1. Internal agency working papers are protected from disclosure only if they are "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy."

Few, if any, letters or memorandums are solely limited to matters of law or policy, and many working papers which primarily involve policy issues are not prepared in the form of letters or memorandums. Furthermore it is not apparent to us how there could be worthwhile discussion of law or policy unrelated to a specific set of facts. The effect of the above language would be to require disclosure of most Bureau records, even though they relate only to internal matters of a nonpublic nature. It would also fail to recognize the confidential relationship between the Bureau and the President which is essential to serving the needs of the Presidency.

In summary, this provision does not recognize that free interchange of information and views among officials and staff of the executive branch is essential and is possible only if purely internal staff documents are protected from routine public scrutiny.

2. All agency records not exempted from disclosure would have to be made promptly available "to any person."

The Bureau makes an earnest effort to comply with individual requests for information when compliance is consistent with the broader public interest. We believe, however, that the public's right to effective, orderly, and impartial execution of the laws far outweighs any benefits which might result from having its records open indiscriminately to anyone who requests access. The provision requiring information to be made available to any person fails to recognize this overriding public right. The practical problems involved are made graphic in considering the steps necessary to meet this requirement in a secured building like the Executive Office Building. Either copies of most of the Bureau's records would have to be made available in an unsecured place or the Executive Office Building would have to be opened up "to any person" seeking access to its records.

Finally, we believe that the committee must give serious consideration to the question of whether legislation along the lines of H.R. 5012 would not violate the doctrine of separation of powers. In this connection we call your attention to a report of the Department of Justice to the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary last year with respect to comparable provisions of S. 1663. The Department stated:

"The revision [of sec. 3(c) of the Administrative Procedure Act] would appear to violate the doctrine of separation of powers, since it would interfere with the constitutional responsibility of the President to preserve the confidentiality of documents and information the disclosure of which would not be in the public interest. Under the revision the standards governing disclosure would be set by Congress rather than the President, except that the President would be authorized to direct withholding of information 'required to be kept secret for the protection of the national security or foreign policy.' Such limitation of the Executive's authority in the area of public information is without basis in constitutional law.

"The issue was extensively debated 6 years ago in connection with the act of August 12, 1958, Public Law 85–619, 72 Stat. 547, amending Revised Statute 161, 5 U.S.C. section 22, the so-called housekeeping statute. On that occasion the Senate recognized the power of the President under the Constitution to withhold information on the ground that its disclosure would be contrary to the public interest and that this authority rested on the constitutional principle of separation of powers."

For reasons set forth above the Bureau of the Budget strongly recommends against enactment of H.R. 5012.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.