

REPLY FROM INTERSTATE COMMERCE COMMISSION

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., March 24, 1965.

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

DEAR CHAIRMAN DAWSON: This is in response to your letter of March 15, 1965, requesting a report on a bill, H.R. 5012, introduced by Congressman Moss, 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. This matter has been referred to our Committee on Legislation and I am authorized to submit the following comments in its behalf:

Section 161 of the Revised Statutes (5 U.S.C. § 22) applies only to the heads of the departments enumerated in 5 U.S.C. § 1. Since the Interstate Commerce Commission is not one of the agencies named therein, section 161 of the Revised Statutes does not now apply to the Commission. However, H.R. 5012 would define the term "agency," as used in section 161 of the Revised Statutes, to include each authority of the Federal Government other than the Congress or the courts.

In the performance of its duties under the Interstate Commerce Act, the Commission traditionally has favored disclosure of information to the public except in those instances where specific statutory requirements or national security considerations prohibit such disclosure. In this connection, section 17(3) of the Interstate Commerce Act requires that every vote and official act of the Commission be made a matter of record and available to the public on request.

Although most of the Commission's records are now open to the public, the changes proposed by H.R. 5012 would prevent the Commission from withholding a limited amount of information which, for sound reasons of administration or public policy, ought not to be disclosed.

Since the term "record" is not defined, we presume that the bill is intended to cover all papers which an agency preserves in the performance of its functions. Because of such an all-inclusive definition of the term "records," broader exemptions should be provided in proposed section 161(c) in order to permit agencies to exercise some rule of reason in regard to the disclosure of information.

For example, the fifth exemption in proposed section 161(c) (p. 3, lines 7-9) is not broad enough to protect from disclosure communications between members of the Commission and its staff in the internal decisional processes, communications between the Commission, on the one hand, and the President and the Congress on the other, and communications between the Commission and other persons unrelated to the Commission's decisional processes. The phrase, "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy," would not enable the Commission to withhold staff memoranda dealing primarily with the analysis of the facts involved in particular cases, as distinguished from legal and policy issues. Moreover, parties to Commission proceedings involving rates would be able to demand memoranda from the Commission's cost finding section advising the Commission of the cost of performing the particular movements involved. If the Commission made such information available, the parties presumably would have an opportunity to comment upon the advice given to the Commission by its own cost experts. If the Commission refused to make such memoranda available, the parties to these rate proceedings could then go to court with the result that further action in the case by the Commission would be delayed while the matter was pending in court. Thus, regardless of whether the Commission disclosed or refused to disclose intra-agency memoranda not dealing "solely with matters of law or policy," a serious delay in the disposition of cases would occur.

The term "inter-agency or intra-agency memorandums or letters" is not broad enough to cover correspondence between the Commission and committees of the Congress or individual Members of Congress. The term "agency" is defined in proposed section 161(b) to exclude the Congress. We have always believed that letters from the Commission to congressional committees or to individual Members of the Congress should not be disclosed by the Commission, but the disclosure of such reports and correspondence is a matter for the committees of the Congress and the Members of the Congress to decide. We do not mean to suggest that our correspondence with congressional committees or with Members of the