

responsible. This limitation is made more objectionable by the fact that such protection may ultimately depend on the concurrence of the courts in the Defense official's judgment that protection is permitted under the imprecise language of the bill. Since jurisdiction is vested in any district court the possibility is evident of inconsistent interpretations of the statute to be settled ultimately by the courts of appeals and the U.S. Supreme Court.

In order to comply with requirements of H.R. 5012 if it were enacted, it would be necessary in each component of the Department of Defense to build a large staff whose duty would be to determine the availability of records and information, to facilitate its collection from a variety of storage sites, and to assist in defending against suits in U.S. district courts anywhere in the United States. Such an organizational requirement would be exceedingly costly. If such a bill is enacted, it should therefore include an authorization consistent with the "sense of the Congress" expounded in the act of August 31, 1951, chapter 376, title V, section 501 (5 U.S.C. 140) for user charges that would cover the full cost of acquiring and providing the information or record obtained.

Also as a basic objection to H.R. 5012, we note the views of the Department of Justice on the questionable constitutionality of such legislation. These views were set forth in the comments on section 3 of S. 1663, 88th Congress, accompanying the letter of August 10, 1964, from the Assistant Attorney General, Office of Legal Counsel, Norbert A. Schlei, to the chairman of the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate. The opinion states that such legislation has the effect of violating the basic principle of separation of powers by interfering with the constitutional responsibility of the President to protect from public disclosure in the public interest records whose protection is essential to the performance of his constitutional responsibilities.

As a further general comment we question the wisdom of the provision of H.R. 5012 by which all other statutes that are inconsistent with section 1 of H.R. 5012 would be repealed, presumably including section 3 of the Administrative Procedure Act. If section 3 of the Administrative Procedure Act is to be amended, this should be accomplished by changing its language with full regard for the effect of these changes on all other provisions of that act. H.R. 5012 has the unhappy result of making it the responsibility of the executive and judicial branches to determine where inconsistency may exist. That this would be a confusing responsibility is clearly revealed by section 1(c)(3) of H.R. 5012 which exempts from the general limitation on using this section to authorize withholding of information from the public those matters which are "specifically exempted from disclosure by statute." It could be argued, for example, that section 3 of the Administrative Procedure Act specifically exempts those "matters of official record * * * held confidential for good cause found" as well as those matters involving "(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 question thus becomes how specific must a "specific exemption" be under section 1(c)(3) of H.R. 5012 to come within its terms. This circuitous result could be avoided by a more direct approach at amending specifically any existing statutes that have proved objectionable.

Finally, by way of general observation, we note that H.R. 5012 seems to suffer from a difficulty that is similar to that found in other bills dealing with the same subject; namely, the intended distinction, if any, between *record* and *information*. The fundamental legislative instruction in H.R. 5012 is an affirmative requirement in section 1(b) that every agency "make all its *records* promptly available to any person" [emphasis supplied]; yet in the second sentence of the same subsection district courts of the United States are given jurisdiction to enjoin the agency from withholding "agency *records* and *information* and to order the production of any agency *record* or *information* improperly withheld from the complainant" [emphasis supplied]. This inconsistency provides a basis for concluding that there could be no improper withholding of *information* under the statute, since the only obligation of the agency is to make its *records* available to any person. If there is no such obligation, an agency needs no specific authority to withhold *information* from the public and the exceptions of subsection (c) need apply only to *records*.

Thus, subsection (c) of section 3 of the Administrative Procedure Act (5 U.S.C. 1002) governs the availability of "public records." The Attorney General's Manual on the Administrative Procedure Act (1947), page 25, concludes that internal memorandums are not considered "official records." Similarly, section 1(c)(5) of H.R. 5012 provides an exception to the availability require-