

delineate specific kinds of information which may be withheld. The amendment, which would apply not only to the executive departments but to all Government agencies other than Congress and the courts, would have the effect of also amending section 3 of the Administrative Procedure Act (see 111 Congressional Record (daily) 2856-57, Feb. 17, 1965). The proposed bill is identical to H.R. 5013-5021, 5237, 5406, 5520, 5583, and 6172.

We have no specific objection or reservations to the provisions of this bill with the following two exceptions:

1. Under subsection (c), clause (5) would permit withholding of "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy." This language was developed by the Senate Judiciary Committee in S. 1666, 88th Congress, as it passed the Senate July 31, 1964 (S. Rept. 1219, 88th Cong.)

In the debate on this provision on the Senate floor, the then Senator Humphrey proposed adding to the exemption the phrase "matters of fact," but the amendment was laid aside at the suggestion of Senator Edward V. Long, floor manager of the bill. Senator Long indicated that it was not the purpose of the bill to override normal privileges dealing with work products and other memorandums summarizing facts used as a basis for recommendations for agency action if those facts were otherwise available to the public (110 Congressional Record (daily) 17079, July 13, 1964).

Staff memorandums are normally an unavoidable mixture of law, policy, and fact, since it is almost never possible to discuss the law and policy relating to a particular matter except in its factual context. It appears that Senator Long's statement recognizes the impracticality of attempting to distinguish these three elements. Senator Humphrey's amendment would make explicit what Senator Long has suggested is implicit. Indeed, it is a necessary amendment if the committee is seeking to avoid implied exceptions in addition to those which are express.

We believe Senator Humphrey's proposal to broaden the exemption to include "matters of fact" as well as matters of law or policy is sound in principle. However, since the broadened exemption would then cover virtually all interagency or intra-agency memorandums or letters we suggest that the qualifying words are unnecessary and the exemption should simply read "(5) interagency or intra-agency memorandums or letters." This revision would clearly specify the material included in the exemption and would avoid implied exemptions in addition to those which are expressed.

2. Under subsection (c), clause (7) would permit withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."

This phraseology was a Senate floor amendment of the language in S. 1666 as reported by the Judiciary Committee. (See 110 Congressional Record (daily) 17079-80, July 31, 1964). The earlier language read: "investigatory files until they are used in or affect an action or proceeding or a private party's effective participation therein." Senator Humphrey contended that the earlier language opened up investigatory files beyond anything required by the courts, including *Jencks v. United States*, 353 U.S. 657 (1957). In proposing the new language, which was adopted, Senator Long said the purpose of the provision was to include the substance of the *Jencks* rule in the bill.

Unfortunately, the change in language to broaden the scope of the exemption may have resulted in limiting its scope in another area; namely, the express committee intention that the exemption should cover all agency investigatory files regardless of the nature of the agency proceeding (S. Rept. 1219, supra, p. 14).

The new language creates an ambiguity which could be of considerable significance. If the phrase is read narrowly it may be interpreted to exempt only investigations having an accusatory or disciplinary purpose. Thus, investigatory files relating to rate or certificate proceedings before the Federal Power Commission might enjoy no protection against disclosure, except to the extent that clause (5), supra (relating to internal memorandums), might afford some exemption. We believe the phrase "law enforcement" in this context was meant to be, and should be, the equivalent of administration of law. The intent is to include in the exemption investigatory files in connection with all agency proceedings, including the Commission's rate and certificate proceedings. This interpretation conforms both to the committee purpose to deal with investigatory files in general and to the Senate's purpose to narrow the divulgence of investi-