think, that additional legislation is needed to procure adequate access to information from Federal agencies. The prevailing deficiencies in this regard relate both to adequacy of access by news media and to opportunity for persons involved in administrative proceedings to ascertain policies which are likely to determine agency decisions in these proceedings. H.R. 5012 makes commendable progress in defining the proper scope of the obligation to disclose. I note that it is substantially identical to paragraphs 3(c) and 3(e) of the latest draft by the staff of the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary of a proposed revision of the Administrative Procedure Act.

One major question presented by H.R. 5012 is whether a judicial remedy against nondisclosure should be provided. I think that clearly it would be better to provide other means of achieving compliance, if it could be done effectively, both to prevent unnecessary burdens on the courts and to avoid the risk of undue interference with agency operations by unjustified demands. With the establishment of an administrative conference, suitably staffed, through which inquiries into inadequate agency functioning can be carried on, it seems to me that it would be better to refrain at this time from creating a new ground of litigation directed against the agencies. If additional legislation should define agency obligations as clearly as this bill, I believe there is reason to have confidence that genuine improvement would take place without direct judicial intervention. The Administrative Conference Act, however, confers authority only in relation to compliance with the Administrative Procedure Act. Therefore, new legislation providing for disclosure should perhaps be attached to the Administrative Procedure Act.

The principal question that remains with respect to the desirable scope of agency obligations to disclose information involves internal documents that arise when an agency is developing a policy or compiling evidence in an investigation. Item 7 in lines 12-14 on page 3 of the bill seems unduly narrow in this regard, since it refers only to investigatory files compiled for "law enforcement purposes." Many proceedings hardly fall in this category; yet the accumulation of evidence, only some of which will be used, is necessary in connection with these as well. I therefore suggest that after the word "purposes" in line 13 there be added, followed by a comma, the words, "or for use in agency proceedings." I recognize that there should be an agency duty to disclose evidence which is intended for use in later agency proceedings under many circumstances; but this duty should, it seems to me, be imposed by provision for discovery at the instance of private parties to proceedings, and not in the present bill.

The wording in line 3 on page 2 in paragraph 161(b) of H.R. 5012, which requires each agency to make "all" its records promptly available to any person, seems somewhat inconsistent with the exceptions recognized in paragraph 161(c). Especially if judicial enforcement of the obligation to disclose is provided, I think the bill should be quite explicit in this regard. Therefore I suggest that, instead of the wording in line 3 on page 2, preceding the period, the following be substituted: "provide for its records to be made promptly available to any person to the extent required by this act."

The language in lines 8-12 which follow would then lend specifically to the duty imposed.

Minor differences of wording between H.R. 5012 and the corresponding paragraphs of the Senate Judiciary Committee staff draft need hardly receive attention here. I am sure the staff of your subcommittee will choose among these alternatives according to which are preferable. They all seem to involve expression, not substance.

If any additional comments from me might be helpful, please let me know.

Sincerely yours,

RALPH F. FUCHS.