

types of information nondisclosure of which would be warranted in the public interest but the nature of which cannot now be foreseen.

Notwithstanding every reasonable effort at this time to anticipate all types of information for which exemption from the statutory requirement would be justified, it is possible—and even probable—that some types of information may arise in the future which are outside the scope of the specific classes which it is possible to enumerate at this time in the statute. While we do not recommend that the public officials be authorized to withhold information except for most compelling reasons, we think the statute should be flexible enough to make adequate provision for those categories of information which may arise in the future but which cannot presently be foreseen, on personal determination by the head of a department or independent agency that nondisclosure would be warranted in the public interest.

Accordingly, it is recommended that an additional clause be included in the proposed section 161(c), to read substantially as follows:

“(10) Matters which the head of a department or independent agency personally determines should not, in the public interest, be disclosed.”

REPLY FROM DEPARTMENT OF DEFENSE

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., March 30, 1965.

HON. WILLIAM L. DAWSON,
Chairman, Committee on Government Operations,
House of Representatives.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on H.R. 5012 and identical bills, to amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

The following comments addressed to H.R. 5012 apply equally to the 14 identical bills on which the views of the Department were requested.

The provisions of section 2 of the bill by which all laws or parts of laws inconsistent with section 1 are repealed has the effect of amending section 3(c) of the Administrative Procedure Act (5 U.S.C. 1002). Thus, H.R. 5012 is similar to S. 1666 of the 88th Congress and S. 1160 of the 89th Congress to the extent that they explicitly sought or seek to amend section 3(c) of the Administrative Procedure Act. It is also similar with regard to its effect on the protection of public records to the proposed revision of section 3 of the Administrative Procedure Act contained in S. 1663 of the 88th Congress.

Under the current provisions of section 3 of the Administrative Procedure Act, official records are made available in accordance with published rules to all persons properly and directly concerned, unless restricted by statutory provision or unless held confidential for good cause found. In addition, official records need not be made available if they involve “(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.”

H.R. 5012 has the apparent purpose of denying to Defense officials, along with the officials of all other agencies, a great deal of the discretion which they may exercise under the existing provisions of the Administrative Procedure Act and of limiting them in withholding official records to the eight exceptions set forth in section 1(c) of the bill. Moreover, section 1(b) apparently permits any person, whether properly or directly concerned or not, to seek in any district court of the United States an affirmative injunction against the agency which would be required to produce its records for the complainant's examination and use, unless the record or information involved falls clearly within one of the eight exceptions listed in section 1(c). In such a case, which would be determined de novo by the court, the burden would be upon the agency to sustain its refusal to produce the record or information. Failure to produce a record or information at the direction of the court is made an explicit basis for contempt proceedings against the responsible officer of the agency involved.

In general, the Department of Defense is opposed to the whole concept of limiting, by the legislative imposition of specific categories of privileged information, the discretion of Defense officials to provide appropriate protection for the information and records which are in their custody and for which they are