

from Government to the American people. As responsible journalists, broadcasters are closely identified with the interest of the public in gaining access to information that is, or of right ought to be, public.

While it is recognized that one of the basic purposes of the Administrative Procedure Act was to require agencies to keep the public informed about the proceedings of the several agencies, there has been legitimate concern over the years that the exceptions and qualifications in the public information section of the act have served in some cases to suppress information in which the public has a legitimate interest, rather than to make it available as the Congress intended.

The problems of the handling and dissemination of news by the Government have been before the Congress for several years. In the 85th Congress an amendment to the "housekeeping" statute (5 U.S.C. 22) was enacted to prevent agencies from using this statute as a basis for withholding information. NAB endorsed and actively supported that measure, but efforts to enact legislation defining in adequate terms a general public information policy for Government agencies have not been successful.

An informed people, capable of self-government, is the cornerstone of American democracy. Not only must voters have information upon which to judge the qualifications of their elected representatives, they must also know about the affairs of government in order to render other vital judgments. Under our constitutional system not all powers are granted to government. Many are retained by the people. Supergovernment, the star chamber, and bureaucratic intrigue are foreign to the genius of America.

We recognize the need for carefully designed exceptions which H.R. 5012 includes. The NAB does not propose, and no responsible journalist proposes, that our Government lay the national security bare to potential enemies. Neither do we seek to disrupt the orderly procedures of government to expose information which is private in nature. Thus we view section 161(c) (4) as an essential part of the bill.

In the broadcasting industry, there are increasing demands from the licensing agency for information of a confidential business nature. This information concerns financial activities and business operations. At present under section 0.417 of the rules of the Federal Communications Commission such information is not open to public inspection. This policy has the same logical basis as that expressed in section 6103 of the Internal Revenue Code which provides that, for reasons of public policy, tax returns are not open to examination and inspection. The subcommittee should make clear its intent in approving this legislation that section 161(c) (4) excepts from operation of the act all information submitted in confidence pursuant to statute or administrative rules or regulations, the disclosure of which would be a violation of personal privacy.

Over the years there have been numerous instances of unjustifiable withholding of information by governmental offices. Some cases are very serious—others simply ludicrous. The natural enemies of an informed public are secrecy without legitimate reason, automatic overclassification, "leaks," anonymous spokesman, "handouts" that do not tell the whole story, and old-fashioned laziness. Some officials find it easier to draw the blinds than to keep the house in order, and complaisant newsmen find it easier to rely on handouts and leaks than to seek the whole truth.

The spirit of the proposed law, we believe, is far more important than its letter. In some way there must be infused into all branches of government a dedication to disclosure of the truth to the American people. Every officer of government should know that it is his duty to conceal only that which the law requires be concealed. All else belongs to the people. The doctrine of freedom of information ought to be confirmed in law.

LETTER FROM GREEN BAY PRESS-GAZETTE, GREEN BAY, WIS.

Hon. JOHN E. MOSS,
Old House Office Building,
Washington, D.C.

March 2, 1965.

DEAR MR. MOSS: The Green Bay Press-Gazette, for many years, has insisted that public agencies should have no secrets from citizens except under very limited circumstances spelled out as specifically as possible.

In view of the recent introduction of legislation in the Congress to establish a Federal records law, I thought you would be interested in the enclosed copy of an editorial which supports such legislation.

I am hopeful that your colleagues in both the Senate and the House also will support the legislation whose need has become ever more evident as the Federal Establishment has grown and increased in complexity.

Thank you.

Sincerely,

DAVID A. YUENGER, *Managing Editor.*

LETTER FROM ALLIED DAILY NEWSPAPERS OF WASHINGTON

March 24, 1965.

HON. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, U.S. House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE MOSS: In behalf of the daily newspapers of the State of Washington, I write in support of H.R. 5012. We are confident that Congress supports the principle of freest possible access by the public to information about government at all levels. This support can be manifested in passage of your bill.

By recognizing under (c) those circumstances in which public release would be against national interests, or otherwise violate the law or the rights of individuals, you have provided ample safeguards against unreasonable application of the statute. By providing for prompt review of secrecy rulings, you give the public a realistic right of access to information.

I might add that the executive departments should not feel they have been singled out for public exposure. Our State press organizations and our individual newspapers maintain a constant vigil over the public's right to know about the activities of State and local government. We ask simply that the Federal Establishment, with its vast and pervasive authority over the lives of all citizens, be equally as open, and responsible, to the public as are lesser levels of government.

Respectfully submitted.

Sincerely,

PAUL CONRAD, *Secretary-Manager.*

LETTER FROM MARITIME ADMINISTRATION BAR ASSOCIATION

Washington, D.C., March 25, 1965.

HON. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, Washington, D.C.

MY DEAR MR. MOSS: Thank you for your inquiry of March 11 addressed to Mark P. Schlefer. The Maritime Administrative Bar Association does indeed have an abiding interest in resolving problems concerning the availability of information at the Federal maritime agencies.

As you know, testimony on behalf of the association was presented by Mr. Schlefer at the Senate hearings on freedom of information legislation during the last session of Congress. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary (88th Cong., 1st sess. 1963) at pages 124-135. There is little that we can now add to that testimony; consequently, we do not plan to file a separate statement on H.R. 5012. If, however, it will be of any assistance to the subcommittee, we should be pleased to have our previous statement made a part of the record of the subcommittee's hearings.

Sincerely yours,

WARNER W. GARDNER.

LETTER FROM RAILWAY LABOR EXECUTIVE'S ASSOCIATION

Washington, D.C., April 1, 1965.

HON. JOHN E. MOSS,
*U.S. House of Representatives,
Washington, D.C.*

DEAR CONGRESSMAN MOSS: This will confirm telephone reference to your letter of March 11 regarding hearings which your subcommittee now has underway

on H.R. 5012 and related bills. The Railway Labor Executives' Association has no objection to H.R. 5012 and therefore finds it unnecessary to file a statement. Your thoughtfulness in recalling our interest in this legislation is most appreciated.

Sincerely yours,

G. E. LEIGHTY, *Chairman.*

LETTER FROM THE MERIDEN RECORD CO.

MERIDEN, CONN., April 9, 1965.

Hon. JOHN MOSS,
*Chairman, House Operations and Government, Information Subcommittee,
House Office Building, Washington, D.C.*

DEAR CONGRESSMAN MOSS: Will you please record the Meriden, Conn., newspapers, the Record and the Journal, as strongly in favor of your bill H.R. 5012, Federal public records.

As you know, we have campaigned successfully for the passage of similar legislation in the State of Connecticut and are constantly striving to strengthen the laws. They have proved very helpful in gathering and disseminating public information through the newspapers, and I am sure the Federal public records bill will be equally beneficial on the national level.

We realize there must be certain exceptions from public information, but will you please explain the following two exceptions in your bill:

"Related solely to the internal personnel rules and practices of any agency.

"Interagency or intra-agency memorandums or letters dealing solely with matters of law or policy."

Best of luck in securing passage of your legislation.

Cordially yours,

THE MERIDEN RECORD-JOURNAL,
CARTER H. WHITE,
General Manager.

LETTER FROM HIDALGO PUBLISHING CO., INC.

EDINBURG, TEX., March 20, 1965.

Hon. JOHN E. MOSS,
Chairman, House Information Subcommittee, House Office Building, Washington, D.C.

DEAR REPRESENTATIVE MOSS: I am now publisher and editor of the Edinburg Daily Review and the Mission Times in the Rio Grande Valley, Tex.

I am not sure that any subcommittee or anyone in Washington cares what I think about House Resolution 5012 and related bills. We worry more here about freezes and the length of carrots than we do what Government agency denies what to a reporter.

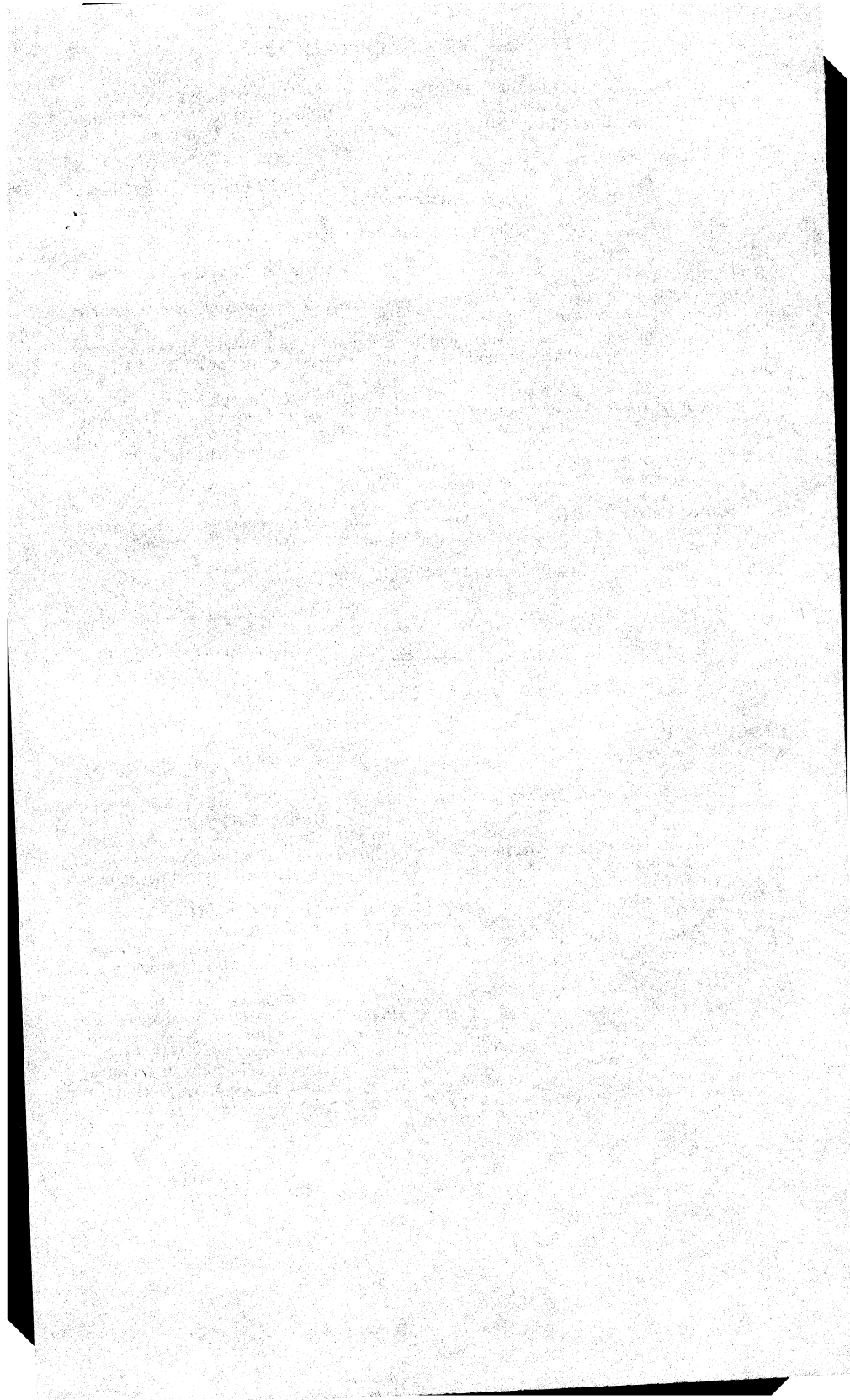
However, I am still convinced that we need legislation such as House Resolution 5012. In 7 years of Washington reporting, part of this time as chairman of the Washington chapter, Sigma Delta Chi, freedom of information subcommittee, I encouraged many instances of arbitrary and illegal suppression of legitimate news.

Much of this is a matter of record with your subcommittee. At times your staff helped solve problems, and at other times they were blocked as well as we here in the absence of legal cures. I know of only two ways to prevent governments from abusing freedom of information. First, there is the great outcry by all the press that forces release of much information. Secondly, there is the one you propose in court procedures. The only positive method of compelling a Government agency is through a court order.

Feel free to enter this letter in any record that might help. If you wish, I will write more detailed support of the legislation.

Sincerely,

JAMES V. MATHIS,
Editor and Publisher.



Biographical Data of Witnesses

BIOGRAPHICAL DATA OF NORBERT A. SCHLEI, ASSISTANT ATTORNEY GENERAL (OFFICE OF LEGAL COUNSEL) U.S. DEPARTMENT OF JUSTICE

Born: Dayton, Ohio, June 14, 1929.

Education: Ohio State University, B.A., 1950; Yale, LL.B., magna cum laude, 1956.

Military service: Midshipman, USNR, 1946-50; ensign, USN, 1950-52, on board U.S.S. *Albany* (CA-123) in Atlantic and Mediterranean Fleets; lieutenant (j.g.), USN, 1952-53, aide to Rear Adm. E. H. von Heimburg, USN, commander, Training Command, U.S. Atlantic Fleet. Released to inactive duty June 5, 1953; now lieutenant, USNR.

Experience: 1954, law clerk with Dinsmore, Shohl, Sawyer & Dinsmore, Cincinnati, Ohio; 1955, special duty with International Law Branch, Office of the Judge Advocate General of the Navy, Washington, D.C.; 1956-57, law clerk to Associate Justice John M. Harlan, Supreme Court of the United States; 1957-59, attorney-associate with O'Melveny & Myers, Los Angeles, Calif.; 1959-62, member of the firm of Greenberg, Shafston & Schlei, Los Angeles; 1961, George S. Leatherbee lecturer, Harvard Graduate School of Business, Cambridge, Mass.; 1961-62, lecturer in law, University of Southern California, Los Angeles. In present position since August 6, 1962.

Memberships: Ohio Bar, District of Columbia Bar, State Bar of California, American Bar Association, Los Angeles Bar Association, San Fernando Valley Bar Association, American Judicature Society, Urban League, Town Hall.

Publications: Associate author of McDougal & Associates, "Studies in World Public Order," Yale University Press, 1961; author of "State Regulation of Corporate Financial Practices: The California Experience," Harvard University, 1962, and articles in legal periodicals. Served as editor in chief, Yale Law Journal, 1955-56.

BIOGRAPHICAL DATA OF FRED BURTON SMITH, DEPUTY GENERAL COUNSEL (ACTING GENERAL COUNSEL), TREASURY DEPARTMENT

Graduate of: Princeton University (1937), Syracuse University College of Law (1940).

Admitted to practice in New York State October 1940.

Member of the Legal Division of the Treasury Department continuously since February 1943.

Mr. Smith is accompanied by Mrs. Charlotte T. Lloyd, Special Assistant to the General Counsel and Chief of the Legal Opinion Section, U.S. Treasury Department.

Mrs. Lloyd is a graduate of Vassar College and Columbia Law School and a member of the New York, District of Columbia, and Virginia bars. She has been in the Office of the General Counsel since 1961 and previously was 10 years in the Solicitor's Office of the Interior Department.

BIOGRAPHICAL DATA OF H. T. HERRICK, GENERAL COUNSEL, FEDERAL MEDIATION AND CONCILIATION SERVICE

Born: New York, N.Y., April 24, 1920.

Education: Hamilton College, Clinton, N.Y., 1942, B.S.; Cornell Law School, Ithaca, N.Y., 1948, LL.B.

Professional experience: Associate in Paul, Weiss, Rifkind, Wharton & Garrison, New York City, August 1948 to May 1950. Solicitor's Office, U.S. Department of Labor, Washington, D.C., August-October 1950. National Labor Relations Board, 1950-57: Legal Assistant to Chairman Herzog, October 1950 to November 1952; attorney, Office of General Counsel, November 1952 to February 1954;

attorney, Advice Section, February-October 1954; trial attorney, Seattle regional office, October 1954 to January 1957. Labor attorney, Westinghouse Electric Corp., Pittsburgh, Pa., February 1957 to May 1961. Assistant to Assistant Secretary of Labor, U.S. Department of Labor, Washington, D.C., May 1961 to October 1963. Executive Secretary, Atomic Energy Labor-Management Relations Panel, June 1962 to present. General Counsel, Federal Mediation and Conciliation Service, October 1963 to present.

Business address: 14th and Constitution Avenue NW. (1219 Labor Department Building), Washington, D.C., 20427. Phone: 961-3513.
Residence: 1308 Popkins Lane, Alexandria, Va., phone: 765-3697.

BIOGRAPHICAL DATA OF GILBERT J. SELDIN, ASSISTANT DIRECTOR OF MEDIATION ACTIVITY, FEDERAL MEDIATION AND CONCILIATION SERVICE

Born: Newark, N.J., October 19, 1910.

Education: B.A., City College, New York, N.Y.; LL.B., Brooklyn Law School, New York.

Membership: New York State Bar Association.

Professional experience: Assistant employment interviewer, New York State Employment Service. Wage and hour investigator and supervisor, Wage and Hour Division, New York. Liaison officer with War Labor Board, Wage and Hour Division, Washington, D.C. Attorney, Solicitor's Office, U.S. Department of Labor, New York. Liaison officer, Wage Stabilization Board, Washington, D.C. Mediator, Federal Mediation and Conciliation Service, Cleveland, Ohio.

Teaching: Taught labor relations at Western Reserve University, Cleveland, Ohio.

Varied employment prior to Government employment, including a short period with Local 66, ILGWU.

Business address: 14th and Constitution Avenue NW. (1219 Labor Department Building), Washington, D.C., 20427, phone: 961-3505.

Residence: 9312 Piney Branch Road, Silver Spring, Md., phone: 434-7181.

BIOGRAPHICAL DATA OF JOSEPH COSTA, CONSULTANT IN VISUAL COMMUNICATIONS, AUTHOR AND LECTURER

Born in Caltabellotta, Sicily, January 3, 1904. Joseph Costa came to New York with his parents when he was 3 years old. A press photographer for more than 40 years, Costa worked on the old New York World, the New York Daily News and at King Features Syndicate where he was photo supervisor and chief photographer of the Sunday Mirror Magazine, until the demise of that paper in October 1963.

He has covered most of the major news events since 1920, and won almost every important award in the field of photojournalism.

Cofounder, first president, and 18-year chairman of the board of the National Press Photographers Association and executive editor of the National Press Photographer, the official monthly publication of the NPPA.

Author and lecturer on photojournalism, he is known on every college and university campus where journalism is taught.

Has devoted more than a quarter century working for the improvement of technical competence of all news photographers and fighting for equal rights of the news camera in communicating today's world by news media, in the public interest.

He is a member of the guiding faculty of the Famous Photographers School of Westport, Conn., and a member of the Freedom of Information Center Advisory Committee, Columbia, Mo.

BIOGRAPHICAL DATA OF JOHN A. MCCART, OPERATIONS DIRECTOR, GOVERNMENT EMPLOYEES COUNCIL, AFL-CIO

Education: St. Joseph's College, Philadelphia, Pa. (1935-39), B.S.; graduate work, Temple University, Philadelphia; Columbus University School of Law, Washington, D.C.

Work: Employed at Philadelphia Naval Shipyard (1940-50), clerical and industrial relations work. Legislative representative, American Federation of Government Employees, AFL-CIO (1950-62). Operations director, Government Employees' Council, AFL-CIO (1963 to present).

BIOGRAPHICAL DATA OF CHISMAN HANES, AMERICAN BAR ASSOCIATION

Born Pine Hall, N.C., on May 26, 1909.

Duke University, A.B., 1930, LL.B., 1933; Harvard Law School, 1930-31.

Practice of law in Raleigh, N.C., 1933-34; member Legal Division, Reconstruction Finance Corporation, 1934-36, 1937-42; assistant to Chairman, Attorney General's Advisory Committee on Crime, 1936-37; special assistant to Executive Director, Office of Defense Plants, Reconstruction Finance Corporation, 1945-46; practice of law in Washington, D.C., 1946 to present; partner in Klagsbrunn & Hanes.

Served in U.S. Army Air Forces, 1942-45; attained rank of major.

Member of North Carolina Bar Association, Bar Association of the District of Columbia, Federal Power Bar Association, and American Bar Association.

Contributor to legal periodicals.

BIOGRAPHICAL DATA OF JOHN H. COLBURN, AMERICAN NEWSPAPER PUBLISHERS' ASSOCIATION

John H. Colburn has been editor and publisher of the Wichita Eagle and the Wichita Beacon since February 1, 1963. Formerly he was managing editor of the Richmond (Va.) Times-Dispatch for 14 years.

Mr. Colburn has been in newspaper work since 1930. He began as a cub reporter-copy boy for the Columbus (Ohio) Dispatch. He joined the Associated Press in Columbus in 1935. During World War II, Mr. Colburn was an AP correspondent in Europe.

After the war, he was named executive editor of the AP World Service in London and secretary of Associated Press, Ltd. He later was transferred to headquarters in New York, where he became a general executive.

Mr. Colburn is a member of the Federal Laws Committee of the American Newspaper Publishers' Association.

Mr. Colburn is a member of the board of directors of the American Society of Newspaper Editors and former chairman of the Freedom of Information Committee of that organization. He received the University of Arizona John Peter Zenger Award for "effective work in support of the freedom of the press," January 12, 1963, and in October was given a certificate of recognition by Southern Methodist University and the Dallas Press club for "distinguished service to journalism as a vigilant crusader for freedom of information."

Mr. Colburn was president of the Associated Press Managing Editors' Association in 1960. In 1961-62, Mr. Colburn directed a study by a group of editors who drafted a code, "What Makes a Good Newspaper," designed to help the public and press evaluate newspapers.

BIOGRAPHICAL DATA OF RICHARD D. SMYSER, MANAGING EDITOR, THE OAK RIDGER, OAK RIDGE, TENN.

Born, York, Pa., 1923. Graduate of Pennsylvania State University, B.A. in journalism, 1944. Served with U.S. Army, 1943 to 1945. Reporter, Chester, Pa., Times, 1946 to 1949. Managing editor, the Oak Ridger, Oak Ridge, Tenn., from the paper's inception in 1949 to the present. Currently a member of the board of directors and chairman of the Freedom of Information Committee of the Associated Press Managing Editors Association.

BIOGRAPHICAL DATA OF DALE W. HARDIN, U.S. CHAMBER OF COMMERCE

Marital status: Married, two children.

Present position: Manager, Transportation and Communication Department, Chamber of Commerce of the United States, since September 1963.

Born: September 9, 1922, in Peoria, Ill.

Education: A.B. (1949) and LL.B. (1951) degrees, George Washington University.

Prior employment: 1951, private law practice; 1951-54, special agent, Federal Bureau of Investigation; 1954-63, congressional liaison officer, Interstate Commerce Commission.

Military service: On active duty with U.S. Marine Corps, 1942-46.

Organizations: Phi Delta Phi Law Fraternity; Federal Bar Association; National Lawyers Club; Society of Former FBI Agents; Virginia and District of Columbia Bars.

BIOGRAPHICAL DATA OF JULIUS FRANDSEN, WASHINGTON MANAGER, UNITED PRESS INTERNATIONAL; CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE OF SIGMA DELTA CHI; AND THE NATIONAL PROFESSIONAL JOURNALISTIC SOCIETY

Graduated from the University of Nebraska in 1927. Began work with United Press (now UPI) in New York in 1929. News editor of the Washington bureau, 1939-64. Washington manager of UPI since September 1, 1964.

BIOGRAPHICAL DATA OF CLARK R. MOLLENHOFF, WASHINGTON CORRESPONDENT, COWLES PUBLICATIONS; AND VICE CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE OF SIGMA DELTA CHI

LL.B. from Drake University, Des Moines, 1944. Reporter for Des Moines Register and Tribune, 1941-50 (except for wartime duty in Navy); Washington bureau since 1950. Recipient of Pulitzer, Raymond Clapper, Heywood Broun, and Sigma Delta Chi for awards for distinguished Washington and national correspondence.

BIOGRAPHICAL DATA OF WALTER B. POTTER, CULPEPER, VA., NATIONAL EDITORIAL ASSOCIATION

Mr. Potter is editor, publisher, and owner of the Culpeper, Va., Star-Exponent, a community daily newspaper, and is publisher and owner of the Emporia, Va., Independent-Messenger, weekly newspaper.

Past president, Virginia Press Association; director of National Editorial Association and chairman of its legislative committee; director of Virginia State Chamber of Commerce; vice president of Jefferson Savings & Loan Association.

Graduate of Washington and Lee University, B.A., magna cum laude, and Phi Beta Kappa. Five years active duty, World War II, and now lieutenant colonel, U.S. Army Reserve, with Bronze Star, Combat Infantry Badge, two invasion arrowheads and five battle stars.

Director and first president of Culpeper Industrial Corp. and Culpeper Development Corp.; past president, Culpeper Chamber of Commerce; past president, Culpeper Lions Club; past director, Culpeper Retail Merchants Association; member, board of stewards and past chairman, board, Culpeper Methodist Church, past director, Culpeper Memorial Hospital, and Culpeper Country Club; member, the Moose, Veterans of Foreign Wars, American Legion, Omicron Delta Kappa, Phi Eta Sigma, Sigma Delta Chi, and Kappa Sigma.

Married to the former Miss Alice Katherine Hudson, of New Orleans, they have two sons, Walter, Jr., 15, and Robert McLean, 12.

BIOGRAPHICAL DATA OF LAWRENCE SPEISER, DIRECTOR, WASHINGTON OFFICE, AMERICAN CIVIL LIBERTIES UNION

Members of the bars of the U.S. Supreme Court, the District of Columbia, and the State of California. In addition to his responsibility in keeping abreast of legislation affecting civil liberties, he handles much of the ACLU's legal work in the District of Columbia. Mr. Speiser has specialized in litigation involving the testing of the constitutionality of various laws and governmental actions infringing on civil liberties and civil rights (freedom of speech, press, religion, due process, and equal justice under law). He has argued and won a number of cases

before the U.S. Supreme Court. Prior to coming to Washington, he was the staff counsel of its northern California affiliate for 5 years (1952-57).

Born in Toronto, Canada, in 1923, he obtained his legal education at the University of California Hastings College of Law. He has also attended Brandeis University in Waltham, Mass., after being awarded one of the first Florina Lasker fellowships in civil liberties and civil rights. Mr. Speiser has spoken before numerous civic groups, schools, and colleges as well as on radio and television on civil liberties matters and has also written extensively for legal periodicals.

Additional Clarification of Department of Justice on "Executive Privilege"

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C., May 5, 1965.

Hon. WILLIAM L. DAWSON,
*Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: I wish to refer to my letter to you of April 12, 1965, forwarding a copy of the testimony of Assistant Attorney General Schlei of March 30, 1965, on H.R. 5012.

There is one portion of Mr. Schlei's testimony which I feel should be amplified. I refer to the second paragraph of page 8 wherein Mr. Schlei stated that executive privilege had never been used during this administration and that it would not be asserted except in situations where the President personally reviewed the matter and authorized its use. Mr. Schlei's reference to executive privilege related solely to inquiries directed by the Congress or its committees to the executive branch.

While I think it clear that, when read in context, Mr. Schlei's reference was limited to congressional inquiries, it seemed to me desirable that this point be made explicit.

Sincerely,

RAMSEY CLARK,
Deputy Attorney General.

Comments From Departments and Agencies on Federal Public Records Law Legislation

LEGISLATIVE BRANCH

REPLY FROM GENERAL ACCOUNTING OFFICE

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 25, 1965.

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

DEAR MR. CHAIRMAN: Reference is made to your letter of February 19, 1965, requesting our comments on H.R. 5012 which proposes to amend section 161 of the Revised Statutes (5 U.S.C. 22) with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

The proposed legislation apparently is designed to permit any person to examine the records of every Federal agency except for those records which fall within the eight categories listed in the proposed subsection (c). The bill also provides that upon complaint of a person denied access to any public record, the appropriate Federal district court shall have jurisdiction to order the production of any agency records or information improperly withheld from the complainant.

We are in general agreement with the concept that governmental information and records should be made available at the request of the public to the maximum reasonable extent, under appropriate safeguards. However, we believe the reference to "any person" is too broad. This language would make it mandatory for an agency to open its records to subversives, aliens—even enemy aliens, to claim hunters, and to others whose interests might be adverse to the Government. We think that the individual being given access to Government records should, at least, be citizens of the United States, and demonstrate that their interest in the records is not adverse to the Government's interest.

We believe, also, that it should be made clear either in the law or its legislative history, that the agency may require in its regulations an identification of documents to be produced; that it may postpone production of documents which are necessary to the Government's current consideration of a matter; that the records are to be made available only for inspection, their custody remaining in the Government agency; and that a reasonable charge may be made for services rendered the public.

We have no basis for estimating the additional cost which might result from servicing legislation such as this, but we would expect that a charge for the service might discourage frivolous requests and at the same time conform with the policy of section 501 of the act of August 31, 1951, 65 Stat. 290, 5 U.S.C. 140.

In addition to the above general comments, we have some question as to how several of the eight stated exceptions would apply to several categories of files maintained by the General Accounting Office. In this connection the divisions and offices of the General Accounting Office prepare and maintain certain records which we believe should be exempted from public disclosure requirements. These include:

1. Memorandums between or within divisions concerning legal or policy matters, reviews of drafts or audit reports, letters to congressional committees and Members of the Congress, letters to heads of agencies and others, and preliminary drafts of decisions of the Comptroller General.

2. The working files relating to the material contained in the audit and report manuals and the manuals themselves.

3. Personnel and administrative files relating to such things as assignments, promotions, and performance of staff members.

4. Audit and investigative working papers.

While items in the first category usually relate to matters of law and policy, there would be many cases where they would not be solely related to such matters. In addition we do not believe drafts of decisions of the Comptroller General should be made available to the public. Accordingly, we recommend that the word "solely" be deleted from the exception set out in subsection (c) (5) of the bill and that the words "and preliminary drafts of decisions" be inserted after the word "letters" in subsection (c) (5).

Items in categories 2 and 3 above apparently would be exempt from the provisions of the bill by reason of exclusions provided in subsections (c) (5) and (c) (6), respectively, the internal policy instructions for our personnel contained in our audit and report manuals being intra-agency memorandums dealing with policy within subsection (c) (5). We, therefore, make no recommendations in regard thereto. We do believe, however, that the language in subsection (c) (6) "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" is so indefinite that the legislative intent should be clearly set out in the committee reports.

Audit and investigative working papers referred to in category 4 above apparently would not be exempt from public examination under the language of the proposed legislation.

Audit working papers, while primarily an accumulation of factual information obtained from the records of agencies and contractors, also contain analyses, records of discussions with individuals, personal opinions of individuals, potential audit leads, all of which may not be confirmed on further examination and thus the disclosure of which may lead to erroneous judgments by uninformed readers or may be harmful to the individuals involved. Moreover, disclosure of information in audit files may jeopardize the Government's position in situations in which there may be legal actions contemplated or in process.

With respect to audits of contractors, our working papers often times will include information that could be construed as trade secrets and commercial or financial information of a privileged or confidential nature. While it would appear that this type of information would be excluded from the coverage of the bill by subsection (c) (4), there is no assurance that the courts would agree.

Many files also include identification of informants, the source of allegations made in confidence, and requests for information by the Congress, its committees or its Members, the disclosure of which might be harmful to the informants, or in the case of requests from Congress, its committees, or its Members, the disclosure of such requests may not be desired by the congressional interest. The files also often contain references to individuals and officials of agencies and contractors which may or may not appear in the finally issued report. However, their mere inclusion in working papers and the context in which they appear may be detrimental to the individuals or violate a confidence of an individual if made available to the public at large.

Our audit working papers many times will also contain information which is specifically exempted from release to the public by the proposed bill. Screening of the working papers to exclude such information would be impractical and costly. Also, exhaustive screening would not assure the removal of all such information.

Under the provisions of 49 U.S.C. 66 payment for transportation services furnished the United States is made upon presentation of bills therefor, prior to audit and settlement by the General Accounting Office. The right is reserved, however, to set off any overcharges thus made from any amount subsequently found to be due the carrier; 49 U.S.C. 66 also imposes a 3-year limitation upon setoff action by the General Accounting Office and a like period during which claims may be filed by carriers. Any claim not filed prior to the expiration of the period of limitation is forever barred.

During the fiscal year 1964 we audited over 4.8 million Government bills of lading on which over \$897 million were paid and on which there was found a total of over \$9.8 million in overcharges. Undue interference with the orderly and timely audit of transportation accounts because of the demand of persons wishing to examine vouchers and related records could delay our settlement of transportation accounts beyond the 3-year period, thus depriving the Government of recovery of overcharges.

A general requirement that all transportation records be made available for examination by the public could generate large-scale demands by commercial rate auditing organizations, in order that they might develop undercharge claims against the United States, determine the practices and traffic distribution patterns of common carriers, or to secure possible future clients from our list of

carriers indebted to the Government. In this connection, we understand it is the usual practice for such organizations to share any recovery of undercharges on a 50-50 basis.

A similar situation could result with respect to the records maintained in our Claims Division in that there could arise a rash of "fishing expeditions" into those files by attorneys and others in search for bases for claims against the Government. These files of settled claims contain much information within the exceptions contained in this bill the separation of which before permitting examination would be a costly and time-consuming operation.

However, we are making no recommendation with respect to the exclusion of our transportation and claims records from the bill except to the extent they are within the general exclusions recommended herein or presently contained in the bill, but wish the committee to be aware of the possible results if the legislation is enacted in its present form.

For the reasons stated above, we recommend strongly that our working papers be excluded from the provisions of this bill. To accomplish this, we propose language along the following lines as an additional exception under section 161(c):

Investigatory and/or audit files compiled for the purpose of complying with requests for information by the Congress, its committees, or its Members or for the purpose of reporting to the Congress on investigations or audits made pursuant to law.

The inclusion of an exception of this nature should preclude us from being required to make information available to individuals that would be detrimental to the interests of the Government since, in our opinion, all of the work of the accounting and auditing divisions is, as required by law, basically for the purposes of reporting to the Congress, its committees or its members. We believe that this premise should be brought out in the committee's report on this bill.

In addition to the reasons stated above for the exclusion of information furnished by informants or otherwise submitted in confidence, it is evident that if such information and its sources are divulged to the public, information from such sources would no longer be available to the Government. Accordingly, we recommend that an additional exception be added to subsection (c) to the effect that disclosure is not required as to information submitted in confidence pursuant to statute or published rule or regulation or it be made clear in the legislative history that such information is of a "privileged or confidential nature" as that term is used in subsection (c) (4). It should also be made clear that subsections (c) (3) or (c) (4) include any information the disclosure of which would be a violation of 18 U.S.C. 1905.

We would like to point out that a number of files consisting of accountable officers' accounts containing such items as vouchers, contracts, etc., are in the technical custody of the General Accounting Office but actually in the physical possession of the various agencies. We assume that the responsibility of complying with the proposed legislation with respect to those files would be the responsibility of the agencies having physical possession of such files and that we could so provide in our regulations under subsection (a).

In order to assure that the authority of the General Accounting Office or other Federal agencies to examine agency records is not impaired by the exclusions set out in subsection (c), we suggest that there be included in section 2 of the bill a provision reading that—

Nothing contained in this Act shall be construed as in any way diminishing the authority of any Federal agency to examine the records or files of any other agency subject to the provisions of this Act.

Your letter of February 19 also requested our comments on H.R. 5013 through H.R. 5021 and your letters of February 24, 26, and March 2 and 15, 1965, requested our comments on H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, and H.R. 6172. Since the above-mentioned bills are identical with H.R. 5012 considered above, the comments contained herein are likewise applicable to those bills.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

EXECUTIVE OFFICE OF THE PRESIDENT

REPLY FROM BUREAU OF THE BUDGET

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., March 30, 1965.

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

DEAR MR. CHAIRMAN: This letter responds to your request for the views of the Bureau of the Budget with respect to H.R. 5012 and a number of other 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.

Under the provisions of H.R. 5012 every agency of the Federal Government except Congress and the courts would, in accordance with published rules stating the time, place, and procedure to be followed, be required to make all its records promptly available to any person except to the extent that records relating to certain matters are specifically exempted from disclosure under provisions of the bill. Upon complaint of withholding, a district court would have jurisdiction to compel the production of records, and the burden would be on the agency to sustain its action. Failure to comply with a court order would be punishable as contempt.

The records specifically exempted from disclosure under H.R. 5012 would be those matters that are "(1) required by Executive order to keep secret in the interest of national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intra-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

The Bureau of the Budget is committed to the principle of freedom of information. We believe that an informed public is essential to our democratic system, and we support full disclosure of Government information insofar as such disclosure is consistent with the public interest. We reluctantly conclude, however, that H.R. 5012 does not adequately protect the public interest.

Agency reports on the bill cite a variety of instances where disclosure of their records would be required contrary to the public interest. In its consideration of S. 1666, a similar bill in the last Congress, the Senate committee gave careful consideration to the examples then cited by agencies, and amended the bill in an effort to take account of these examples. Agency reports on the current bill, however, now cite other examples, thus showing the difficulty of dealing with this problem through a series of exemptions.

Another problem is the rigidity inherent in the elimination of all discretionary authority in the heads of agencies with respect to the time at which information can appropriately be released. We do not see how legislation can be drafted to take account of rapidly changing circumstances—circumstances which determine in many instances the time at which or the conditions under which disclosure of specific records would or would not be in the public interest. Premature disclosure in many instances would confuse, rather than enlighten, the public.

If H.R. 5012 were applicable to the Bureau of the Budget, the major adverse effects which it would have on the Bureau are discussed below:

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.

EXECUTIVE DEPARTMENTS

REPLY FROM DEPARTMENT OF AGRICULTURE

DEPARTMENT OF AGRICULTURE,
Washington, D.C., March 19, 1965.

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

DEAR MR. CHAIRMAN: This is in reply to your request of February 19, 1965, for a report on H.R. 5012 through 5021, 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. Your letters of February 24, 26, and March 2, 1965, request reports on bills, H.R. 5237, H.R. 5406, H.R. 5520, and H.R. 5583, measures which are also identical to H.R. 5012 through 5021.

The Department recommends that these bills be not passed.

Subsection (a) of the proposed amendment of section 161 of the Revised Statutes deletes from the existing section 161 the sentence which provides that: "This section does not authorize withholding information from the public or limiting the availability of records to the public." Subsection (b) of the proposed amendment provides that every agency shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person. The subsection also confers on the U.S. district court "in which the complainant resides, or has his principal place of business, or in which the agency records that the complainant seeks are situated" jurisdiction to enjoin the agency from the withholding of agency records and information and to compel production "of agency records or information improperly withheld." In such cases the court shall determine the matter de novo and the burden of proof to sustain its action is placed on the agency. In the event of noncompliance with the court's order, the court may punish the responsible officers for contempt. Proceedings before the district court authorized by subsection (b) are given precedence on the docket over all other causes except those which the court deems of greater importance. The term "agency" is defined to mean "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress or the courts."

Subsection (c) of the proposed amendment provides that the section does not authorize withholding information from the public or limiting the availability of records to the public except with respect to those matters which are set forth in eight specific categories as follows: (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions.

We believe the eight grounds for withholding information raise a number of questions of interpretation and in general may be too restrictive, with the result that agency information, records, and determinations may be required to be made available to persons which should be withheld in the public interest. We are not aware of any abuse of the "good cause to be held confidential" test in the Administrative Procedure Act which suggests the need for the more restrictive exceptions now proposed.

The proposed broadening of availability of agency records to "any person" would, in our judgment, go too far in the direction of opening up Government files for general inspection. The Department has a policy of making its official records available to the public to the maximum extent possible. The major exceptions are instances where, by direction of the President, the Congress, or other authorities, the Department is required to withhold information from the public. These cases fall essentially within the eight specific categories in the proposed subsection (c). There are, however, certain additional categories of records, all set forth in departmental regulations (see 7 CFR 1.4), which the Department has determined must be made available in a manner that will protect the public welfare as well as avoid giving undue advantage to any person or to the representatives of special interests. As we construe the proposed subsection (c), these regulations of the Department would be inconsistent therewith.

There is a serious question whether legislation which would attempt to deny to the Executive branch the right by appropriate published rule to keep certain information confidential in the public interest would not invade the executive power of the President under the Constitution and the separation of powers provided therein. Aside from this question, however, it seems that purely as a matter of good business management and efficiency, it would be undesirable to require, for example, everything reduced to writing other than those memoranda or letters "dealing solely with matters of law or policy" by every agency official to be made available to any person presently or anytime in the future. Such persons would, of course, include private counsel, Government contractors, speculators, the press, or anyone else. One result would be a serious interference with internal exchanges because officials could well become reluctant to reduce many matters to writing. Moreover, much of the Department's research data are voluntarily supplied to the Department on the basis of our assurance that it will not be disclosed except as part of summary tables and figures. Inability to make such a commitment would result in drying up our sources of information and would cause inestimable harm to research programs which are based on confidence built over many years.

The Department receives many informal complaints in regulatory matters on a confidential basis, and reports of possible fraud or other violations of law from individuals who desire their identity to be protected. In addition, frequently interested members of the public furnish information in confidence to the Department which is of aid to the Department in more effectively carrying out the objectives of Department programs. Such information is, of course, not used as a basis for any determination which may adversely affect an individual under our programs. However, it does indicate areas needing investigation to determine facts upon which informed judgments and determinations can be made. General knowledge that the Department could not keep this information confidential would tend to eliminate an important source of information necessary to carrying out the Department's responsibilities under the law.

The Department undertakes programs of broad economic impact with respect to which care must be taken in the timely release of information to the public. Access to the records, as this proposed bill would permit, would result in advance "leaks," before timely public release should be made. In addition, this Department's activities include investigations which may be undertaken for other than strict law enforcement purposes the results of which should be held confidential in the public interest. Furthermore, many matters relating to examination, operating or condition reports are prepared by, on behalf of, or for the use of a number of Department agencies such as the Rural Electrification Administration and the Farmers Home Administration which, although not relating to the regulation or supervision of financial institutions, require secrecy in the public interest.

Section 2 of the bill provides for the repeal of all laws or parts of laws inconsistent with the amendments made by the first section of the bill. This language would create confusion and place in doubt the continued effectiveness of section 3 of the Administrative Procedure Act (5 U.S.C. 1002), which excepts from the publication requirements of that act "(1) any function of the United States requiring secrecy in the public interest of (2) any matter relating solely to the internal management of an agency." For example, the exception in subsection (c) of the bill numbered (1) is limited to matters involving functions of the United States requiring secrecy to protect the "national defense or foreign policy" and the matters must be specifically exempted from disclosure by Execu-

tive order. A great deal of material which may require secrecy in the public interest but which does not relate to the national defense or foreign policy unless specifically exempted from disclosure by statute, might become subject to being made available as a result of section 2 of the bill; e.g., matters relating to domestic affairs that require secrecy at least for specific periods to avoid harm to the public interest generally. The extent to which matters "relating solely to the internal management of an agency" could be withheld would also be open to serious question.

For the foregoing reasons, it is our opinion that the public information requirement must preserve to the agencies, or at least to this Department, discretion to withhold from random public inspection that which the public interest requires to be withheld, including information relative to international operations.

The Bureau of the Budget advises that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

OVRILLE L. FREEMAN.

REPLY FROM DEPARTMENT OF COMMERCE

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,

Washington, D.C., March 30, 1965.

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

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Department concerning H.R. 5012 and a number of 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.

These bills would amend section 161 of the Revised Statutes (5 U.S.C. 22) by adding two new subsections. New subsection (b) would require every agency in the executive branch, in accordance with published rules stating the time, place, and procedure to be followed, to make all its records promptly available to any person unless specifically excepted by new subsection (c). It further provides that the U.S. district courts may enjoin an agency from the withholding of agency records and information and order the production of any agency records and information improperly withheld from a complainant. In such cases the court would determine the matter de novo and the burden would be upon the agency to sustain its action.

Subsection (c) does authorize withholding of records and information on the following eight grounds: Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; internal personnel rules and agency practices; specifically exempted from disclosure by statute; trade secrets and commercial or financial information obtained from the public and privileged or confidential; interagency or intraagency memorandums or letters dealing solely with matters of law or policy; personnel and medical files and similar matters, the disclosure of which would clearly constitute invasion of privacy; investigatory files compiled for law enforcement purposes; and examination, operating, or condition reports used by agencies responsible for the regulation or supervision of financial institutions.

We are in accord with the view that information in Government agencies should be made available to the public, but only to the extent that making information available will not unduly disrupt the operation of Government, result in damage to innocent members of the public, or otherwise result in more harm than good. It is our view that H.R. 5012 insufficiently safeguards these interests and we are therefore unable to recommend enactment of this legislation.

Sections 1(c) and 2 of the bill would in effect repeal sections 3(b) and 3(c) of the Administrative Procedure Act (5 U.S.C. 1002 (b) and (c)) relating to availability of final opinions, orders, and other official records. Section 3(c) provides that save as otherwise required by statute, matters of official record shall be made available to "persons properly and directly concerned except information held confidential for good cause found." The determination at present of what persons are properly and directly concerned and what agency records are confidential for good cause found are left to agency discretion. H.R. 5012 would remove these matters from agency discretion. We seriously question the desirability of removing this discretion from agencies and requiring them

as proposed in H.R. 5012 to make all their records available to anyone upon demand except within the framework of the exceptions in subsection (c) thereof.

We think it would be disruptive to the conduct of the Government's business, particularly in view of the provision for private suit in district courts, to compel production of records in which the agency concerned would have the burden of sustaining its action and the responsible officers thereof be punished for contempt in event of noncompliance of the court's order.

We believe a judgment on the merits of H.R. 5012 must involve a thoughtful balancing between the bill's objective on the one hand, and on the other the public interest in efficient and effective management of the Government's business.

H.R. 5012 presents a number of problems with respect to specific activities of this Department.

1. We assume that the exception in subsection (c) (3) for items "specifically exempted from disclosure by statute" is intended to preserve the protection now accorded information obtained in confidence from members of the public under such provisions as section 6 of the Export Control Act, section 705 of the Defense Production Act, 15 U.S.C. 176a and other similar statutory provisions. We urge that the legislative history be made clear on this point. It is not clear what the relationship of section 2 of the bill is to 18 U.S.C. 1905, a penal statute which prohibits the unauthorized disclosure of any information relating to trade secrets, confidential business data and the like which have been received by any Federal employee in the course of his official duties.

2. The requirement that records be made promptly available to any person ignores such fundamental questions as the need to know, citizenship, and age of the individual. It would leave the agency defenseless against unnecessary and unreasonable demands. Also, no provision is made to recover costs of furnishing the records, which could be very large, as, for example, in cases where extensive reference to old, archived records, were sought.

3. In the Area Redevelopment Administration certain confidential information is obtained from applicants as part of an application for financial assistance. These records are considered confidential because they contain financial data and individual trade information. Section 18(b) of the Area Redevelopment Act prohibits disclosure of unauthorized information concerning any future action or plan of the Secretary which might affect the value of securities and section 20 provides that the Secretary shall maintain and make available certain specific information about applications as soon as they are approved. It is not clear whether the exception in subsection (c) (4) relating to "trade secrets and commercial or financial information obtained from the public and privileged or confidential" would exempt the records of loan and grant agencies from public disclosure, especially where the enabling legislation of such agencies clearly spells out what information is to be made public, as is the case with the Area Redevelopment Administration. At the very least internal evaluations of applications for loans and grants should be clearly exempt from public disclosure.

4. The relationship between the proposed section 161(c) (3) and section 2 of the bill is ambiguous. For example, section 2 of the bill might be interpreted to repeal 35 U.S.C. 122, which presently preserves the confidential status of patent applications. Even if 35 U.S.C. 122 is not repealed, proposed section 161(c) (3) may not protect patent applications. It can reasonably be argued that patent applications are not "specifically exempted from disclosure by statute," because 35 U.S.C. 122 allows disclosure of such applications under certain circumstances and thus does not fully exempt them from disclosure. Furthermore, 35 U.S.C. 122 allows disclosure of patent applications when "necessary to carry out the provisions of any act of Congress" and H.R. 5012, if enacted, can be interpreted to be just such an act. Enactment of H.R. 5012 may well result in a flood of litigation against the Patent Office by persons seeking to gain the use of inventions not yet protected by patent. The outcome of such litigation cannot be predicted because of these problems outlined.

5. The Patent Office, pursuant to 35 U.S.C. 31, 32 investigates the character and reputation of attorneys and agents desiring to practice before it. It appears that H.R. 5012 would not maintain the present secrecy of the Patent Office files on its attorneys and agents, who are not Patent Office employees. If such files were to be opened to the public, it would become very difficult for the Patent Office to obtain the information it needs to effect the mandate of 35 U.S.C. 31.

6. We would oppose placing the burden upon the agency to sustain its action in withholding information. In order to sustain its burden in showing that

its records contain matter exempt from disclosure under this bill, an agency would have to prove the contents of such records and thereby negate the intended protection of such records.

7. We raise the question as to whether an amendment to section 161 of the Revised Statute is the most appropriate method of accomplishing the purposes of H.R. 5012. It would appear more appropriate if legislation is enacted to amend section 3(c) of the Administrative Procedure Act. In this connection it is noted that during the 88th Congress bills (S. 1666 and S. 1663) containing provisions somewhat analogous to H.R. 5012 did provide for amendment to the Administrative Procedure Act.

In view of the above and for the reasons set forth in the attached comments from the Department's Patent Office, Maritime Administration, Bureau of Public Roads, and the Assistant Secretary for Administration, this Department recommends against the enactment of H.R. 5012.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report from the standpoint of the administration's program.

Sincerely,

ROBERT E. GILES.

PATENT OFFICE COMMENTS ON H.R. 5012

There are listed below those instances when materials in the possession of the Patent Office are kept confidential. Those instances which are justified on the bases of statute and executive order are listed separately from those instances justified on other bases. Presumably, those instances relying on statute or Executive order would be treated under H.R. 5012 as exceptions under (c)(1) or (c)(3) although the express repealer of section 2 of the bill creates an ambiguity with respect to laws relied upon as providing an exception.

There is presented a much more serious question as to whether the other listed instances, not relying on statute or Executive order, would be exempted from the coverage of the bill. As indicated, in connection with each item, there appears satisfactory and reasonable bases for treating this material in a confidential manner with safeguards against abuse. Examination of these items raises questions concerning the appropriateness of a categorical directive such as would be provided by the bill, which does not allow that distinction and choice of administrative action which appears to be so necessary and proper.

I. INFORMATION RESTRICTED BY LAW OR EXECUTIVE ORDER

A. Applications for patents are directed by law to be kept in confidence by the Patent Office (35 U.S.C. 122). Some discretion is allowed to be exercised in this matter by the Commissioner of Patents "in such special circumstances as may be determined by" him. The Commissioner is circumspect in the exercise of this authority because of danger that property rights in patents may be jeopardized by disclosure. Other exceptions expressly provided by the statute are the disclosure under authority of the applicant or owner, and disclosure necessary to carry out the provisions of any act of Congress.

B. When publication or disclosure by the grant of a patent on an invention might, in the opinion of the head of designated agencies, be detrimental to the national security, it is ordered to be kept secret and violation of such an order is punishable by fine or imprisonment or both. The owner of a patent application may appeal such an order to the Secretary of Commerce (title 35 of the United States Code, ch. 17, sec. 181-188).

C. If agreements in connection with or in contemplation of the termination of a patent interference are not filed with the Patent Office, the agreements and patents involved are not enforceable. If any party filing such an agreement so requests, the agreement shall be kept separate from the file of the interference, and made available only to Government agencies on written request, or to any person on a showing of good cause. Occasion for the exercise of this discretion on the part of the Commissioner has not as yet arisen. Exercise of this discretion would be reviewable by the courts. The statute was recently enacted (Oct. 15, 1962; Public Law 87-831; 35 U.S.C. 135).

D. Executive Order 9424 of February 18, 1944 (3 CFR 1943-48 Comp.) provides for the establishment of a register for the recording of all licenses, assignments or other interests of the Government in or under patents or patent applications.

In accordance with that order and regulations of the Commissioner (37 CFR 7.1-7.7), this register is not open to public inspection. It is available for examination and inspection by duly authorized representatives of the Government; an exception is made as to those instruments which the department or agency of origin has authorized in writing as available for public examination. In the latter event, the instrument is made available generally.

II. INFORMATION PRESENTLY RESTRICTED FOR OTHER REASONS

A. The Secretary of Commerce by Executive Order 10930 was assigned responsibility for carrying out the functions set forth in Executive Order 10096 as they relate to the overseeing of agency determinations of the rights of the Government and its employees to the property in inventions made by Federal employees. These functions are to be performed by the Commissioner of Patents pursuant to a delegation of authority by the Secretary (Mar. 24, 1961, 26 F.R. 3118).

In the course of these determinations, it may be necessary for the employee-inventor and/or the employing agency to disclose in some detail the subject matter and circumstances of the discovery. This same information is or may become the substantive material in a patent application before the Patent Office (see 37 CFR 300.7) which is to be held in confidence (35 U.S.C. 122, and see item I. A. above).

For the reasons that provide the basis for the direction of 35 U.S.C. 122 relating to confidentiality of patent applications, the same information contained in the documents used in the determinations under Executive Order 10096 should be maintained confidential subject always to the conclusive discretion of the Federal Government and the employee-inventor acting jointly until such time as the right to the property in the discovery is resolved.

The program established by Executive Order 10096 for determination of rights to the property in an invention is not based on a specific statute directed to this end and neither the order nor a statute provides specifically for restricting access to such documents. The documents providing details concerning the discovery of an employee-inventor should, in our opinion, be kept confidential until a patent issues or is refused on the subject matter of the determination. Consistent with the treatment accorded patent applications, such documents have been kept confidential.

B. Section 31 of title 35 of the United States Code authorizes the Commissioner of Patents to prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants before the Patent Office, and to require them to show that they are of good moral character and reputation.

Papers received by the Commissioner in his efforts to carry out this function are held confidential to assure the availability of information and to protect a candidate for recognition to practice against unwarranted invasion of his privacy. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsections (c) (2) and (c) (6).

C. In the exercise of his authority to inquire into the qualifications of attorneys and agents to enable them to render valuable service, advice, and assistance (35 U.S.C. 31), in the presentation or prosecution of applications for patents, the Commissioner gives examinations to test these qualifications. By regulation, review of a determination by the Commissioner based on such an examination is available by petition to the Commissioner (37 CFR 1.341 (i)). By provisions of section 32 of title 35 of the United States Code, a person "so refused recognition" because of his failure to attain a passing mark may have recourse to the U.S. District Court for the District of Columbia to determine if the Commissioner had a reasonable basis for his determination. (See Local Civil Rule 95.) Pending such an action before the court, the test papers are preserved in secrecy, a practice accepted by the court (*Cupples v. Marshall, Comr. Pats.*, Jan. 9, 1952; 92 USPQ 169, 171). A contrary practice would be disruptive of the orderly operation of the Patent Office. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsections (c) (2) and (c) (6).

D. In the exercise of his authority to suspend or exclude, either generally or in a particular case, from practice before the Patent Office any agent or attorney shown to be incompetent, or guilty of improper conduct (35 U.S.C. 32, and see further 37 CFR 1.348), the Commissioner receives complaints concerning alleged misconduct of agents and attorneys and makes inquiries and investiga-

tions of such complaints. These complaints may involve unsupportable allegations. Responses to inquiries may be given in confidence. All actions attendant upon such an investigation should, in our opinion, be kept confidential, certainly during the development stage. In the event of an appeal from the Commissioner's final decision, which is made with the procedural safeguards of the Administrative Procedure Act (37 CFR 1.348), the court action involves additional considerations. These attorneys and agents are not "personnel" of the Office so as to come within the exceptions provided by subsection (c) (2) and (c) (6).

E. The Commissioner in his discharge of his general responsibility for the issuance of patents and the registration of trademarks and for the conduct of proceedings before the Patent Office (35 U.S.C. 6) has directed that complaints against examiners and other employees of the Office be communicated separately from papers relating to other business before the Office (37 CFR 1.3).

To assure orderly disposition of such complaints, and as a safeguard against the dissemination of unwarranted allegations, the present practice of maintaining such complaints and papers involved in the investigations of such complaints confidential should be continued.

F. Patent applications are ordinarily acted on by the Office in the order in which they are filed or amended. Under certain circumstances the examination of an application is advanced (37 CFR 102). One such exception involves a petition of a prospective manufacturer who, if the patent issues, plans to use or make the patented item. Certain business information such as how much money has been expended in the manufacture of the device, the number of the devices manufactured, and the extent to which manufacture has affected the employment of labor is provided the Office as a justification for the request for special treatment.

It is the practice of the Patent Office to preserve the confidential status of such information. Despite the statutory confidentiality of pending applications (35 U.S.C. 122), such information is not made of record in the case looking to the time when the patent may issue and the file become available for public examination.

G. Pending applications for trademark registrations are promptly indexed with all the important information including a reproduction of the mark, date of use and use in commerce, date of filing and class of goods on which used. This index is available to the public as promptly as it can be assembled, about 3 to 4 weeks after receipt of the application.

The entire application is available upon publication of the mark for opposition. Prior to such publication, which normally is made 5 or 6 months after receipt, the application is made available to examination upon written request (37 CFR 2.27). This latter technique is used as a matter of administrative convenience to minimize disruption of the files. These essential information is available in the index.

We believe the public right to know is satisfied by the index and the availability of the application upon written request prior to publication and the continuation of the requirement of a written request during this period is needed in the interest of orderliness.

MARITIME ADMINISTRATION COMMENTS ON H.R. 5012

For the following reasons we recommend against favorable consideration of the bill.

H.R. 5012 sets the limits of disclosure for beyond those necessary to realize a practical balance between the confidentiality of Government records and freedom of information to the public.

H.R. 5012 is also subject to other specific objections. Under the bill, the first step in resolving any dispute is to file a complaint in a Federal district court. No provision is made for an intermediate step or agency determination with the result that every close question will be brought immediately to the district court. In fact most denials of information would probably result in a lawsuit. This would add to the already crowded dockets and might embroil every agency in a deluge of litigation.

Enhancing the probability of litigation are the numerous ambiguous terms set out in the statute such as "memorandums or letters" contained in exemption No. 5. It is impossible to delineate with any accuracy the scope of such words. Do they include maps or plans? Are work papers or informal notes within the exception?

The use of the word "solely" in exceptions 2 and 5 for all practical purposes emasculates the two exceptions. These exemptions presently provide that exempted documents are those " * * * related solely to the internal personnel rules and practices of any agency * * *" and any " * * * interagency or intra-agency memorandums or letter dealing solely with matters of law or policy * * *." Since most documents would not meet such absolute standards, the exemptions would be virtually nonexistent. It would be better to insert in lieu of "solely" the words "insofar as" or their equivalent permitting partial disclosure of documents of a mixed nature.

Lastly, it should also be noted that H.R. 5012 presently amends 5 U.S.C. 22. Since H.R. 5012 deals with the same subject matter as section 3 of the Administrative Procedure Act of June 11, 1946 (60 Stat. 238), questions will arise as to what extent H.R. 5012 amend section 3. Since the obvious intent of H.R. 5012 is to change the existing law embodied in the Administrative Procedure Act, it is suggested that the changes if approved specifically amend section 3 rather than 5 U.S.C. 22.

While we desire to insure the free flow of information between the Government and the public, H.R. 5012 as it is presently written contains many drawbacks and we, therefore, recommend against favorable consideration.

BUREAU OF PUBLIC ROADS COMMENTS ON H.R. 5012

This bill would add two new subsections, (b) and (c), to section 22 of title 5, United States Code. These subsections would require every Federal agency to make all of its records promptly available to any person under rules of procedure which it shall make. The Federal district courts would have jurisdiction to enjoin the withholding of agency records, with the burden of proof upon the Federal agency to justify its withholding, and contempt procedures for non-complying Federal officers. Eight categories of exceptions to this requirement of availability are made; however, because of the indefiniteness of these categories it is impossible to tell exactly which of this Bureau's records would be covered by the bill.

H.R. 5012 does not require the party seeking information from a Government agency to specify with any particularity what information is sought. This, taken together with a lack of a requirement of bona fides in the person seeking inspection of records, would invite fishing expeditions and harassment without a corresponding public benefit. Even in the case where a person was seeking particular information in good faith, the exceptions governing records which need not be disclosed are sufficiently vague to be productive of a vast volume of litigation. We are not able to ascertain, for example, whether appraisals and other materials related to real property acquisition and in the custody of Public Roads would be required to be disclosed to the public.

Because of the sweeping and indefinite nature of this proposal, the Bureau of Public Roads recommends against its enactment.

ASSISTANT SECRETARY FOR ADMINISTRATION COMMENTS ON H.R. 5012

Insofar as the bill would be applicable to the Department of Commerce, and particularly to the activities under my supervision, it is my view that the bill is unsatisfactory, and I therefore recommend against its enactment in its present form.

My reasons may be summarized as follows:

1. The enumeration of specific classes of information in the proposed section 161(c) of the Revised Statutes is not sufficiently inclusive of the types of information for which the need for an exemption can be anticipated at this time. For example,

(a) Item (6) should be broadened to read as follows: "(6) personnel, medical, security, and investigative files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;" (new language italicized).

(b) A new item (9) should be added to read substantially as follows:

"(9) All budget estimates and supporting materials submitted to the Bureau of the Budget, and decisions of the President as to his budget recommendations and estimates until they are made public by the President." (See Bureau of the Budget Circular No. A-10 (revised), dated January 18, 1964).

2. The enumeration of specific classes of information in the proposed section 161(c) is not sufficiently comprehensive or flexible to provide appropriately for

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

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-

ments for some kinds of interagency or intra-agency memorandums. Therefore, there are inconsistencies between the terms of the bill and subsection 3(c) of the Administrative Procedure Act and a further internal inconsistency within the bill, in that courts are given authority to require production of *information* presumably including internal memorandums, whereas internal memorandums are exempt from production under section 1(c) (5) of the bill and under section 3(c) of the existing Administrative Procedure Act, and the obligation to "make available" extends only to records under section 1(b) of the bill.

As indicated, in the foregoing general comments subsection (b) is objectionable to this department because it would require Defense officials to carry the burden of justifying the withholding of information or records and to suffer the punishment for contempt in the event of noncompliance with a court order. This provision of the proposed law ignores the fact that the ultimate responsibility for the conduct of the executive branch rests with the President. The employees of the executive branch work for the President and should not be subject to contempt of court when performing an official act in accordance with directives of an agency head. Certainly it is not conducive to good government to have a statute that purports to place a subordinate in the position of being in contempt of court in the performance of an official act; nor, as an alternative, furnishing documents in direct violation of an order of the agency head.

If, in fact, subsection (b) is intended to provide a contempt penalty for a subordinate who withholds information at the direction of the President or a department head, the subsection is of questionable legal validity. In this connection see *In re Timbers* (226 Fed. 2d 301 (1955)), and cases therein cited.

Subsection (c), in setting forth specific exceptions for the general requirement that all records and information must be made available on request to any person, no matter how trivial or sinister his purpose, raises a host of unsolvable issues and problems.

Section 1(c) (1) authorizes withholding of information or records only if "specifically required by Executive order [*italic supplied*]." Employment of this exception, therefore, apparently requires a presidential decision in the form of an order that can be cited and interpreted by a subordinate. Whether an official forced to defend himself in a court action brought under section 1(b) need only cite the Executive order in justifying his decision to withhold or whether the order itself must be sustained is not determinable from the language. The phrase "by Executive order" seems to prevent delegation, and the word "specifically" invites claims of invalidity if any attempt to withhold information or records by category is made. The impossible burden that would be placed on the President if he were required to make individual judgments in the case of every document that is to be treated as privileged is apparent.

Although the second exception for "internal personnel rules and practices of any agency" is desirable as far as it goes, it makes no provision for the many other kinds of internal rules and practices equally deserving of protection and of no legitimate interest outside the agency. Moreover, it raises a question concerning the status of matters which cannot satisfy the requirement of relating "solely" to personnel rules and practices but involving other matters as well. It appears to be the intent of the provision to give no protection to those portions of records which relate to internal rules and practices of an agency when they are mixed with other information. An example of the kind of internal management rule that would receive no protection under section 1(c) (2) of H.R. 5012 is found in DOD Directive 4105.46 which prescribes the permissible price latitudes for DOD negotiators in cost-plus-fixed-fee contract negotiations. The undesirability of making such information generally available is obvious, but H.R. 5012 provides no basis for not doing so.

If we assume that section 2 has not repealed all statutes which specifically exempt information or records from disclosure, then the exception provided in section 1(c) (3) is reasonably clear. Since section 2 repeals only those statutes or parts of statutes that are inconsistent with section 1, it could reasonably be concluded that statutes which specifically exempt from disclosure certain kinds of information are compatible with section 1.

The exception in section 1(c) (4) for "trade secrets and commercial or financial information obtained from the public and privileged or confidential" is difficult to interpret. Requiring that trade secrets and commercial or financial information obtained from the public be privileged or confidential before they are entitled to protection begs the question of how that kind of information achieves the status of privilege or confidentiality, if not by this subsection. Should the intent

be to provide protection for information of this type obtained from the public with the understanding or assurance that it will be protected as privileged information, then section 1(c) (4) should be redrafted to say so clearly.

Section 1(c) (5) recognizes the necessity for protecting interagency and intra-agency memorandums. The reason for limiting this exception to those memorandums dealing "solely with matters of law or policy" is, however, not obvious. It is a well-accepted maxim that no large organization can function effectively if communications from subordinates to superiors or between subordinates are subject to general public scrutiny. If agency decisions by superiors are to be made with the benefit of full, frank, and open discussion, and recommendations by and between subordinates, these comments and recommendations must have the protection of privileged information. Otherwise, every memorandum would be carefully written with a view toward its possible impact on the public. The inhibiting effect of such a requirement is obvious. Yet exception 5 of paragraph 1(c) apparently would limit this privilege to exclude memorandums that contained any mixture of fact with law or policy. The difficulty of writing a memorandum of law or policy without including factual matters would have the effect of either denying the privilege to many memorandums that should be protected or promoting artificial memorandums splitting, with factual memorandums cross-referenced to policy or legal memorandums on the same subject. The extra administrative burden of the second possibility is apparent. Memorandums dealing with both law and policy would also not fall within exception 5 of paragraph 1(c) and would have to be split before qualifying for the privilege.

Although the exception provided by section 1(c) (6) is highly desirable, the burden in the event of legal challenge of proving in a Federal court that revelation of the record or information would constitute a "clearly unwarranted invasion of personal privacy" is a heavy one. Discretion of the agency to determine what is "clearly unwarranted" when privacy is invaded would be subject to the review of any district court judge before whom an action for production of the record or information was initiated. Furthermore, unless some provision is made for examination of the information or record by the court in camera, such as that in section 3500, title 18, United States Code, the invasion of privacy would occur in the course of the very litigation that attempts to prevent it.

Again, the exception provided in section 1(c) (7) for investigative files indicates recognition of the necessity for protecting such information, but the limitation on the protection significantly reduces its beneficial effect. There are many investigative files compiled and held by the Department of Defense for other than "law enforcement purposes" which nevertheless require the same protection. For example, investigative files compiled for the purpose of determining whether an individual is to receive a personnel security clearance for access to classified information often contain highly personal and sometimes prejudicial information (perhaps even inaccurate) that should not be available to the general public. The reasons for this are much the same as for those which justify the privilege for investigative files compiled for law enforcement purposes. The necessity of treating such files as privileged has been endorsed by several Presidents of the United States and has generally been respected by Congress. (See, for example, President Truman's memorandum of March 13, 1948, addressed to all officers and employees in the executive branch of the Government, who are directed to decline to furnish information, reports, or files dealing with the employee loyalty program.)

Other investigative files such as aircraft accident investigation reports also contain invaluable information that is obtained only by the assurance that it will be treated as privileged. Judicial recognition of the necessity for protecting such information in aircraft accident investigation reports is found in such cases as *Machin v. Zuckert*, 316 Fd. 2d 336 (C.A.D.C.), 1963, where the legitimate interests of the Government in promoting air safety was recognized by the court as a valid reason for denying to the litigants access to the accident report. Other inspection and survey reports of investigation are also dependent on full and frank exchanges between investigators and the persons questioned, and the continued protection of the information obtained in the course of these exchanges is absolutely essential to the continued flow of information vital to the effective and efficient management of the Defense Establishment.

Some additional examples of the kinds of information or records which the Department of Defense now considers it essential to treat as privileged but which might not receive protection under H.R. 5012 are the following:

1. Reports of proceedings pertaining to the conduct of, or the manner of performance of duties by military and civilian personnel and the names of persons who participated in the investigation or adjudication of any particular case.
2. All reports, records, and files pertaining to individual cases in the military, civilian, and industrial security programs, including the names of individuals who participated in the consideration and disposition of any particular case and the decisions made.
3. Examination questions and answers to be used in training courses or in a determination of the qualifications of candidates for employment, entrance to duty, advancement, or promotion.
4. Information as to the identity of confidential sources of information and information furnished in confidence.
5. Information which is, or reasonably may be expected to be, connected with any pending or anticipated litigation before any Federal or State court or regulatory body, until such information is presented in evidence or is determined to be appropriate for public disclosure.
6. Advance information on proposed plans to procure, lease, or otherwise acquire and dispose of materials, real estate, facilities, or functions, which would provide undue or discriminatory advantage to private or personal interests.
7. Preliminary documents pertaining to proposed plans or policy development when premature disclosure would affect adversely morale, discipline, or efficiency.
8. Conversations and communications between personnel of the Department of Defense, including Defense contractors, and between such persons and representatives of other Government agencies, which are merely advisory or preliminary in nature and which do not represent any final official action, and documentary evidence of such contacts.
9. Unclassified information furnished in confidence by foreign nations or international organizations to the United States, the dissemination of which is limited by the foreign source.

The Department of Defense appreciates the desirability of facilitating the availability of public information and endorses this objective. However, in view of the wide dissimilarity of functions and problems of the various executive agencies, there is a serious question whether a single statute of general applicability can achieve effectively this intended result.

The Department notes with interest that several of the eminent legal experts serving as members of the Board of Consultants and Review of the Administrative Procedure Act, established by the Senate Subcommittee on Administrative Practice and Procedure, indicated their serious reservations about many of the provisions of S. 1663, 88th Congress, that are comparable in purpose and in language to H.R. 5012. We invite your attention particularly to the comments of Marvin E. Frankel and Walter Gellhorn of the Columbia University Law School which begin at page 678 (as par. 4 of those comments) of the hearings of July 21, 22, and 23, 1964, before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 88th Congress, 2d session.

In associating himself with the comments of Professors Frankel and Gellhorn, Prof. Clark Hyse of the Harvard Law School stated in his letter of July 1 to the chairman of the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate (appearing on p. 593 of the hearings of July 21, 22, and 23, 1964) several observations which this Department would endorse as equally applicable to H.R. 5012. These include the comment that:

It is my judgment that improvement in the administrative process is more likely to be achieved by detailed, ongoing studies by an administrative conference than by legislative enactment of S. 1663.

and the statement—

Because it does not appear that the proponents of the changes proposed by S. 1663 have used the "method of patiently pursuing the facts and preparing remedial measures in light of the specific evil disclosed." I hope that the subcommittee will proceed with caution.

Even Prof. Kenneth Culp Davis of the University of Chicago, a vigorous proponent of revision of many portions of the Administrative Procedure Act, indicated his opposition to section 3(c) of S. 1663, on which H.R. 5012 is based. The reasons for this opposition are clearly set forth on pages 247 through 249 of the hearings of July 21, 22, and 23, 1964, *supra*. Of particular interest are the following comments of Professor Davis which summarize his views:

But section 3(c) in its present form will do little if any good, and it will do an immense amount of harm. It will prevent agencies from receiving

confidential information in writing from private parties, and for that reason it will not have the effect of opening up the confidential information to the public. It will cause working papers within an agency to be destroyed, but it will not cause them to be made public. It will cause exchanges of ideas and false starts to be made orally instead of in writing, but the effect will not be to make anything of this sort public ***.

The public interest will suffer when administrators are forced to transact the public business without written records. The public will gain little or no increased information.

For the reasons set forth above, the Department of Defense is strongly opposed to the enactment of H.R. 5012.

The Bureau of the Budget advises that from the standpoint of the President's program, there is no objection to the submission of this report.

Sincerely,

L. NIEDERLEHNER,
Acting General Counsel.

REPLY FROM DEPARTMENT OF THE INTERIOR, OFFICE OF THE SECRETARY

APRIL 29, 1965.

Hon. WILLIAM L. DAWSON,
Chairman, Committee on Government Operations,
House of Representatives,
Washington, D.C.

DEAR MR. DAWSON: Your committee has requested our report on H.R. 5012, a bill 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.

Reports have also been requested on H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, and H.R. 6172, identical bills.

H.R. 5012 amends section 161 of the Revised Statutes, as amended (5 U.S.C. 22). Section 161 now reads as follows:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public."

H.R. 5012 retains all of the words of the present Rev. Stat. 161, but adds to the last sentence a series of eight exceptions. It thereby changes the last sentence from a disclaimer which states that nothing in that particular section authorizes a withholding of information, into a limitation which provides that only the excepted information may be withheld and that all other information must be made available.

H.R. 5012 also transfers from the executive branch to the judicial branch the authority to determine whether particular information is or is not excepted even though the determination involves an exercise of judgment or discretion which is permitted by the legislative rule.

The Department of Justice has advised the committee that these bills contravene the separation of powers doctrine and would be unconstitutional since they impinge upon the constitutional authority of the Executive to withhold documents in the executive branch where, in his discretion, he determines that the public interest requires that they be withheld. For similar reasons, the Justice Department has also advised that the provision transferring such authority to the judicial branch would also be unconstitutional.

Aside from these constitutional objections, the Justice Department has presented to the committee the reasons for the administration's conclusion that the bills are unwise. We concur in the statement presented by Assistant Attorney General Schlei on March 30.

Although we recommend against the enactment of the bill, the following technical deficiencies in the bill are listed for your information:

1. Rev. Stat. 161 applies only to the 10 executive departments enumerated in Rev. Stat. 158. It does not apply to all Federal agencies.

2. The bill amends Rev. Stat. 161 in a manner that makes it inconsistent with section 3 of the Administrative Procedures Act, without specifically repealing the latter section.

3. The reference in the bill to internal personnel rules and practices does not cover investigatory files relating to personnel actions. It should cover them.

4. The reference in the bill to matters specifically excepted from disclosure by statute is ambiguous in its application to a statute that prohibits a Federal official from disclosing particular information unless authorized by law.

5. The reference to trade secrets, etc., apparently contains a drafting error. The words "and privileged or confidential" should be "which is privileged and confidential."

6. The reference to memorandums and letters dealing solely with matters of law or policy does not expressly include working papers, preliminary drafts, and records of advisory committee meetings.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the administration's program.

Sincerely yours,

D. OTIS BEASLEY,
Assistant Secretary of the Interior.

REPLY FROM DEPARTMENT OF LABOR, OFFICE OF THE SECRETARY

APRIL 7, 1965.

Hon. WILLIAM L. DAWSON,
Chairman, Committee on Government Operations, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your request for our views on H.R. 5012-5021, 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.

This Department supports the principle of providing citizens with maximum disclosure of information by their Government. We have therefore cooperated fully with congressional committees seeking information and have readily responded to requests for information by individual citizens. For the past several years, our disclosure policies and practices have been under study for the purpose of improving and refining them wherever possible. In our experience, present law has served well to protect both the citizens' right to know and the need for limited withholding of information in order to assure adequate performance of our statutorily prescribed duties.

A major defect in the proposed legislation is its inherent inflexibility. H.R. 5012-5021 would require every agency to make all its records available to any person, with certain specifically enumerated exceptions. In our view, it would be impossible to anticipate at this time all specific items which should be justifiably withheld in the public interest. Because of the potentially severe and disruptive effects which this legislation could have on our operations, we would be opposed to its enactment.

In addition to our general opposition to these bills, several specific difficulties arise in connection with certain provisions. It is our understanding that section 1(c) is intended to exclude from this broad disclosure requirement certain records, including business or financial information obtained in confidence and investigatory files compiled for law enforcement purposes. Section 1(c) should be modified to state directly that the specified items are excluded from the requirements of section 1(b). Even with this change, however, we would be seriously concerned about the practical effect of the proposal, particularly on our statistical, enforcement, and other operating programs.

Section 1(c) (4) is apparently designed to exempt from the disclosure requirement trade secrets and commercial and financial information obtained from the public, and privileged or confidential. The term "commercial and financial" may well not include wage and employment data, industrial injury statistics, social and economic data and other information furnished the Department in confidence. The Department operates under arrangements which provide in many cases for the voluntary submission of statistical data by all types of business firms throughout the country. This information, as well as information in connection with other programs of the Department, is obtained with the understanding that portions of it will not be publicly disclosed or identified in any way. Disclosure of this information could jeopardize the entire statisti-

cal and other operating programs of the Department and thus make it impossible to carry out the functions which we are required by law to perform.

Section 1(c)(5) would exclude from the disclosure requirement "interagency or intraagency memorandums or letters dealing solely with matters of law or policy." We are also concerned with the far more numerous instances of memorandums dealing with mixed questions of fact and law or policy formulations made with respect to given factual situations. These matters would apparently be subject to disclosure under the bill. The availability of such information to public disclosure, even where the conclusions are only tentative, could seriously inhibit the development of legal or policy positions within the Department and impair our enforcement programs.

We also note that the act authorizes the courts to determine de novo whether information has been improperly withheld by a Government agency. If judicial review is provided, it should be based upon the administrative record of a denial rather than on a trial de novo with the burden of proof placed upon the agency. This would be in accordance with normal procedure, which has been most satisfactory from the standpoint of interested parties, for handling review of administrative decisions.

In view of the objectionable features of this legislation we are opposed to its enactment.

The Bureau of the Budget advises that there is no objection to the submission of this report from the standpoint of the administration's program.

Sincerely,

W. WILLARD WIRTZ, *Secretary of Labor.*

REPLY FROM POST OFFICE DEPARTMENT

APRIL 23, 1965.

Hon. WILLIAM L. DAWSON,
*Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in reply to your request for a report on the bills H.R. 5012 through H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, and H.R. 5583, all of which are identical. They propose 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.

Subsection (b) of the proposed amendment would require every agency to "make *all* its records promptly available to *any* person" (italic supplied). This language would permit any crank or individual with some prejudice or complaint in a given matter to demand that the Department make available all its records, which, in some cases might go back 50 to 100 years.

Of primary importance to the Department is the exemption contained in item (7) of section 1(c), relating to investigatory files compiled for law enforcement purposes. The conditions under which statements and evidence can be furnished to defendants is presently prescribed by section 3500 of title 18, United States Code.

Our Bureau of the Chief Postal Inspector, in the conduct of its operations, compiles a number of records and reports that are not related to law enforcement because criminality is not involved. We believe that it would not be in the public interest to release such reports for reasons that (1) from the standpoint of management they have greater value when the investigator knows that his conclusions are immune from public disclosure, (2) patrons in many instances volunteer information of considerable value in service investigations when they have assurance that their information will not be revealed, and (3) investigations involving local disputes become further aggravated when the opinions of local citizens are publicly disclosed.

We additionally feel that the exemptions (4) and (5) of section 1(c) are too restrictive. We believe, for example, that in such matters as the negotiation of contracts and service arrangements, the Department should be on the same footing as a private party so far as disclosure of its position is concerned in order that it may be assured of the benefits arising from competition. As a matter of fairness and right, private business information should be appropriately protected at least from competitors. We find no authority in the proposed legislation to prevent the curious from access to information received by the Department in confidence from private firms in connection with service negotiations.

It is our view that any public information requirement must preserve to the agency discretion and the right to determine the extent to which it is feasible, or in the public interest, to make its records available for random public inspection by persons who have no direct concern. Exercise of such discretion with respect to the disclosure of information is inherent in the administrator's role. To remove the administrator's discretion and judgment in the information field would be inconsistent with his responsibilities and the public interest.

For the above-stated reasons, the Department opposes the enactment of this legislation.

The Bureau of the Budget has advised that from the standpoint of the administration's program there is no objection to the submission of this report to the committee.

Sincerely yours,

JOHN A. GRONOUSKI, *Postmaster General.*

REPLY FROM DEPARTMENT OF STATE

DEPARTMENT OF STATE,
Washington, D.C., March 12, 1965.

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

DEAR MR. CHAIRMAN: Your letters to the Department of State, dated February 19, 24, 26, and March 2, 1965, requested comments on a number of bills, H.R. 5012 through 5021, 5237, 5406, 5520, and 5583, which propose to amend section 161 of the Revised Statutes (5 U.S.C. 22) with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records. These several bills are identical.

The effect of the bills is to delete the final sentence of the current 5 U.S.C. 22 and add subsections (b) and (c) which, insofar as this Department is concerned, are substantially similar in contents to section 3(c) of the revised S. 1663 of the 88th Congress, 2d Session, a bill to revise the Administrative Procedure Act of 1946, as amended, (5 U.S.C. 1001 et seq.).

Subsection (b) requires every agency to make its records available to the public in accordance with published rules stating the time, place, and procedure to be followed. It is difficult to conceive how the Department could satisfy such a requirement, given its multifarious operations and its hundreds of establishments abroad.

There is another aspect of subsection (b) deserving of the committee's attention. The committee would, we are sure, agree that the Department is in a better position to determine whether the conduct of foreign policy requires that a particular matter not be disclosed than a court would be. Nevertheless, the bill appears to require that the Department assume the burden of proof in court against a complainant seeking material, indeed even on risk of punishment of responsible officers for contempt on failure to comply with a court order. Such a procedure clearly assumes that the court will have access to the information in order to determine whether it must be disclosed. It additionally creates the risk that the court will disagree with the Department's conclusion that the material must be withheld in the interest of our foreign policy. Whether or not safeguards are inserted to limit the court's access to the nature of the information and its independence of judgment, once the judiciary has been interjected into this sphere, it is uncertain whether its rulings will accord with the Department's appraisal of what must be withheld in furtherance of the conduct of our foreign policy. It should therefore be sufficient for the Department to enter a categorical defense that the Secretary has determined that disclosure of the material would adversely affect the foreign policy of the United States.

Subsection (b) would also grant any person, irrespective of his relationship, if any, to the material requested or the effect of the information on his pecuniary or other legally protected interests to seek any and all information in which he may have a capricious curiosity. It could thus encourage fishing expeditions of the widest range, which could impose severe burdens of time, money, and personnel on an agency whose operations are as farflung and decentralized throughout the globe as the Department of State's, merely in order to satisfy a complainant's idle whim. The phrase "improperly withheld" appears to be the only restraint upon such a complaint and its generality is totally undefined. Indeed,

the subsection is broad enough to permit representatives of foreign governments to roam through the Department's files to meet their intelligence requirements.

Subsection (c) fails to define "records" other than by the list of exclusions. Given the vernacular understanding of what constitutes a record, the duty to disclose would include all documents embodying foreign policy recommendations in the executive branch, unless they fall within the exclusions. If anything, by attempting to define the term through a list of exclusions, the risk of harmful disclosure is aggravated. Thus, for example, does the fact that (c) (5) specifies "interagency or intra-agency memoranda" imply, on the basis of the "inclusio unius, exclusio alterius" maxim, that intergovernmental memorandums are not protected? What is meant by the language "solely with matters of law or policy?" Is the implication that if any other matter is contained in a memorandum or letter that the entire document must be disclosed? That only the material not of law or policy must be disclosed? How does one separate out such material and who has the final word on which category particular information falls within? Similar questions arise as to each of the exclusions in which this Department has an interest.

The exclusion in subsection (c) (1) would not meet the Department's needs. The exclusion appears to contemplate an itemized listing in advance of every aspect of foreign policy for which secrecy is required. This requirement misconceives the nature of foreign policy, its variety in application to particular circumstances, and its fluidity in the face of rapidly changing events. Furthermore, to insist on a priori catalog of every conceivable circumstance requiring secrecy will inevitably lead to gaps and vexatious problems of interpretations of the scope of individually listed items, particularly in view of the statutory condition that the matter be "specifically" required to be kept secret. Furthermore, we question the feasibility of handling this problem by Executive order; amendment is difficult and cumbersome and lacks the flexibility and speed demanded by the series of ad hoc decisions which of necessity offer the only method for safeguarding the meticulous protection of foreign policy in this context. It will be noted that the comparable exemption under the Administrative Procedure Act currently reads "any function of the United States requiring secrecy in the public interest." The determination of whether secrecy is dictated by the public interest is made by the agency concerned. If the committee believes that standard too sweeping, the Department would have no objection to a standard which reads, "required to be kept secret in the interest of the national defense or foreign policy as determined by the President or his delegate."

Finally, it is our view that subsection (c) (2) should be broadened to include "any matter relating solely to the internal management of an agency," the standard incorporated in the present Administrative Procedure Act. There are obviously a number of internal matters which are not solely related to personnel rules and practices; e.g., budget and fiscal questions, and hence are not covered by the proposed standard in the subject bills. Since almost any piece of paper may be held to constitute a record, this material would comprehend voluminous and scattered rules, regulations, delegations of authority, and many more informal documents. To require their disclosure would impose an onerous burden on the Department's personnel and facilities which would either disrupt our services to the public, or result in a large increase in personnel, facilities, and appropriations, with relatively little corresponding benefit to the public.

The Bureau of the Budget advises that from the standpoint of the administration's program there is no objection to the submission of this report.

Sincerely yours,

DOUGLAS MACARTHUR II,
Assistant Secretary for Congressional Relations.

REPLY FROM DEPARTMENT OF THE TREASURY

DEPARTMENT OF THE TREASURY,
Washington, D.C., March 26, 1965.

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

DEAR MR. CHAIRMAN: Reference is made to your requests for the views of this Department on H.R. 5012 through H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, and H.R. 6172, to amend section 161 of the Revised Statutes with re-

spect to the authority of Federal officers and agencies to withhold information and limit the availability of records.

The Treasury Department agrees with the objective of increasing public knowledge of Government operations which affect the public. The Department objects, however, to legislation in the form of the present bills which would require unwarranted disclosure to any person of Government files. Under such a requirement the public interest would suffer and private persons would be unnecessarily injured.

A memorandum stating our more specific objections to this kind of legislation is attached.

The Department has been advised by the Bureau of the Budget that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely yours,

FRED B. SMITH,
Acting General Counsel.

DEPARTMENT OF THE TREASURY

MEMORANDUM ON H.R. 5012 AND OTHER 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

H.R. 5012 and other identical bills are designed to substitute a revised section 161 of the Revised Statutes, as amended (5 U.S.C. 22), generally known as the housekeeping statute, for the access to records section of the Administrative Procedure Act (sec. 3(c), 5 U.S.C. 1002(c)). The amendment takes the form of the addition of new subsections. Subsection (b) would require each agency to "make all its records promptly available to any person," and would invest the district courts of the United States with jurisdiction to enjoin an agency from withholding records or information improperly withheld. Subsection (c) would provide that the housekeeping statute shall not authorize withholding information from the public or limiting the availability of records to the public except matters that fall within eight specified categories. Section 2 of the statute would repeal inconsistent laws, presumably section 3(c) of the Administrative Procedure Act.

This memorandum is an analysis of the Department's specific objections to legislation of this type. The objections of the Department are discussed under the four following major topics:

I. DISCLOSURE OF ALL RECORDS TO ANY PERSON

Subsection (b) of the bills would require the Treasury to make all of its records (not covered by the specific exemptions) promptly available to "any person." The damaging and even absurd results of such a provision are illustrated by Prof. Kenneth Culp Davis of the University of Chicago, an outstanding expert on administrative law, in his testimony in the July 1964 hearings on S. 1663 before the Senate Subcommittee on Administrative Practice and Procedure. Concerning this requirement in section 3(c) he said that the President would have to honor a request of high school children "playing games" to make available all White House records "minus the seven exceptions"; the Department of Justice would have to provide to a mentally disturbed person all correspondence relating to a judicial appointment, etc. (at 247, 248). Other administrative law scholars said that section 3(c) "takes too little account of the individual citizen's interest in nondisclosure of public records pertaining to him" (Frankel and Gellhorn, at 678). The inappropriateness of the proposed provision with respect to many Treasury records is indicated by the specific recognition of the confidentiality of the records of various Treasury offices in the Federal Reports Act of 1942 (5 U.S.C. 139-139(f)). The legislative history of this act shows that the reason for this confidentiality was both the private character of much of the information in the records, and the injury to essential Government operations which would result from indiscriminate disclosure.

Furthermore, Congress should be aware of the enormous burden subsection (b) of the House bills would place on the taxpayers. The result of the proposed requirement might well be that all major agencies would require additional appropriations to maintain legal and administrative personnel engaged principally in determining disclosure requirements; this would add significantly to the expense of the Government.

As stated, Treasury records often contain information about private citizens. Under the proposed legislation the Treasury would have to make these records available to anyone who asks for them regardless of whether he is a crank, crook, prying neighbor, or competitor. The bills would thus result in an infringement of the citizens right to privacy in his private affairs. If the phrase "any person" were amended to read "any person with a legitimate public or private interest in the information to be disclosed," the proposed legislation would still be objectionable but it would to some extent be improved.

Furthermore, the bills are defective in not specifically authorizing an agency to charge reasonable fees for locating and making available information from its records to private persons. Considerable time and effort are often required to obtain and assemble records. Many agency records are in dead storage and obtaining them can be time consuming and expensive. Also, where records are in active use, the agency should have the alternative of providing copies at the expense of the person requesting them. The user charge statute, 5 U.S.C. 140, expresses the "sense of Congress" that the furnishing of services to particular persons be made self-sustaining.

II. IMMEDIATE JUDICIAL REVIEW OF AN AGENCY DECISION TO WITHHOLD

Subsection (b) of the House bills further provides for a judicial determination de novo of an agency's refusal to disclose to any person. Apparently, the complainant, who is presumably "any person," would be given a right to judicial review although he suffers no legal wrong and although he is not adversely affected or aggrieved within the meaning of any relevant statute by the agency's refusal to disclose. This provision may well place an unjustified burden on an already severely taxed judiciary. At the least, the complainant should be a person with a legitimate public or private interest in the information to be disclosed. Moreover, there should be included a provision for the procedure permitted in 18 U.S.C. 3500 and for privileged documents under rules 34 and 45 of the Rules of Civil Procedure; namely, delivery of the documents to the court in camera and, if the court finds necessary, sealed for appellate court review. These are the kinds of questions which an administrative conference considering further disclosure of Government records might well take up with the Judicial Conference, as authorized under the Administrative Conference Act of 1964 (Public Law 88-499).

III. EXEMPTIONS FROM DISCLOSURE

Although the eight exemptions listed in subsection (c) are obviously intended to recognize the public interest and legitimate private interest in withholding from indiscriminate disclosure certain records and information held by Federal departments and agencies, insofar as the Treasury Department is concerned they are inadequate. No specification of particular exemptions is capable of insuring the public interest in nondisclosure. For example, under which exemption could the Government withhold its civil litigation files from adverse litigants? or its own trade secrets in the production of inks and paper for its currencies from counterfeiters? or its instructions to law enforcement agents from criminals? The answer is: Under no exception. The Executive has throughout our constitutional history been recognized as having the duty and authority to determine when records and information should be protected from disclosure in the "public interest." The scope of the Executive's duty and authority should continue to be recognized.

It is attractive to think that a statute can be drafted which clearly delimits all of the areas which should be protected from disclosure and then compels the disclosure of all the rest. But no draftsman, however ingenious, can realistically hope to foresee all of the circumstances which will arise in the future or, indeed all of the consequences of such a disclosure policy even as applied to present problems. There will always be situations arising in which the common consensus clearly would be that nondisclosure is in the public interest; and the Government should not be compelled to disclose in such circumstances merely because a statute has not foreseen the circumstances.

Exemption (1).—Turning to the text of the exemptions, in the first exemption the term "national defense" should be changed to read "national security" since the broader term is needed, particularly in certain financial areas. In order to protect exchange stabilization fund activities which help preserve the value of the dollar, the nondisclosure must be assured of exchange stabilization arrangements and reports. These arrangements and reports may not be comprehended

by a court to be within the term "foreign policy" but may well be considered within the standard "national security," since the insurance by executive action of the basic economic strength of the country has been stated to be in the interest of national security. (See 19 U.S.C., Supp. V, 1862, a part of the Trade Expansion Act of 1962.)

Furthermore, the requirement that an Executive order be used as the mechanism by which the executive branch carries out its necessary and important functions in this regard adds a heavy and unnecessary burden upon the President and an intolerable one if the particular matter has to be specifically identified in the order.

Exemption (2).—This exemption reduces the existing exemption for matters "relating solely to the internal management of an agency" to matters related "solely to internal personnel rules and practices." It reflects the view that all other internal management operations of the Government should be disclosed to any person at all. But internal operations include many matters which are of no public interest or which should not be made readily available, as a few examples will illustrate.

As we read the present exemption, it would not protect the Treasury Department if it refused to detail in advance the method it intended to employ in protecting the movement of currency from the Bureau of Engraving and Printing to its own cash room in the main building. Apparently, upon demand, the Treasury would have to supply the records of how it proposed to use its guard force.

Nor is our concern in this area merely speculative. The Washington Post of March 13, 1965, carried an article which dealt with the question of whether the White House has a musical "jamming" system with which the President can foil attempts at electronic eavesdropping of his telephone conversations. The article quotes a highly placed source as saying, "Look, if there were such a device it isn't likely we would talk about it." The proposed legislation would apparently make the executive branch talk about it.

The Department recommends that this exemption be revised to exempt any matter relating solely to the internal management or procedure of an agency.

Exemption (3).—This provision exempts from disclosure records and information that is " * * * specifically exempted from disclosure by statute." The Criminal Code in 18 U.S.C. 1905 penalizes any U.S. officer or employee who discloses to any extent "not authorized by law" various enumerated matters including trade secrets, other business operations, amount of income, profits, expenditures and related matters. The Internal Revenue Code in 26 U.S.C. 7213 (a) and (b) penalizes disclosure by any U.S. officer or employee to any extent "not provided by law" of any income information disclosed in an income return or any operations of any business visited by him in the discharge of his duties. It is not clear whether the first sentence in the proposed 5 U.S.C. 22(b) is an authorization by law to disclose information otherwise protected by 18 U.S.C. 1905 and 26 U.S.C. 7213 (a) and (b)—18 U.S.C. 1905 should not be destroyed. Since its enactment in 1894 it has been essential to the administration of Federal laws. The prohibition in 26 U.S.C. 7213, with the limitations in 26 U.S.C. 6103, has been essential in the administration of our self-assessment tax system since the first income tax in 1913. Taxpayers place confidence in the protection it affords to the financial information they readily disclose. It is urged that exemption (3) cover matters that are "prohibited from disclosure by statute," and that the legislative history should show that these two penalty statutes remain effective.

Exemption (4).—This exemption is helpful but, as has been indicated, does not include the trade secrets of the Government which are the fruit of its research, development, and manufacture. Moreover, as respects private information, it is not clear how its status as privileged or confidential is determined. It should be pointed out that the word "privilege" commonly relates to a circumstance arising out of a relationship between persons. It does not normally relate to the status of the facts themselves. Thus, information given by client to his attorney, or by a patient to his doctor, is privileged because of the relationship between the parties—not because of the nature of the information. If the bill means that information obtained by the Government under a pledge of confidentiality, or information which is tendered to the Government in confidence, should be treated in such a way that the confidence should be respected, this should be made clear. If it does not mean this, whatever else it means should be made explicit.

Exemption (5).—This exemption for interagency or intra-agency memorandums or letters dealing "solely" with law or policy is so unrealistic as to be almost useless as an exemption. Most interagency and intra-agency communications

necessarily include facts as well as law and policy. Policy is made in the light of facts, and even purely legal memorandums contain analyses of factual situations which must necessarily be incorporated in the memorandums. Litigation files encompass law and fact inextricably. Moreover, those memorandums which deal with factual matters should be equally protected from indiscriminate disclosure, as they have been in the past. A factual report of a Treasury agent or informer which may not be part of an "investigatory file" protected by exemption (7) is as worthy of protection as a purely legal memorandum. The privilege against disclosure of communications, whether dealing with fact, law, or policy, within an agency or between agencies of Government is not only recognized and protected by the courts but supervised by them to prevent unjustified withholding. See Kenneth Culp Davis, "Administrative Law," volume I, sections 3.13, 8.15. Clearly preferable would be an exemption of "communications between officers or employees of the U.S. Government relating to the internal operations of the Government, excepting communications which are solely compilations of fact not otherwise confidential under this section."

Exemption (6).—The Department believes that the modifier "clearly" in this exemption should be deleted since it seems to contemplate some unwarranted disclosure and to encourage disclosure of personal files which until now have been kept confidential. If any unwarranted disclosure occurs, one result may be to expose the United States under the Federal Torts Claims Act, 28 U.S.C. 2674, to liability for a tortious invasion of personal privacy. See Harper and James, "The Law of Torts," sections 9.5-9.7. On the whole, it would be preferable simply to exempt personnel and medical files and similar private personal matters.

Exemption (7).—The limitation on disclosure of investigatory files compiled for law enforcement purposes is interpreted to mean that private parties cannot obtain information from such files except in the context of discovery proceedings in litigation as now provided by law. But the bill does not make this clear, as it should. Anything less than such protection for criminal investigations would disrupt law enforcement, expose informers to reprisals, and harm innocent citizens. However, more than this protection is needed both with respect to law enforcement and to the investigation of civil matters which should be kept confidential until the responsible agency has reached a decision.

With respect to the investigation of crime, effective law enforcement requires withholding from indiscriminate disclosure the overall plans, procedures, and instructions of Government agencies on law enforcement matters as, for example, in connection with the organized crime drive. It should also be apparent that the investigation by an agency, in other than criminal matters, of appropriate means to carry out a statutory responsibility may also need to be withheld from indiscriminate disclosure until the investigation culminates in a final decision, such as a report to Congress. One clear example of this is the investigation by the Treasury of the most practical and appropriate changes in the silver content of coinage to be recommended to Congress. As pointed out in connection with exemption (5), these internal matters would not be protected under that exemption since they necessarily deal with factual problems.

Exemption (8).—The Treasury Department considers this exemption necessary.

IV. REPEAL OF INCONSISTENT PROVISIONS

Section 2 of the House bills repeals all laws or parts of laws inconsistent with the requirement that every agency make all of its records promptly available to any person, except records or information within the eight enumerated exemptions. But the instant repeal of such laws might throw doubt on the continuing validity of regulations on disclosure of national defense and foreign policy matters until further Executive orders and guidelines could be issued. Also a general repealer is often uncertain in its effect until after litigation. Therefore, it is the Department's view that no amendment of section 3 of the APA should apply until after a reasonable period of adjustment and that, in the interest of clarity and to preclude any future misunderstanding, the provisions and parts of provisions repealed should be explicitly indicated in a repeal provision.

Conclusion.—It should be stressed that the foregoing discussion of the provisions of the legislation should not be taken as suggesting that if the deficiencies which are pointed out are remedied, the bills would then be acceptable. Our basic position is that the discretion of the Executive must, in the last analysis, continue to exist. The President, charged as he is by the Constitution with the duty of proper enforcement of the laws, cannot have his constitutional duties curtailed by legislation which would substitute another judgment for his.

INDEPENDENT AGENCIES

REPLY FROM ATOMIC ENERGY COMMISSION

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., May 6, 1965.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Foreign Operations and Government Operations,
Committee on Government Operations, House of Representatives.

DEAR MR. MOSS: Thank you for your letter of March 25, 1965, requesting the comments of the Atomic Energy Commission on H.R. 5012, a bill 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 Commission is in sympathy with the underlying policy of the bill in favor of full availability of information to the general public, but believes that its adoption in its present form might create problems in the Commission's performance of its statutory duties.

The bill would in effect amend section 3(c) of the Administrative Procedure Act, 5 U.S.C. 1001. We believe that it is more appropriate that any modification of section 3(c) be accomplished by an amendment of the Administrative Procedure Act.

The bill would deprive agencies of the authority under section 3(c) to hold information confidential, "for good cause found," pursuant to declared and justifiable agency policy. The areas of exemption as enumerated in the bill are in our view too narrow and specific to permit the Commission, with its diverse functions, to perform its various statutory duties effectively. Some of the categories of information subject to withholding and which might be required to be made matters of public record, to the prejudice of legitimate public and private interests are: confidential information which officers or employees are forbidden to divulge by 18 U.S.C. 1905, the scope of which does not appear to be identical with the exception for trade secrets in H.R. 5012; confidential information received from educational and other nonprofit institutions; confidential memorandums and reports prepared as part of the adjudicatory process; information on unclassified patent applications, contracts, and selection of contractors in advance of formal announcement, and other information which might assist a person to benefit improperly from a Commission program; and information withheld selectively from foreign nations in the overall interest of the United States in order to achieve more favorable information exchange arrangements with other countries, and withheld pursuant to agreements with other countries. Possibly some information within these categories could be construed as falling within the areas of exemption enumerated in the bill.

We note that the bill would permit suit in any district court even by citizens or residents of foreign countries. We note also that the bill would afford no protection for information which has been given to an agency with the understanding that it would be treated confidentially.

Appendix A, which is attached, explains our comments in greater detail. For your convenience, I am also enclosing a copy of part 9 of our regulations.

The Bureau of the Budget has no objection to the submission of these comments from the standpoint of the administration's program.

Cordially,

DR. GLENN T. SEABORG,
Chairman.

APPENDIX A

COMMENTS OF THE ATOMIC ENERGY COMMISSION ON H.R. 5012, A BILL 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

As we understand this bill, it would retain in section 161 of the Revised Statutes the present general authorization of departmental regulations governing the conduct of the various departments. It would delete the present second sentence of section 161, which was added by Public Law 85-619 (72 Stat. 547), effective August 12, 1958, and which provides: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

That sentence would be replaced by new paragraphs (b) and (c) which would govern not merely "departments," as does the present section 161, but would apply to all "agencies" as defined in the new paragraph (b).

The proposed paragraph (b) of section 161 of the Revised Statutes would require that every agency, in accordance with published rules, "make all its records promptly available to any person." The district court of the United States in which the plaintiff resides or has his principal place of business, or in which the records in question are situated, would be given jurisdiction to require the production of withheld records and information. The burden would be on the agency to sustain its action. Such proceedings would be given priority over all other cases "except as to those causes which the court deems of greater importance," and would be "expedited in every way." Under the proposed paragraph (c), it would be provided that the section does not authorize withholding information except: (1) As required by Executive order in the interest of the national defense or foreign policy; (2) related solely to internal personnel practices; (3) specifically exempted from disclosure by statute; (4) trade secrets and privileged commercial and financial information obtained from the public; (5) intraagency and interagency communications, dealing solely with matters of law or policy; (6) documents the disclosure of which would constitute an unwarranted invasion of privacy; (7) investigatory files compiled for law enforcement purposes, except as available to a private party; and (8) certain documents concerning the regulation of financial institutions.

We note that except for the definition of "agency," which is slightly different, the proposed paragraph (b) is identical with subsection 3(c) of the current S. 1336, a bill "To amend the Administrative Procedure Act, and for other purposes." S. 1336, as you know, is a proposed comprehensive revision of the Administrative Procedure Act of 1946, 5 U.S.C. section 1001 et. seq., and the exceptions enumerated in the proposed paragraph (c) of H.R. 5012 are identical with those enumerated in paragraph 3(e) of S. 1336. We note also that under section 2 of H.R. 5012 all laws inconsistent with the proposed amendments would be repealed by the enactment of the bill.

The Atomic Energy Commission is in sympathy with the underlying policy of the bill in favor of full availability of information to the general public, but believes that its adoption in its present form would constitute a serious impediment to the Commission's performance of its statutory duties.

The Atomic Energy Commission was established by the Atomic Energy Act of 1946 (60 Stat. 755; 42 U.S.C. 1801 et seq.) as amended by the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

The programs authorized by the 1954 act with respect to atomic energy are programs: To conduct and assist research and development; to disseminate unclassified scientific and technical information, and to control the dissemination and declassification of restricted data as defined in the act; to control the possession, use and production of atomic energy and special nuclear material; to encourage widespread use of atomic energy for peaceful purposes; to engage in international cooperation in order to promote the common defense and make available to cooperating nations the benefits of peaceful applications of atomic energy; and to conduct a program of administration consistent with the foregoing policies, and programs which will enable the Congress to be currently informed so as to take further appropriate legislative action. A considerable portion of the Commission's activities is concerned with the development and production of atomic weapons.

In addition to administrative and executive functions of the Commission conducted under the General Manager, and licensing and other regulatory functions under the Director of Regulation, the Commission conducts the following types of

adjudication on the record. Each of these is subject to review by the Commission, except for decisions of the Board of Contract Appeals and for security clearance determinations.

(a) Licensing of production and utilization facilities (principally reactors), including construction permits and operating licenses, under 42 U.S.C. 2131-2140, 2231-2239; the hearings usually being conducted by atomic safety and licensing boards.

(b) Licensing of source, byproduct and special nuclear material, under 42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2112, 2231, and 2239, in proceedings usually heard by hearing examiners.

(c) Modification, suspension, or revocation of licenses, under 42 U.S.C. 2231, 2236, and 2239; the proceedings usually being conducted by hearing examiners.

(d) Applications for just compensation for inventions or discoveries useful in nuclear weapons, or for awards for inventions or discoveries useful in producing or utilizing atomic energy, under 42 U.S.C. 2181-2188, 2223 and 2239 and 35 U.S.C. 183 and 188, in proceedings heard by the Patent Compensation Board.

(e) Personnel security hearings under 42 U.S.C. 2201, conducted by personnel security boards which make recommendations to the General Manager.

(f) Appeals from decisions of contracting officers under the disputes articles of contracts, in proceedings conducted by the Board of Contract Appeals or in certain cases by hearing examiners.

(g) Hearings held upon termination of, or refusal to grant or to continue, Federal financial assistance pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d).

Your subcommittee is respectfully invited to consider in this connection the more detailed discussion of the Commission's responsibilities as given in my letter of March 15, 1965, discussing the Commission's compliance with Section 3 of the Administrative Procedure Act. I believe that it is proper, however, to note specifically certain of the Commission's policies and practices.

Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002, is made applicable to all functions of the Commission under the Atomic Energy Act of 1954 by the terms of section 181 of the 1954 act, 42 U.S.C. 2231. The latter section provides for certain special procedures in the cases of agency proceedings or actions involving restricted data or defense information as defined in the Atomic Energy Act, sections 11(h) and 11(w) (42 U.S.C. 2014(h)(w)).

Under the Commission's regulations, 10 CFR part 9, "Public Records," a wide variety of documents is included in the public records of the Commission. A copy of part 9 is attached for your information. The following categories are excluded from the public records of the Commission:

(a) Documents withheld, as a result of timely application by the submitting party, for good reason as determined according to section 2,790(b) (see below);

(b) Documents relating to personnel matters and medical and other personal information, which in the interest of personal privacy are not normally made public;

(c) Intraagency and interagency communications, including memorandums, reports, correspondence, and staff papers prepared by members of the Commission, AEC personnel, or any other Government agency for use within the executive branch of the Government;

(d) Transcripts or other records of Commission meetings except those which constitute public hearings;

(e) Correspondence between the AEC and any foreign government;

(f) Records and reports of investigations;

(g) Documents classified as restricted data under the Atomic Energy Act of 1954 or classified under Executive Order No. 10501 (except that documents classified as restricted data which would otherwise be public records will be made available to Members of Congress upon authorization by the Commission, and to persons authorized under access permits issued pursuant to part 25 to the extent so authorized);

(h) Correspondence received in confidence by the Commission relating to an alleged or possible violation of any statute, rule, regulation, order, license, or permit;

(i) Correspondence with Members of Congress or congressional committees, except (1) correspondence released by the Member of Congress or congressional committee concerned, or (2) correspondence regarding the issuance, denial, amendment, transfer, renewal, modification, suspension, or revocation of a license or permit or regarding a rulemaking proceeding;

- (j) Any other document involving matters of internal agency management;
- (k) Names of individuals who have received exposure to radiation.

Part 9 is by its terms applicable to proceedings under Part 2: Rules of Practice and Part 25: Permits for Access to Restricted Data, of the Commission's rules and regulations. It is the Commission's practice to apply the criteria of part 9 to the disclosure of information in other circumstances. You will note that in certain cases under 10 CFR 9.7, disclosure of documents held confidential under section 9.4 may be authorized pursuant to subpoena or, as required, to other governmental personnel.

We believe that the adoption of H.R. 5012 would be unfortunate, particularly in view of the explicit terms of section 2 repealing all laws inconsistent with the proposed amendment. Its effect would be to amend the existing terms of section 3(c) of the Administrative Procedure Act, and we believe that it is more appropriate that any modification of section 3(c) be accomplished by an amendment of the Administrative Procedure Act.

The effect of the bill would be to deprive agencies of the authority, granted by section 3(c) of the Administrative Procedure Act, to hold information confidential "for good cause found," and would permit them to withhold from public inspection only records in the limited categories enumerated in the bill. These areas of exemption are in our judgment too narrow to permit an agency such as the Atomic Energy Commission, with its diverse functions, to perform its various statutory duties effectively.

Section 9.4 of the Commission's regulations, enumerating the categories in which information may be withheld, corresponds to a considerable extent with the exceptions in H.R. 5012. We believe that section 9.4 of our regulations is convincing evidence of the Commission's agreement with the basic objectives of the bill, and consider that section 9.4 has gone as far in that direction as is consistent with the Commission's performance of its duties. The bill does not leave room, as we believe it should, for the effectuation of declared and justifiable agency policy as a proper basis for withholding information.

While it may be useful to enumerate specific categories of documents to be excluded from records available to the public, it is of primary importance that, considering the diversity of functions of various agencies, particular agencies be given discretion to exclude documents which, in their informed judgement, should be held confidential even though they do not fall within one of the enumerated classes. It is, therefore, important that, even if such categories are enumerated, there continue to be such a provision as now exists in section 3(c) of the Administrative Procedure Act, permitting an agency to withhold from publication "information held confidential for good cause found." Such a course would permit the enumerated categories to furnish a guide for agency discretion, but would permit due regard for the flexibility necessary for the proper operation of individual agencies.

The wisdom of retaining statutory authority in an agency to withhold information held confidential for good cause found, rather than attempting to enumerate exhaustively the categories to be kept confidential, is illustrated by the provision of the Commission's regulations in section 9.4(k) that the names of persons exposed to radiation are not to be disclosed.

It is not entirely clear that such information would fall within the sixth proposed exemption in the bill, covering personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. But we believe that there would be general agreement that such an exception, which like others in section 9.4 is for the benefit of the person affected, is highly consistent with the public interest.

The bill would open up the possibility that anyone at all, including competitors of a firm which has furnished information, could bring suit in a distant court to compel the disclosure of such information. It would not even be required that the complainant be a citizen or resident of the United States. The firm which had furnished the information would presumably have the right to intervene in the suit as an interested party. In view of the nature of a good deal of the information in the hands of the Commission, even such as is not classified as "defense information" or "restricted data," we feel that it is far more consistent with the public interest to leave such disclosure to the informed judgment of the agency under published rules such as part 9.

In the area of business confidential information, as was pointed out in my letter of March 15, 1965, the Atomic Energy Commission complies with 18 U.S.C. 1905, which provides:

"Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than \$1,000, or imprisoned not more than one year or both; and shall be removed from office or employment."

The proposed exception in H.R. 5012 for "trade secrets and commercial or financial information obtained from the public and privileged or confidential" covers something of the same subject matter as 18 U.S.C. 1905, but is less explicit than 18 U.S.C. 1905 and may be considered to be different in scope. 18 U.S.C. 1905 appears to be a "specific exemption from disclosure by statute," and there is no obvious indication in section 2 of H.R. 5012 of an intention to repeal it. Under these circumstances, the coexistence of 18 U.S.C. 1905 and the proposed fourth exemption in the bill for trade secrets would appear to present some possibility of confusion. The fact that Government employees are subject to criminal penalties under 18 U.S.C. 1905 suggests that the relation between that statute and the bill should be clarified.

Moreover, the Commission often receives in confidence from educational and other nonprofit institutions information which is not trade secrets or commercial or financial information, but which, as in the case of the ideas of investigators for research projects, should be granted similar protection.

We note that the bill would not provide any exception for minutes of Commission meetings, and it might be argued that under the terms of the bill meetings of the Commission which did not happen to deal with matters required by Executive order to be kept secret in the interest of national defense or foreign security would be available to anyone. There may be grave doubt whether such minutes would fall within the exemption of "memoranda or letters dealing solely with matters of law or policy," and we believe that making such minutes matters of public record would seriously hamper the Commission's performance of its diverse and important responsibilities.

As another example of the inadequacy of the exceptions enumerated in the bill, it might be argued that confidential memorandums and reports prepared as part of the adjudicatory process, and circulated only among Commissioners and other personnel having adjudicatory duties, would also become matters of public record. We believe that the areas of exempted documents should include, as did S. 1666 of the 88th Congress (a bill to amend sec. 3 of the Administrative Procedure Act), a category of internal memorandums relating to the consideration and disposition of adjudicatory and rulemaking matters.

One other class of documents which the Commission properly refrains from disclosing, and which might arguably be required to be disclosed under the bill, includes those enumerated in AEC manual, chapter 2104, discussed in my letter of March 15, 1965.

In addition to staff papers submitted to the Commission for consideration, chapter 2104 includes unclassified patent applications not yet released; information concerning bills of material, time schedules, anticipated requirements, new sites and selection of contractors in advance of formal announcement, or any other information which might assist a person to benefit improperly from a Commission program; and lists of disqualified bidders and ineligible contractors. We believe that these exceptions are necessary to the proper performance of the Commission's statutory duties.

The bill does not take into account the necessity for an agency such as the Commission to withhold selectively information in the overall interest of the United States in order to achieve more favorable arrangements with other countries. For example, the Commission can save significant funds and accelerate its technical program by entering into information exchange arrangements with advanced nations under which certain unclassified technical information is provided in exchange for comparable data from other countries. The negotiation of such arrangements would become much more difficult, if not impossible, if the Commission were required to disclose all its technological information "to any

[foreign] person" without reciprocal benefits. As a related point, the Commission has established internal procedures governing the dissemination to foreign nations of unclassified published and unpublished AEC technical information. Under these procedures unusual requests from foreign nations; e.g., for large collections of engineering drawings on nuclear reactors, chemical processing plants, etc., are subject to careful examination, while the same information is not withheld from interested domestic parties. Under H.R. 5012, it would appear that such information is to be made available to anyone, since it is presumably not covered by the first exception, dealing with "foreign policy."

In the case of certain of our exchange programs, we have agreed with the cooperating nations that some categories of information we receive from them, although unclassified, will be given only limited distribution by the Commission. The language of the bill does not make it clear that it would permit continuation of such arrangements.

We believe that a question is raised by the word "solely," as it occurs in the second and fifth exceptions. A serious question of interpretation might arise if a court should be called upon to consider whether a document relates "solely" to the subjects discussed in those sections—internal personnel rules and practices, matters of law or policy. In view of the fact that the question whether a document falls within the excepted classes would be decided by litigation, we think that such language is especially troublesome.

The exceptions for records and reports of investigation should not apply "to the extent available by law to a private party." We believe that the quoted language should be clarified and an objective standard enunciated in the bill itself, especially since an order directing the disclosure of information might lead to irreversible prejudice to the public interest.

REPLY FROM CIVIL AERONAUTICS BOARD

CIVIL AERONAUTICS BOARD,
Washington, D.C., March 12, 1965.

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

DEAR MR. CHAIRMAN: This is in reply to your request for reports on H.R. 5012 through H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, and H.R. 5533, 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 proposed legislation would require every agency of the Federal Government to make all its records available to the public, except for those in specified categories. Persons denied access to records would be entitled to seek an order from a Federal district court convenient to them requiring the production of the records with the burden of proof to justify withholding being placed on the agency involved.

It appears from statements made in support of the legislation when it was introduced that it is based on S. 1666, 88th Congress, a bill amending the Administrative Procedure Act. The Board is gratified that a number of provisions contained in S. 1666 to which it objected in a report to the Senate Committee on the Judiciary on October 23, 1963, have not been incorporated in the legislation, and that the scope of the provisions exempting materials from disclosure has been broadened. At the same time, however, the Board is concerned as to the effect of some of the provisions on its policies and procedures.

Before discussing these provisions, the Board wishes to point out that it recognizes the overall desirability of making factual information available to the public to the fullest extent consistent with the effective discharge of the public business and the private rights of the persons from whom the information is obtained. In furtherance of this objective, the Board attempts to make factual information in its possession available to private persons to the fullest possible extent. Thus, the Board makes factual information relating to aircraft accidents available for the use of private litigants when it cannot be obtained from other sources. The Board also makes available various statistical and other information relating to air carriers, and section 1103 of the Federal Aviation Act (49 U.S.C. 1503) specifies that most of the matters filed with the Board by air carriers and other persons be treated as public records. Conse

quently, there is little in the way of factual information which is not now available to the public. Indeed, the Board is not aware of any complaints concerning its present informational policies with respect to basic factual matters.

Turning to the provisions of the legislation, the Board assumes that the exemption from disclosure covering matters "specifically exempted * * * by statute" would be applicable to its procedures under sections 902(f) (divulging of information), 1001 (conduct of proceedings) and 1104 (withholding of information) of the Federal Aviation Act (49 U.S.C. 1472(f), 1481 and 1504).

Concerning the exemption for "inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy", the Board believes that there are documents of this nature not restricted to matters of "law or policy" which should not be disclosed to the public since many of them contain staff views and recommendations. It has long been recognized that the disclosure of internal governmental materials containing staff views and recommendations tends to destroy candor in presentation contrary to the public interest, and the courts have accorded a qualified public policy privilege to such materials for this reason. See *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939. As there stated by Mr. Justice Reed (at pp. 945-946):

"Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

"There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief * * *."

The Board also believes that exempting from disclosure only "investigatory files compiled for law enforcement purposes" could impede and hamper the discharge of certain of its important functions. Although investigatory files developed in discharge of the Board's responsibility under section 701(e) of the act (49 U.S.C. 1441(e)) for ascertaining the cause of aircraft accidents, and making recommendations designed to avoid future such accidents, are not compiled for "law enforcement purposes," such files contain staff views and statements. Thus, the opening up of these files would be contrary to the public interest as well as impede the discharge of the Board's responsibilities in this area.

The Board further believes that permitting persons desiring access to records to select the judicial district most convenient to them for production of the records, rather than the district in which the records are located, could impose a severe administrative burden on it. In addition to the time and expense that would be required for travel by the Board's employees to numerous points throughout the country, substantial costs and inconvenience would be incurred by shipment of voluminous records to such points.

Despite the fact that H.R. 5012 and the related bills constitute improvement over S. 1666; the Board is opposed to their enactment because it believes that its existing policies and procedures adequately provide the public with factual information, and because of the undesirable effects of certain provisions of the bills on the discharge of its functions.

The Board has been advised by the Bureau of the Budget that there is no objection to the submission of this report from the standpoint of the administration's program.

For the Civil Aeronautics Board:

HAROLD R. SANDERSON, *Secretary*.

REPLY FROM CIVIL SERVICE COMMISSION

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., March 11, 1965.

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

DEAR MR. CHAIRMAN: This is in further reply to your letters of February 19, 1965, February 24, 1965, February 26, 1965, and March 2, 1965, requesting the

Commission's views on H.R. 5012 through 5021, H.R. 5237, H.R. 5406, H.R. 5520, and H.R. 5583, 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.

These identical bills would amend section 161 of the Revised Statutes (5 U.S.C. 22). Subsection (a) repeats present law. Subsection (b) requires every Federal agency, except Congress and the Courts, to make its records promptly available to any person and authorizes recourse to the district courts to enforce this right. Subsection (c) provides certain exceptions under which an agency could withhold information from the public or limit the availability of its records. The following are the excepted matters that are particularly of interest to the Commission:

- (1) Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
- (2) Related solely to the internal personnel rules and practices of any agency;
- (5) Inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy;
- (6) Personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.

We would interpret the exception No. (2) as exempting matters relating solely to the internal personnel rules and practices of the Federal Government as a whole. This is consistent with the interpretation by the Department of Justice of similar language appearing in the Administrative Procedure Act.

The Civil Service Commission does not object to the enactment of the provisions contained in the identical bills listed above.

The Bureau of the Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,

JOHN W. MACY, Jr., *Chairman.*

REPLY FROM FEDERAL AVIATION AGENCY

FEDERAL AVIATION AGENCY,
Washington, D.C., March 11, 1965.

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

DEAR MR. CHAIRMAN: This is in reply to your request for the views of this Agency with respect to H.R. 5012 through 5021, 5237, 5406, 5520, and 5583, 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 provisions of this bill raise a number of basic questions concerning the availability of Agency records and documents. The existing statute defining availability of Agency records, the Administrative Procedure Act, provides that only "matters of official record" need be made available only to "persons properly and directly concerned" and that even these documents may be held confidential "for good cause found." The three quoted limitations operate to give agencies needed discretion as to what may be withheld. All three of the limitations are omitted from H.R. 5012. In addition, a judicial procedure for compelling disclosure is provided which begins with the presumption that the Agency has improperly withheld the information sought—a presumption which the Agency must overcome to vindicate its nondisclosure.

If a statutory change respecting availability of agency records and documents is thought desirable, the statute ought to be clear that only factual material need be made available. We suggest the word "factual" be inserted before the word "records" on page 2, line 3, of H.R. 5012. On the same point, the eight exceptions listed in the proposed section 161(c) are essential as they include those matters for which there is no legitimate disclosure need.

We oppose the provisions in the proposed section 161(b) following the first sentence in that section, which grant broad authority to district courts to compel disclosure of agency materials. The underlying issue here is where discretion should lie to decide what matters are properly withheld. The existing statute

places that discretion in the agencies. H.R. 5012 would in large measure place the discretion in the Federal district court. It is our belief that agencies are in a better position to determine the precise consequences of releasing a given document and for that reason should retain initial discretion to decide what should be disclosed. Placing this discretion in the courts can only be justified by a clear showing that agencies are abusing their powers. It has not been our experience that such a charge has been or could be made. In view of the burden which will without question be placed on the courts by this proposal, and in view of the facility the proposal affords for unreasonable, dilatory and harassing requests, we would hope no shift of discretion would be made that is not founded on a well-documented case that the existing system is being abused.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. HALABY, *Administrator.*

REPLY FROM FEDERAL COMMUNICATIONS COMMISSION

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 2, 1965.

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

DEAR MR. CHAIRMAN: This is in reply to your request seeking this Commission's comments on H.R. 5012 to H.R. 5021, inclusive, and H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, and H.R. 6172, 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.

Enclosed please find copies of our comments on these bills. We are advised by the Bureau of the Budget that from the standpoint of the administration's program there is no objection to the presentation of this report to your committee.

Yours sincerely,

E. WILLIAM HENRY, *Chairman.*

COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON H.R. 5012 TO H.R. 5021, INCLUSIVE, AND H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, AND H.R. 6172, 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

Bills H.R. 5012, et al., would amend section 161 of the Revised Statutes (5 U.S.C. 22) with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records. The bills provide, with eight specific exceptions,¹ that every agency shall publish rules making "all its records promptly available to any person." They further provide for an action in a district court to require the agency to produce records improperly withheld.

The basic statutory provision governing the availability of Commission records is section 3(c) of the Administrative Procedure Act (5 U.S.C. 1002(c)). That section provides: "Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to

¹ The eight areas in which an agency may withhold information from the public, or limit the availability of records to the public, are matters that are "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

persons properly and directly concerned except information held confidential for good cause found." Section 4(j) of the Communications Act further provides in pertinent part: " * * * Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense." Sections 213(f) and 412 of the Communications Act (47 U.S.C. 213(f) and 412), give the Commission discretion to withhold specific types of information.

The Commission has published rules and regulations which specify which of its records are open to public inspection and which are ordinarily not for public disclosure (sec. 0.417, 47 CFR 0.417). A copy of these rules is attached. This section of the rules also specifies procedures whereby interested parties may, at the Commission's discretion, gain access to those records not ordinarily available for public inspection.

The Commission agrees with the underlying purpose of these bills—that agencies should operate publicly. Section 2 of these bills would repeal all "laws or parts of laws inconsistent with the amendment made by the first section of this Act." Among the laws which would be affected is subsection 3(c) of the Administrative Procedure Act, 5 U.S.C. 1002(c), which permits matters of official record to be held confidential for good cause found. We believe that the general standard of subsection 3(c) has worked well, and that the Commission has fairly complied with it. However, should Congress find it desirable to enact legislation along the lines of H.R. 5012, this Commission does not anticipate any particular difficulty in administering a more specific statute. We do oppose certain features of the proposals in H.R. 5012 and should like to comment on these particular points.

By requiring every agency to make all of its records, except those containing eight specified categories of information, promptly available to any person, and by repealing all laws inconsistent with this requirement, these bills would substantially enlarge the categories of material and records which would be open to the public. We believe that the bills go too far in this direction.

First, we believe that in the absence of good cause shown, it is sound public policy to exclude from public inspection matters prepared by agency personnel for use within the agency, such as memorandums and reports, as well as inter-agency memorandums, letters, and reports of investigations. (See generally, "Attorney General's Manual on the Administrative Procedure Act," pp. 24-26.)

Subsection (c) (5), exempting from disclosure "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy," would be difficult to interpret and would not protect all intra-agency memorandums. Most intra-agency memorandums of necessity deal with both facts and law or policy. Furthermore, subject to provisions of law governing separation of functions (§ 5(c) of the Administrative Procedure Act; § 409(c) (1) of the Communications Act), the Commission should be able to receive memorandums and working papers from the staff without the need for disclosing such working papers. It is important to the effective functioning of the Commission that members of its staff who are called upon for advice and assistance may respond upon a confidential basis. If staff memorandums are to be examined almost routinely outside the Commission, staff advice and suggestions will inevitably be inhibited. We stress that our position is not premised on any desire to permit agencies to decide cases upon extraneous or incorrect bases (indeed, we must set out the factual and legal bases of all our actions and these bases are subject to review by the courts). Rather, our aim here is simply to permit the most effective and full exchange between the agency members and their staff—the very same type of exchange permitted, for example, between judges and their staffs.

Finally, we point out that the same considerations apply to correspondence and memorandums exchanged with the executive branch (e.g., the Bureau of the Budget) or with other agencies (e.g., the Federal Trade Commission).

Furthermore, the effect of the provisions of H.R. 5012 regarding secret matter is unclear to us. Under section 4(j) of the Communications Act, 47 U.S.C. 154(j), the Commission "is authorized to withhold publication of records or proceedings containing secret information affecting the national defense." See also section 3 of the Administrative Procedure Act, 5 U.S.C. 1002. A Commission rule promulgated pursuant to that authority currently provides that maps showing the exact location of submarine cables shall not be open to public inspection (Commission rules, sec. 0.417, 47 CFR 0.417). Items on the Commission's

classified agenda are also withheld under section 4(j) of the Communications Act because they contain "secret information affecting the national defense." We believe that subsection (c) (3) of H.R. 5012 providing an exemption for matter "specifically exempted from disclosure by statute" would be interpreted to include section 4(j) of the Communications Act. However, the provision of section (c) (1) of H.R. 5012 for an Executive order relating to secret matter might be deemed to repeal section 4(j) in light of the repeal provisions of section 2 of H.R. 5012. This question should be clarified so that the Commission's present authority under section 4(j) is retained, particularly since it is unclear whether a general Executive order or a series of particularized ones is contemplated.

Subsection (c) (4) of the bills recognizes the necessity of protecting the confidentiality of trade secrets and "commercial or financial information" obtained by the agency from the public and "privileged or confidential." The Commission receives information, which by rule is not available to the public, pertaining to such matters as reports, contracts, maps, etc., in connection with the valuation of common carrier property (47 U.S.C. 213); contracts relating to foreign wire or radio communications whose disclosure would place American communication companies at a competitive disadvantage (47 U.S.C. 412); and certain technical data furnished the Commission by manufacturers of radio receivers (Commission rules, sec. 0.417, 47 CFR 0.417). We believe it would be undesirable to make all of this information automatically available to any person, rather than retaining the Commission's present discretion. It is not clear, however, whether the phrase "commercial or financial information obtained from the public and *privileged or confidential*" [emphasis supplied] is broad enough to include all of the above-described information.

We are also concerned with the meaning of subsection (c) (7), which exempts from public disclosure "investigatory files compiled for law-enforcement purposes except to the extent available by law to a private party." It is not clear at what point letters, memorandums, complaints, etc., become an "investigatory file" within the meaning of this provision. If this provision is not intended to apply until an investigation is undertaken by the Commission staff, then the complaint initiating an investigation would have to be made public upon request. Such a result would be highly undesirable. For example, the Commission has received confidential information in the past from broadcast station employees who charged that the station was being operated in violation of the law or Commission rules or policies. Such information might not be forthcoming if it could not be supplied, initially at least, on a confidential basis.

We also suggest that a ninth category be added to exempt from the broad disclosure provisions of these bills all material in adjudicatory cases, the procedure for which is governed by sections 5, 7, and 8 of the Administrative-Procedure Act (5 U.S.C. 1004-1007). For example, in many hearing cases, especially those involving license renewal or revocation, the Commission does not disclose the names of witnesses who have been subpoenaed. Whether such information should be disclosed is a highly specialized question which we urge should not be dealt with in general public disclosure legislation.

Finally, the proposed enforcement procedure also appears to be undesirable. It reverses the normal presumption that a Government agency has acted properly and in accordance with law. We also believe that, with respect to this Commission at any rate, there is no need for creating a new cause of action in the district courts. A Commission refusal to make records available for public inspection should be reviewable by a person aggrieved in the same manner as other agency actions under section 402(a) of the Communications Act (47 U.S.C. 402(a)), and the Judicial Review Act of 1950 (5 U.S.C. 1031-1042). The latter statute contains ample provisions to insure a full and fair review of the agency's actions, without the time-consuming and unnecessary resort to de novo trial of the entire matter. The statute limits, properly, we think, resort to the courts to those substantially affected by an agency order. If there were to be a different standard as to standing to seek review, amendment of the above-cited provisions would be required.²

Attachment.

Adopted March 31, 1965, Commissioner Loevinger absent.

² Adoption of a different standard allowing any person to obtain review, irrespective of his interest or grievance, would raise serious legal and policy questions. Cf. dissenting opinion of Douglas, J., *Scrapps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4.

FEDERAL COMMUNICATIONS COMMISSION, RULES AND REGULATIONS

Information

§ 0.411 Public information

Any person desiring to obtain information may do so by writing or coming in person to any of the Commission's offices. A broader range of information and more comprehensive information facilities are available at the Commission's main office in Washington, D.C., however, and inquiries of a general nature should ordinarily be submitted to that office.

§ 0.413 General information office

The Office of Reports and Information is located in the New Post Office Building. Here the public may obtain copies of public notices of Commission actions, formal documents adopted by the Commission and other public releases, as they are issued. Back issues of public releases are available for inspection in this Office. Copies of fact sheets which answer recurring questions about the Commission's functions may be obtained from this Office.

§ 0.415 Public reference rooms

Public reference rooms are maintained by the Commission where the public may inspect any material which is available for public inspection in accordance with § 0.417. Unless otherwise indicated, these rooms are located in the New Post Office Building, 13th Street and Pennsylvania Avenue, NW., Washington, D.C. They are as follows:

(a) The Broadcast and Docket Reference Room. Here the public may inspect all broadcast applications and files relating thereto, lists described in §§ 0.419, 0.421, and 0.425, dockets relating to all Commission matters which have been designated for hearing or which are the subject of rule making proceedings, any other docketed matters, and undocketed petitions for rule making.

(b) The public may inspect all safety and special applications and files relating thereto at the offices of the Divisions of the Safety and Special Radio Services Bureau which process such applications. The categories of radio stations in the Safety and Special Radio Services, and the Divisions concerned therewith, are listed in § 1.951 of this chapter. The Marine Radio Division, the Public Safety Radio Division, and the Amateur and Citizens Radio Division are located in the 1101 Building, 11th Street and Pennsylvania Avenue NW., Washington, D.C. In addition, a complete file concerning amateur radio operators is available for inspection in the Amateur License Reference Room, which also is located in the 1101 Building.

(c) Information concerning applications filed by commercial radio operators may be obtained at the 1101 Building, 11th Street and Pennsylvania Avenue NW., Washington, D.C.

(d) The Common Carrier Reference Rooms, located in the 1101 Building, 11th Street and Pennsylvania Avenue NW. Here the public may inspect the following:

(1) All annual and other reports filed by common carriers pursuant to section 219(a) of the Communications Act.

(2) The schedules for all charges for interstate and foreign wire or radio communications filed pursuant to section 203 of the Communications Act.

(3) Contracts, agreements, or arrangements between carriers filed pursuant to section 211(a) of the Communications Act.

(4) All applications for common carrier authorizations, both radio and non-radio, and files relating thereto.

(e) The Experimental Services Branch of the Technical Division of the Office of the Chief Engineer. Here the public may inspect experimental license files.

(f) The Frequency Registration and Notification Branch of the Frequency Allocation and Treaty Division, Office of Chief Engineer. Here the public may inspect the frequency records of the Commission.

(g) The Technical Standards Branch of the Technical Division of the Office of the Chief Engineer. Here the public may inspect the Radio Equipment Lists (lists of type-approved and type-accepted equipment).

§ 0.417 Inspection of records

(a) Subject to the provisions of sections 4(j) and 606 of the Communications Act of 1934, as amended, the following Commission records are open to public inspection:

(1) Tariff schedules required to be filed under section 203 of the Communications Act, all documents filed in connection therewith, and all communications related thereto.

(2) Valuation reports filed under section 213 of the Communications Act, including exhibits filed in connection therewith, unless otherwise ordered by the Commission, with reasons therefor, pursuant to section 213(f) of the Communications Act.

(3) Annual and monthly reports required to be filed under section 219 of the Communications Act.

(4) Contracts, agreements, or arrangements between carriers filed pursuant to section 211(a) of the Communications Act, except for those kept confidential by the Commission pursuant to section 412 of the Act. The Commission will give appropriate consideration to a petition filed by any person showing that any such contract, agreement, or arrangement relates to foreign wire or radio communication; that its publication would place American communication companies at a disadvantage in meeting the competition of foreign communication companies; and that the public interest would be served by keeping its terms confidential.

(5) All applications and amendments thereto filed under Title II or Title III of the Communications Act, including all documents and exhibits filed with and made a part thereof; all communications opposing or endorsing any such application; all pleadings, briefs, and other papers filed with the Commission with respect to such applications; transcripts of testimony, depositions, and exhibits pertaining to such applications; orders and other documents issued by the Commission or the presiding officer in proceedings thereon; and all authorizations and certifications issued upon such applications. Pursuant to section 3(c) of the Administrative Procedure Act, however, the Commission may, upon a finding of good cause, either on its own motion or on motion of an applicant, permittee, or licensee, designate any of the material in this subparagraph as "not for public inspection".

(6) All petitions for issuance, amendment, or repeal of any rule, including all documents or exhibits filed with and made a part thereof; all communications opposing or endorsing any such petition; all pleadings, comments, briefs, and other papers filed in rule making proceedings; transcripts of testimony, depositions, and exhibits in such proceedings; and all orders and other documents issued by the Commission or the presiding officer in such proceedings. Pursuant to section 3(c) of the Administrative Procedure Act, however, the Commission may, upon a finding of good cause, either on its own motion or on motion of any participant in the rule making proceeding, designate any of the material in this paragraph as not for public inspection.

(7) All minutes of Commission actions, except for minutes of classified matters (pursuant to section 4(j) of the Communications Act) and executive matters (pursuant to section 3 of the Administrative Procedure Act).

(8) The Master Frequency Records (Standard Form 128).

(9) Files relating to submarine cable landing licenses, except for maps showing the exact location of submarine cables, which are withheld from public inspection under section 4(j) of the Communications Act.

(b) Subject to statutory restrictions, the Commission may in its discretion open other records to public inspection, upon written request describing in detail the documents to be inspected and the reasons therefor. Normally, however, the following Commission records are not open to public inspection:

(1) The information filed under § 1.611 of this chapter, and network and transcription contracts filed under § 1.613 of this chapter. See 18 U.S.C. 1905.

(2) Information submitted by equipment manufacturers and other persons, in accordance with the provisions of §§ 2.577, 5.204, and 15.70 of this chapter. See 18 U.S.C. 1905.

(3) Personnel files. See 5 U.S.C. 631.

(Secs. 4, 213, 412 and 606, 48 Stat. 1066, 1074, 1099 and 1104, as amended; 47 U.S.C. 154, 213, 412 and 606. Sec. 1905, 62 Stat. 791; 18 U.S.C. 1905. Sec. 1753, Revised Statutes; 5 U.S.C. 631)

REPLY FROM FEDERAL HOME LOAN BANK BOARD

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., March 30, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request for comments on H.R. 5012 of the present Congress, which if enacted would amend section 161 of the Revised Statutes (5 U.S.C. 22).

In its present form, that section provides in its first sentence that the head of each department is authorized to prescribe regulations, not inconsistent with law, for (among other things) the custody, use, and preservation of the records, papers, and property appertaining to it. It further provides in its second sentence (added by Public Law 85-619, approved Aug. 12, 1958) that the section does not authorize withholding information from the public or limiting the availability of records to the public.

H.R. 5012 would retain the substance of the first sentence and would add two new subsections. The first of these, subsection (b), would provide that every agency—defined as each authority, whether or not within or subject to review by another agency, of the Government of the United States other than Congress or the courts—shall, in accordance with published rules stating the time, place, and procedure, make all its records promptly available to any person. The U.S. district court in the district where complainant resides or has his principal place of business, or where the records are situated, would have jurisdiction to enjoin the withholding of records and information. The bill provides that in such cases "the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action."

The other new subsection, subsection (c), would provide that the section does not authorize withholding information from the public or limiting the availability of records to the public except in eight specified categories, of which the last covers matters "contained in or related to examination, operating, or condition reports prepared by, on behalf, or for the use of any agency responsible for the regulation or supervision of financial institutions."

As the agency responsible for the Federal regulatory and supervisory functions with respect to all Federal savings and loan associations and all savings and loan associations and similar institutions whose accounts are insured by the Federal Savings and Loan Insurance Corporation, the Federal Home Loan Bank Board is of the view that all matters relating to the condition or affairs of financial institutions should be exempt from disclosure where the agency having authority with respect to the examination, regulation, or supervision of such institutions determines that disclosure would not be in the public interest.

The present bill, by limiting the exemption to such matters as are "contained in or related to examination, operating, or condition reports" as set forth in the bill, falls short of what the Board believes is needed in this connection for the protection of the public.

Further, the Board is concerned that the bill appears to disregard the doctrine of executive privilege. While the Board recognizes that there are areas of disagreement over that doctrine, the Board also feels that the existence of this doctrine from the very founding of the Republic is evidence of the vital role it plays in protecting full freedom of discussion as the basis for administrative operations and decisionmaking. The exemption in the bill for "interagency or intra-agency memorandums or letters dealing solely with matters of law or policy" is far from an adequate expression of the scope of this doctrine.

While a precise estimate is not possible, it is the Board's opinion that enactment of this bill would add substantially to the expenses of the Board and the Federal Savings and Loan Insurance Corporation in fulfilling their statutory obligations.

For the foregoing reasons the Board is not in favor of the enactment of H.R. 5012.

Informal advice has been received from the Bureau of the Budget that, from the standpoint of the administration's program, there is no objection to the submission of this report.

Sincerely yours,

JOHN E. HORNE, *Chairman.*

REPLY FROM FEDERAL MARITIME COMMISSION

FEDERAL MARITIME COMMISSION,
Washington, D.C., March 12, 1965.

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

DEAR MR. CHAIRMAN: The following comments are in response to your request of February 19, 1965, for the views of the Federal Maritime Commission on

H.R. 5012 through H.R. 5021, 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 Commission supports the principle of public access to information and records held by a Federal agency. However, in terms of the statutory responsibility placed upon the Federal Maritime Commission, we believe that provisions of these bills are open to ambiguous interpretations which could adversely affect this Commission's maintaining certain information and records submitted by persons subject to the Commission's jurisdiction on a confidential basis. For example, in section 161(c) (5) and (7) the use of the words "solely" and "law enforcement" could raise serious problems in determining which records must be made available to the public. Additionally, particular care must be given to defining categories of information which would be made available to the public under the provisions of these bills in the light of the criminal penalty, for example, under section 1905 of title 18 applicable to Government employees who divulge certain information.

The bill would require any agency to sustain in the courts its withholding of information or records when a complaint is filed by a member of the public. It would seem more orderly to the administrative process if provisions were made for the complaint to specifically state the nature of the record desired and the reasons why the complainant believes it to be wrongfully withheld.

By statute, certain information and records must be filed with this Commission by parties subject to its jurisdiction. In many cases this information is of a confidential business nature involving competing carriers of waterborne commerce. Confidential information is also received in connection with the Commission's investigatory functions. The Commission has no choice but to continue to withhold this information from public scrutiny.

Under these bills, if the Commission were not to have the authority to define the material to be withheld within the Commission, then further classification and definition of the types of records to be withheld would be needed. We would desire to furnish specific language necessary to clear up these ambiguities so that the intent of the bills could be accomplished.

The Bureau of the Budget has advised that there would be no objection to the submission of this letter from the standpoint of the administration's program.

We call to your attention that the comments herein contained are applicable to similar requests of your committee on H.R. 5237, 5406, 5520, and 5583.

Sincerely yours,

JOHN HARLEE,
Rear Admiral, U.S. Navy (Retired), Chairman.

REPLY FROM FEDERAL POWER COMMISSION

FEDERAL POWER COMMISSION,
Washington, D.C., March 30, 1965.

Re H.R. 5012 through H.R. 5021; H.R. 5237; H.R. 5406; H.R. 5520; H.R. 5583;
H.R. 6172, amend section 161 of the Revised Statutes * * *.

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

DEAR MR. CHAIRMAN: In response to your requests for comments on the subject bills, there are enclosed copies of the report of the Federal Power Commission.

It is contemplated that this report may be released by the Commission to the public within 3 working days from the date of this letter unless there is a request that its release be withheld.

Sincerely,

JOSEPH C. SWIDLER, *Chairman.*

FEDERAL POWER COMMISSION REPORT ON H.R. 5012, ET AL., 89TH CONGRESS

A BILL 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 purpose of H.R. 5012 is to amend Rev. Stat. 161 (5 U.S.C. 22) to make agency records and information more readily available to the public and to

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 intraagency 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 principal. 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-

gative file material to the controlled circumstances permitted under *Jencks* and 18 U.S.C. 3500 for the limited purpose of impeachment of Government witnesses. In order to eliminate the existing ambiguity we recommend that the text of clause (7) be revised to read: "(7) investigatory files except to the extent available by law to a private party."

REPLY FROM FEDERAL RESERVE BOARD

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Washington, D.C., March 10, 1965.

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

DEAR MR. CHAIRMAN: This refers to your letters dated February 19, 1965, and February 24, 1965, respectively requesting a report and views on bills H.R. 5012 through 5021, and H.R. 5237, each identical with the others, all of which would amend section 161 of the Revised Statutes (5 U.S.C. 22) with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records. For purposes of this reply, references to provisions of H.R. 5012, together with comments thereon, are intended to apply equally to bills H.R. 5013 through 5021, and H.R. 5237.

Subsection (a) of H.R. 5012 is identical with the present language of the entire R.S. 161. In the interest of an ordered administration of Government Affairs consistent with the public interest the Board approves the provisions of subsection (a) of H.R. 5012.

With the exceptions of a portion of exemption numbered (4) (p. 3, lines 6 and 7 of H.R. 5012), exemption numbered (8) (p. 3, lines 14-17 of H.R. 5012), and certain other minor variations, the combined subsections (b) and (c) of H.R. 5012 are identical with the provisions of section 3 (c) and (e) of S. 1663, 88th Congress, as revised by the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary.

Exemption numbered (4) in H.R. 5012 would authorize withholding from the public matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential." Exemption numbered (8) would authorize withholding matters "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions." The language of the latter exemption is identical with language that the Board proposed be added to S. 1663. This proposal, with explanatory comments, was submitted to Chairman Long of the Senate Subcommittee on Administrative Practice and Procedure, by letter of July 15, 1964.

The Board considers the provisions of H.R. 5012 to be a vast improvement over the provisions of S. 1663 as originally introduced and, because of the presence in H.R. 5012 of the above-quoted portion of exemption numbered (4) and exemption numbered (8), to be an improvement over S. 1663 as revised. Nevertheless, the Board continues in its belief made known previously in its expression of views on S. 1663, that the public's right of access to Government records and information is adequately and reasonably secured and served by the provisions of section 3(c) of the Administrative Procedure Act (5 U.S.C. 1002(c)). It is the Board's opinion that a combination of the provisions of section 3(c) of the Administrative Procedure Act with the court enforcement provisions proposed in H.R. 5012 would assure an equitable balancing of the need of Federal agencies to determine themselves what records and information a particular person should or need have, with the public's right to such records and information. Applied to this Board, there is reason to believe that a literal construction of the eight exemptions from disclosure contained in H.R. 5012 could leave exposed to indiscriminate public demand certain critical records and materials relating to the Board's credit and monetary policy functions, as well as to other of its statutorily directed functions. Such a result could impair the Board's effectiveness both as an instrument of national economic policy and as a regulatory body.

Regarding the provisions in subsection (b) of H.R. 5012 which would enable a complainant to secure judicial relief when an agency wrongfully withholds records and information, the Board is in sympathy with the need for a form of judicial enforcement, and is generally in accord with the means to this end

provided in subsection (b). Consistent with the Board's position earlier taken with reference to a similar provision in S. 1663, however, the Board opposes the provisions of subsection (b) which would permit "any person," whether or not properly and directly concerned, to have access to all agency records not specifically exempted and, upon mere allegation of an improper withholding, would permit "any person" to bring suit to obtain a court order requiring production. While it is true that, under H.R. 5012, a court order requiring production of agency records would have to be based upon a finding that such records had been improperly withheld, it is believed that such requirement would have but a minimal deterrent effect on the potential number of baseless complaints that could be filed.

In respect to cases filed, the agency is assigned the burden of sustaining its action in withholding records or information from "any person." Thus, in any case where the records sought do not fall within one of the eight exemptions set forth in subsection (c) of H.R. 5012, the agency, in attempting to sustain its action, would be denied the opportunity presently offered by section 3(c) of the Administrative Procedure Act of showing that the person demanding access to the agency records is not properly and directly concerned with the matter reflected in such records. The Board is in accord with the purposes of subsections (b) and (c) of H.R. 5012, and, in reference thereto, finds reasonable the placing on the agency of the burden of sustaining its withholding action. However, that burden would be made unreasonable by retention in subsection (b) of the requirement that every agency shall make its records available to "any person."

Sincerely yours,

WM. MCC. MARTIN, Jr.

REPLY FROM GENERAL SERVICES ADMINISTRATION

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., April 5, 1965.

HON. JOHN E. MOSS,
*Chairman, Subcommittee on Foreign Operations and Government Information,
Committee on Governmental Operations, House of Representatives.*

DEAR MR. MOSS: Your letter of March 25, 1965, requested the views of the General Services Administration on H.R. 5012, a bill 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 bill would, in effect, substitute for section 3(c) of the Administrative Procedure Act (5 U.S.C. 1002(c)), new provisions, to be included in 5 U.S.C. 22, to govern the availability to the public of Government agency "records," providing jurisdiction in district courts of the United States to enjoin agency withholding of certain "agency records and information," and providing for certain related aspects of judicial procedure, including punishment for contempt of "responsible officers."

The bill, which provides for eight categories of exception from a general information disclosure and records availability requirement, is similar to that portion of the proposal in S. 1336 and S. 1160 which would amend section 3(c) of the Administrative Procedure Act, and is a refinement of similar provisions in S. 1666 and S. 1663 of the 88th Congress.

The proposed bill is intended to delineate more clearly information and records access rights and to impose restrictions on the right of Government agencies to limit access to Government records and information. It would, in effect, circumscribe the present broad agency authority in section 3 of the Administrative Procedure Act to withhold information relating solely to agency "internal management," or information requiring nondisclosure "in the public interest" or "held confidential for good cause found," and would also, apparently, impose limitations on executive branch implied powers over records and information disclosure.

We are naturally in agreement with the general objective of proper public access to Government records and information as a necessary characteristic of our free society. However, we think the bill would result, in some areas, in undesirable and perhaps unintended results adversely affecting both agency functions and reasonable rights of privacy of affected individuals.

Past legislative efforts to deal with this problem appear to have been unsuccessful, primarily, we believe, because the remedy proposed was too sweep-

ing to permit maintaining the delicate balance between the needs of effective Government and those of public information.

Recognizing the extent of discretion over information disclosure and records access under present law, and to be constructive, we think it necessary to provide concrete suggestions as to types of Government information requiring special treatment as regards our agency functions. Specifically, we suggest that the following activities or matters should not be open to general public inspection.

1. Property appraisals made by the Government for use in acquisition or disposal of property, especially prior to consummation of the acquisition or disposal. (Disclosure would prejudice the Government's legitimate economic bargaining interests.)
2. Records related to evaluation of bidder responsibility, including financial and credit information, especially prior to award. (Disclosure would make virtually impossible the orderly and fair conduct of contract award procedures; also, information on credit, integrity, etc., should be entitled to privacy in the interest of the affected individuals.)
3. Government (interagency) consolidated, as well as intra-agency, debarred and suspended bidders lists; also, ex parte documents which reflect adversely on individuals. (These lists are maintained as a mechanism for the conduct of a governmental proprietary function and general dissemination outside Government would serve no useful purpose and would be unfair and harmful to affected concerns because of the defamatory and "penal" implications which would inevitably be drawn by many persons as a result of publicizing such lists. The individuals actually on the list are so advised and given opportunity to contest the debarment.)
4. Contract records in general, especially prior to award, but including after award, especially where the individuals seeking the information are not properly or directly concerned. (Indiscriminate access would be generally disruptive of the contracting process and promote unfair competitive actions among concerns doing business with the Government or otherwise.)
5. Internal guidelines for Government use in dealing with contractors, such as architect-engineer fee curves. (Disclosure would prejudice the Government's legitimate efforts to negotiate effectively. The Government does not have equal access to contractor's private profit objectives in contract negotiation.)
6. Results of tests of contractor products by persons other than the manufacturer or vendor. (Access to detailed test results by competitors would be unfair and potentially harmful to the producers or vendors of products which may be excellent products though not meeting particular Government specification requirements.)
7. Information which the Government is contractually bound to withhold from dissemination. (Primarily technical data, manufacturing or process type information but not necessarily covered by category (4) of the bill.)
8. Budget, fiscal, and Government project information. (Proposed agency budget, until released by the President; proposed public buildings projects prior to submission to Congress, etc.)
9. Agency planning and other internal agency management documents, especially those which may give competitive advantage or would otherwise be prejudicial to the interests of persons similarly situated but who are without such information or which would adversely affect morale or effectiveness. (The proposed implied repeal of the present exception for any matter relating to "the internal management of an agency," would have particular Government disruption potential.)
10. Information which would prejudice the Government's bargaining position in business transactions, such as expected prices on stockpile sales, expected realization estimates on Government mortgage foreclosures, expected ultimate purchase or sale prices, etc.
11. Records and information representing preliminary and developmental processes in arriving at final decisions, including such matters as evaluations by subordinates looking toward recommendations for agency action (whether or not it falls within category (5) of the bill), including factual data which is not "law or policy."
12. Business, company, or other information furnished the Government in confidence, whether or not it falls technically within category (4) of the bill. (This principle is ingrained in both common law and statutory law, includ-

ing prior acts of Congress such as 18 U.S.C. 1905; 18 U.S.C. 605; 15 U.S.C. 190; 13 U.S.C. 9; 5 U.S.C. 139b, etc.)

13. All categories of customary privileged matters within the common law context (doctor-patient, attorney-client, clergy-parishioner, etc.), whether or not it comes within categories (4) or (6) of the bill, and including internal or private matters of private parties not otherwise a matter of public information.

14. Records and information involved in current or pending claims and litigation and investigative records not related to "law enforcement." (This is a needed addition to "law enforcement" under category (7) of the bill.)

15. Records and information, the nondisclosure of which is directed by the President in the national interest. (Needed to preserve constitutional authority of the executive branch, as more fully discussed below.)

16. Records and information where the scope or nature of the request is of such character as does not reasonably permit compliance by the agency because of the unavailability of manpower, or the particular skills needed to segregate or compile the information. (This has nothing to do with "withholding" the information, but simply the capability, administratively, to cope with the request to obtain a massive amount of information or specialized information requiring unavailable skills.)

Except as the context of each item enumerated otherwise suggests, as for example privileged or proprietary information, or information withheld at the direction of the President, there would normally be no objection to furnishing information in the above categories to Congress, the Comptroller General, or any other authorized governmental source which would reasonably be expected to avoid indiscriminate publication or access.

Unlike the Administrative Procedure Act which calls for the disclosure of information to "persons directly and properly concerned," the proposed bill makes no distinction as to the status of persons seeking the information. The public interest in seeking a broad policy of liberal Government information disclosure should, it is believed, be balanced by an equal solicitude for avoiding the release of information in such way or in such circumstances as would promote the mischievous purposes of intermeddlers, idle curiosity seekers, smut peddlers, persons with irrelevant prejudicial motives, and others having no reasonably legitimate interest in the information. An illustration of this principle is contained in the above item suggesting the need to furnish information on the results of product tests to the product owner, but not to his competitors.

The bill, imposing, as it does, significant disclosure requirements on the executive branch, naturally raises questions involving application of the basic principle of the equal and coordinate status of the three branches of the Federal Government under which no one branch may encroach upon the constitutional prerogatives of the others. In this respect, category (1) of the bill, for example, appears to contravene this principle by imposing limitations on the executive branch, excepting only matters "to be kept secret in the interest of the national defense or foreign policy." (See, in this regard, Department of Justice comment on the Apr. 20, 1964, Subcommittee Revision of S. 1663, 88th Cong., 2d sess., Administrative Procedure Act hearings before the Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 88th Cong., 2d sess., on S. 1663, July 21, 22, 23, 1964, at p. 208, with particular reference to sec. 3 of that bill; also, the Department of Justice statement of Mar. 6, 1958, before the Subcommittee on Constitutional Rights, Senate Judiciary Committee, on "Inquiry by the Legislative Branch Concerning the Decision Making Process and Documents of the Executive Branch.")

In this connection, the provisions of the bill providing jurisdiction for obtaining injunctions to require disclosure and authorizing the district court "to punish the responsible officials" for contempt, raises serious problems of fundamental conflicts between the executive and judicial branches of government. It is not unlikely that such a provision would result in Government employees finding themselves on the horns of a dilemma: noncompliance with a court order, and a prison sentence for contempt, on the one hand—or, on the other hand, compliance with the court order and made the subject of disciplinary proceedings or other prejudicial consequences for failure to carry out an order issued by an authorized official of the executive branch. Also, to be noted here, is the inconsistency in terminology in proposed section (b) as regards the requirement simply to "make all its records available promptly" but providing a judicial remedy addressed more broadly to "records and information."

Although the proposed section (c) of the bill deals with "information" and "records," category (5) of the bill speaks only of interagency or intra-agency "memoranda or letters." It would appear appropriate to add the words "or other matters," in order to make this category coextensive with the section subject matter.

In category (2) of the bill the reference to internal personnel "rules and practices" would appear to be narrower than the subject matter of the section which, as above indicated, deals with "information" and "records." Thus, it would appear desirable to add the word "matters," a term employed in a similar context in the introductory portion of section 3 of the Administrative Procedure Act.

Subsection (b) of the proposed 5 U.S.C. 22 provides for agency publication of rules stating the "time," place, and procedure to be followed in making its records available. If, as we would definitely recommend, it is the purpose of the reference to "time" to permit agencies to distinguish between availability of records before and after an event, then we recommend this be clarified. For example, if it is intended to permit an agency to withhold bid or negotiation information at least until after award, this is not entirely clear although we would be inclined so to construe it since such construction would contribute to the workability of the criteria.

It is worth noting that the subject matter of the bill is one which has heretofore been an integral part of the general structure of the Administrative Procedure Act, dealing with the broad subject of administrative procedure, authority, and limitations. It would appear desirable that the subject matter of this bill remain under section 3 of the Administrative Procedure Act since that section deals with the entire subject of "public information," and there is recognized interdependence and overlapping between subsection 3(c), proposed to be transferred to 5 U.S.C. 22, and subsections 3(a) and (b), which would remain in the Administrative Procedure Act.

Based upon the foregoing considerations, the General Services Administration is opposed to enactment of H.R. 5012 in its present form. We recognize that perhaps some clarifying improvements in section 3 of the Administrative Procedure Act may be desirable although we believe it has been generally reasonably construed. If legislation similar to the proposed bill is to be enacted, we recommend consideration of the adoption of amendments which will adequately reflect the suggestions above outlined.

The financial effect of the enactment of this measure cannot be estimated by GSA. However, substantial cost attributable to administration of such a measure is inevitable.

The Bureau of the Budget has advised that, from the standpoint of the administration's program, there is no objection to the submission of this report to your committee.

Sincerely yours,

LAWSON B. KNOTT, Jr., *Acting Administrator.*

REPLY FROM HOUSING AND HOME FINANCE AGENCY

HOUSING AND HOME FINANCE AGENCY,
OFFICE OF THE ADMINISTRATOR,
Washington, D.C., March 23, 1965.

Subject: H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583, 89th Congress.

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

DEAR MR. CHAIRMAN: This is in further reply to your request for our views on the above-captioned identical bills "To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold and limit availability of records."

These bills would amend existing law relating to the withholding of information from the public or limiting the availability of records to the public by Federal agencies. They would require each agency, in accordance with published rules concerning the time, place, and procedure to be followed, to "make

all its records promptly available to any person," except as to matters that are (1) specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition of reports prepared by, on behalf of, or for the use of, any agency responsible for the regulation or supervision of financial institutions.

These bills would also provide that upon complaint by a person seeking agency records, Federal district courts would have jurisdiction to enjoin the agency involved from withholding such records and to order the production of improperly held records. In such cases, the burden of sustaining any withholding of records would be on the agency involved and district courts would be authorized to punish agency officers responsible for noncompliance with court orders. In addition, such actions would take precedence on district court dockets over all other actions except those deemed by the court to be "of greater importance."

Under the present law, matters of official record are required to be made available "to persons properly and directly concerned," except for matters "requiring secrecy in the public interest," "relating solely to the internal management of an agency," or "held confidential for good cause found" (section 3 of the Administrative Procedure Act). The proposed bills would require disclosure "to any person" of "all its records". The only exceptions would be material which the agency finds by published rule qualifies within one of the eight categories of records specified above.

The Housing Agency believes this enlargement of the public records requirements would not benefit persons seeking information from proprietary agencies such as HHFA, but would be very burdensome for the Agency. The great majority of our papers relating to agency operations concern preliminary processing of applications for mortgage insurance or loans or grants authorized by the various programs administered by the Agency. These papers are not a matter of official record and are not now required to be made available even to persons directly concerned.

Taken literally, the phrase, "all its records" would seem to require disclosure to any person of all intra-agency reports and recommendations and other internal memoranda (except those dealing "solely with matters of law or policy") involving the exchange of preliminary views, as contrasted to final action by authorized officials. This would hinder the free and candid exchange of preliminary views within the Agency.

In addition, the disclosure would often not be in the best interest of the applicants for benefits under our programs. In the urban renewal program, for example, the local public agency applying for a loan or grant would not wish such background information as appraisals of property to be acquired in the project area to be made a matter of public record by a Federal agency which is not itself responsible for the acquisition under State or local law. The Agency might bring some of such material under the exception provided for records such as "intra-agency memorandums or letters dealing solely with matters of law or policy." However, in many cases it is a difficult task to determine whether a particular matter is one of law or fact, or a combination of law or fact. To be required to do so on a piecemeal basis would be a considerable administrative burden, and an unnecessary one in the light of the effectiveness of the present general provisions relating to public disclosures by agencies acting in a proprietary, rather than a regulatory, capacity.

The Housing Agency recognizes the continuing need to study and improve the administrative process relating to the disclosure of public records by Federal agencies. However, we recommend against the changes proposed in these bills. We believe they would needlessly encumber and delay our work, and would often hurt rather than protect those with whom we deal.

The Bureau of the Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

ROBERT C. WEAVER, *Administrator.*

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

Congress would reveal any improprieties, but we do believe that if were required to disclose such correspondence to any person who might ask for it, that its publication out of context might seriously embarrass the Congress and its Members.

In addition, the bill is deficient in that it fails to exempt from compulsory disclosure the Commission's records and correspondence with carriers subject to its jurisdiction. For example, we do not believe that we should honor a request of a student who seeks to examine all of the correspondence between the Commission and a large railroad over a 5-year period. Even if there were only a relatively few such requests, the burden of the Commission would be intolerable and far out of the proportion to any benefit to the person receiving such information.

As we read the judicial enforcement provisions of proposed new section 161 (b), unless the record denied were within one of the enumerated exceptions, the district court would have no discretion in ordering disclosure, regardless of how slight the complainant's justification may be when considered against the inconvenience and expense to the agency. As a minimum, the court should be empowered in its discretion to require a complainant to justify his demands.

For the reasons set forth above, we are opposed to the enactment of H.R. 5012 in its present form.

Respectfully submitted.

CHARLES A. WEBB,
Chairman, Committee on Legislation.
CHARLES A. WEBB,
JOHN W. BUSH,
EVERETT HUTCHINSON.

REPLY FROM NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., May 6, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your letter of March 25, 1965, requesting comments by the National Aeronautics and Space Administration on H.R. 5012, a bill 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.

Subsection (a) of section 166 of the Revised Statutes (codified at 5 U.S.C. 22), as it would be amended by the bill, gives the head of each Department authority to prescribe regulations for the conduct of the Department's business: it is appropriate "housekeeping" legislation and follows the language of the first sentence of the existing statute.

The important new provisions of the bill are those which set out the conditions under which agencies of the Government may be compelled to produce records otherwise withheld. Federal district courts would have the power to compel agencies to produce records under the sanction of contempt charges. Action could be initiated by a complaint after which the agency would bear the burden of sustaining its action. The court could, in its discretion, give precedence on its docket to complaints filed under the authority of the proposed bill. The provisions appear to be unnecessary, particularly in their application to the National Aeronautics and Space Administration. In a letter addressed to the subcommittee under date of March 17, 1965, this agency stated:

"NASA's official policy is that no limitations are placed upon the availability of records to the public except those which are imposed pursuant to Executive Order No. 10501, as amended, pertaining to the disclosure of information classified in the interest of national security. In addition, however, limitations are placed upon the disclosure of information submitted by individuals and firms which is proprietary, or consists of trade secrets, or confidential financial information. In this latter connection, 18 U.S.C. 1905 imposes criminal penalties upon employees of the Government who disclose such information without authority of law. The availability of security and personnel records and reports is likewise limited in many instances in order to protect the sources of the Government's

information as well as the legitimate right of privacy of the individuals concerned."

It should be noted that all classes of records excepted from NASA's general policy as stated above, under subsection (c) of the proposed legislation, would be privileged.

The legislation would impose undue burdens on the Government and its officials in carrying out its business. The courts have long recognized the necessity for officials of the Government to exercise their duties unembarrassed by lawsuits in respect of actions taken in the performance of their work—suits which would consume time and energies that would otherwise be devoted to governmental services. *Barr v. Matteo*, 360 U.S. 564, 571 (1959); *Gregoire v. Biddle*, 177 F. 2d 579, 581.

There is no precise meaning ascribed to the term "records" as it appears in subsection (b). It could mean any document or item containing information in the possession of the agency including such diverse objects as contracts, invoices, transcription belts, and tape recordings. Moreover, there later appears in subsection (b) the phrase "records and information." It is not clear whether the term "records," when it first appears, is intended to encompass "information," nor is it clear what "information" would mean as opposed to "records." If it means something different from records, then it would not be available under agency procedures which only encompass means of acquiring "records," leaving "information" to be acquired through court process.

There is no requirement that one requesting records identify the desired item or make a showing that he has a legitimate need for them. Anyone, merely out of idle curiosity, could compel an agency to produce all of its records except for those classes of items withheld pursuant to subsection (c) of the proposed legislation. The expense and administrative burden stemming from that type of request could seriously impair the operations of any agency, including NASA.

Shifting the burden of proof to the agency for sustaining its decisions with respect to withholding creates additional problems. There would be evidentiary questions, such as the extent of the showing an agency would have to make to sustain its actions and the extent to which a court would be permitted to go behind an administrative determination that records should be withheld because they deal with exempt categories of information.

From the foregoing it appears that, not only is the proposed legislation unnecessary in that its purposes can be, and, in fact, are being, accomplished under existing law, the administration of them would result in confusion and unnecessary expense of time and money. Accordingly, the National Aeronautics and Space Administration recommends against the enactment of H.R. 5012.

This report has been submitted to the Bureau of the Budget which has advised that, from the viewpoint of the program of the President, there is no objection to its submission to the Congress.

Sincerely yours,

RICHARD L. CALLAGHAN,
Assistant Administrator for Legislative Affairs.

REPLY FROM NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD,
Washington, D.C., March 25, 1964.

Hon. JOHN E. MOSS,
*Chairman, Subcommittee on Foreign Operations and Government Information
of the Committee on Government Operations, House of Representatives.*

DEAR CONGRESSMAN MOSS: It is our understanding, based on communications with Mr. Benny Kass of the subcommittee staff, that hearings will soon be held on H.R. 5012, a bill 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, and that you would be interested in having an expression of the views of the National Labor Relations Board respecting the impact this bill would have upon its operations.

At the outset, permit me to state that we do not challenge the general purposes of the bill to assure access by the public, to the fullest extent practicable, to information concerning the operations of administrative and other governmental agencies. In our view, however, the proposal contains a number of serious defi-

ciencies which, if enacted into law, would hamper this agency in carrying out its functions effectively and in the best interests of the public.

The proposed subsection (b) of section 161 would require agencies to make their records "available to any person." The phrase "any person" is unduly embracive and could lead to a disruption of the Government's business by opening the door to unjustified requests for information by curiosity seekers and irresponsible persons. (See testimony of Prof. Kenneth C. Davis, hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 88th Cong., 2d sess. of S. 1663, July 23, 1964, pp. 247-248.) Consideration should be given to some words of limitation, such as "persons properly and directly concerned" (as presently contained in section 3 of the Administrative Procedure Act, 5 U.S.C. 1002), or "persons with a legitimate interest."

The district court procedure set out in subsection (b) to restrain the withholding of agency records provides for a de novo determination by the court. However, where the alleged withholding has taken place in an administrative proceeding it would appear that the normal procedure for judicial review of final agency orders should be followed and would provide an adequate remedy. In the case of this agency, section 10(f) of the National Labor Relations Act provides that any party aggrieved by a final order of the Board may obtain review of such order in an appropriate U.S. court of appeals.

Subsection (b) also provides that in suits to compel disclosure of records "the burden shall be upon the agency to sustain its action." This is contrary to the ordinary civil discovery procedure; rule 34 of the Federal Rules of Civil Procedure provides that a court may order production of books and papers upon motion of "any party showing good cause therefor." There would appear to be no good reason to reverse the procedure when an agency of the Government is the holder of the records sought by a litigant.

Subsection (c) (2) excepts from the provisions of subsection (b) matters that are "related solely to the internal personnel rules and practices of an agency." The language of this exception appears to be unduly restrictive. We see no good reason for departing from the exception now provided in section 3 of the Administrative Procedure Act—i.e., "any matter relating solely to the internal management of an agency," and this language should be substituted.

Subsection (c) (3) excepts matters that are "specifically exempted from disclosure by statute." The use of the narrow term "statute" fails to take into account the law in this area created by sound judicial decisions. The substitution of "law" for "statute" would preserve the carefully considered principles established in such landmark cases as *U.S. v. Morgan*, 313 U.S. 409, 422; *Hickman v. Taylor*, 329 U.S. 657; *Kaiser Aluminum Co. v. U.S.*, 157 F. Supp. 939 (Ct. Cl.), and *Roviano v. U.S.*, 353 U.S. 53, 59-62.

Subsection (c) (4) excepts matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential." The phrase "commercial or financial" unnecessarily limits this exception. The equivalent exception in S. 1666 (88th Cong., 2d sess.), as passed by the Senate (110 Congressional Record 17080), contained more preferable language, i.e., "trade secrets and other information obtained from the public and customarily privileged or confidential."

Subsection (c) (5) excepts "interagency or intra-agency memoranda or letters dealing solely with matters of law or policy." There is infrequent occasion to deal with abstract legal or policy questions; most agency internal communications relate to legal or policy issues based upon a specific set of facts or to mixed questions of law, policy, and fact. In view of the limited nature of the exception provided by (5), an agency would thus be required to make available virtually all of its internal documents, since most of them would deal to some extent with facts. This would include internal staff memoranda containing advice and recommendations relative to pending cases, working papers, tentative draft decisions, etc. All of these documents tend to reveal the mental processes of decision makers and their staffs in arriving at determinations in specific cases and are entitled to be privileged against disclosure. See *Morgan v. U.S.*, *supra*, and *Kaiser Aluminum Co. v. N.L.R.B.*, *supra*. In sum, if internal reports are to be worth anything, they must be based on facts rather than abstractions, and they

must be the free expressions of those who prepare them and not something "cleared for publication." As the Supreme Court said in *Hickman v. Taylor*, *supra*, "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." This is to say nothing of the mental processes of the decisionmakers themselves. It is suggested, therefore, that this exception be broadened to read as follows: "inter-agency or intra-agency memoranda, letters, or other papers."

Subsection (c) (6) excepts "personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While there is some ambiguity here, we construe this as providing an unqualified exception for personnel and medical files, the limiting phrase "the disclosure of which, etc.", modifying only "similar matters." There is no reason why only personnel and medical files should be generally excepted. In any event, the requirement of a "clearly unwarranted invasion of personal privacy" would appear to be unduly restrictive and to offer insufficient protection to a right highly valued in our democratic society. Consideration should be given to the deletion of the underlined phrase.

Subsection (c) (7) excepts from availability "investigatory files compiled for law enforcement purposes except to the extent they are available by law to a private party." This provision would appear to permit a Board respondent to obtain the affidavits taken from employees and other persons in the course of the preliminary investigation of an unfair labor practice case, even though those persons may never be called as witnesses in the proceeding. For, "to the extent * * * available by law to a private party," could well encompass the discovery procedures of the Federal Rules of Civil Procedure, and such affidavits would be obtainable under those procedures. To permit the disclosure of pre-trial statements of persons who may never be called as witnesses would unduly interfere with the administration of the National Labor Relations Act, for these persons, who are generally employees, would be reluctant to give statements if they knew that their statements could be revealed to a hostile employer or union in a position to take retaliatory action affecting their economic welfare, even though they may not be called to testify. In recognition of this fact, the courts have held that it is an interference with employee rights under the act for an employer to ask employees for copies of statements which they have given to Board agents, and about the matters contained in those statements. *Texas Industries v. N.L.R.B.*, 336 F. 2d 128 (C.A. 6); *Surprenant Mfg. Co. v. N.L.R.B.*, 58 LRRM 2484 (C.A. 6); *N.L.R.B. v. Winn-Dixie*, 58 LRRM 2475 (C.A. 6). Under the more limited *Jencks* rule, which is applicable to Board proceedings, pre-trial statements are made available, but only in the cases of those persons who have been called as witnesses in the Board proceeding. Accordingly, it is suggested that the exclusion in (7) be amended as follows: "(7) investigatory files, including statements of agency witnesses until such witnesses have been called to testify in an action or proceeding and request is timely made by a private party for the production of relevant parts of such statements for purposes of cross-examination."

Finally, the proposed subsection (a) of section 161 authorizes "the head of each Department to prescribe regulations * * * for the government of his Department." This has been interpreted as not being applicable to, and thus not vesting this authority in, heads of "agencies" as distinguished from "Departments." A recent decision of the U.S. Court of Appeals for the Ninth Circuit so held; *General Engineering, Inc., and Harvey Aluminum v. National Labor Relations Board*, 58 LRRM 2432 (C.A. 9). There is something of an anomaly in using a statute which is otherwise not applicable to "agencies" to prescribe rules relating to the availability of their records. It is suggested that consideration be given to clarifying the applicability of section 161(a) to make it clear that heads of agencies are also included.

In view of the above comments, this agency would be opposed to the enactment of H.R. 5012 in its present form. We would appreciate having this report included in the record of the hearings on this bill.

The Bureau of the Budget has advised that it has no objection to the submission of this report to your committee.

Sincerely yours,

WILLIAM FELDESMAN, *Solicitor*.

REPLY FROM SECURITIES AND EXCHANGE COMMISSION

SECURITIES AND EXCHANGE COMMISSION,
Washington, D.C., March 19, 1965.

Re H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018,
H.R. 5019, H.R. 5020, H.R. 5021, H.R. 5237, H.R. 5406, H.R. 5520, H.R. 5583,
H.R. 6172, 89th Congress.

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

DEAR MR. CHAIRMAN: The Bureau of the Budget has advised that from the standpoint of the administration's program it has no objection to the comments in the Commission's memorandum on the above bills.

Sincerely yours,

HUGH F. OWENS, *Commissioner.*

MEMORANDUM ON H.R. 5012, 89TH CONGRESS

The provisions of H.R. 5012 are intended "[t]o make sure that the public gets the information it is entitled to have about public business * * *"¹ by amending section 161 of the Revised Statutes of the United States (5 U.S.C. 22), commonly known as the Federal "housekeeping" statute. To accomplish this purpose the bill would require that all agency records, with certain limited exceptions, be made available for inspection by any person.

This Commission agrees that unnecessary secrecy in the operation of the Government should be eliminated and that Government agencies should attempt to facilitate the securing of information by members of the public having a legitimate interest therein. Indeed, the enactment of the statutes administered by this Commission was in large part motivated by the desirability of making information available to members of the public which might be pertinent to their investment decisions. Accordingly, the vast bulk of material contained in this Commission's files is public and the Commission makes every effort to have it readily available to the press and to individual members of the public.² The Commission attempts to comply not only with the letter of section 3 of the Administrative Procedure Act, dealing with public information, but also with the spirit of that section. Rule 25(a) of the Commission's Rules of Practice provides that all information contained in documents filed with the Commission is public unless otherwise provided by statute or rule or directed by the Commission. In addition to complying with the publication provisions of section 3 of the Administrative Procedure Act, the Commission seeks to assure wide dissemination of its rule proposals, rules, opinions and interpretations adopted for the guidance of affected persons by furnishing copies of this material to the press, making it available for public inspection at the Commission's offices and sending copies to numerous persons on mailing lists which the Commission maintains. These mailing lists include persons who are directly subject to regulation by the statutes we administer as well as those who have requested certain classes of material from the Commission. The latter category alone includes more than 35,000 names.

On the other hand, the Commission treats certain types of matters as non-public, including documents afforded confidential treatment pursuant to schedule A, paragraph 30 of the Securities Act of 1933, section 24 of the Securities Exchange Act of 1934, section 22(b) of the Holding Company Act of 1935, section 45(a) of the Investment Company Act of 1940, and section 210 of the Investment Advisers Act of 1940, and proceedings in connection therewith, material obtained in any nonpublic proceeding, inter-agency and intra-agency correspondence, memorandums and working papers, documents relating to internal matters, preliminary copies of proxy material, correspondence with the public, and classified material.

The major difficulties that would be created for this Commission by enactment of H.R. 5012, would flow from possible arguments that various of the exceptions from the general disclosure requirements are not sufficiently broad to permit

¹ See remarks of Congressman Fascell when introducing H.R. 5013, an identical bill. 111 Congressional Record 2857 (1965).

² The breadth of the material available to the public is demonstrated by the list which the Commission has prepared and issued to the public entitled "Compilation of Documentary Materials Available in the SEC," a copy of which is attached.

confidential treatment of some types of information that we believe should not be made generally public.

We are of the view that there are important considerations why certain material in the Commission's files should not be subject to general public scrutiny, as where disclosure of the material would impair the advice and assistance we render to persons seeking to comply with the statutes we administer, where it would unfairly injure members of the public, or where it would interfere with free communication between Government officials with respect to the most efficacious manner of administering the law. Certain of these considerations are recognized in the legislative history of the Administrative Procedure Act, which points to the problem of publicity which might "reflect adversely upon any person, organization, product or commodity" prior to "actual and final adjudication" by an agency. (H. Rept. 1980, 79th Cong., 2d sess. (1946), p. 40.) The importance of these considerations may vary in different situations. Thus, information sought in a congressional investigation or pertinent to the determination of a lawsuit might properly be made available despite counteravailing considerations which would be sufficient to refuse to make the information available to casual inquirers.

We would emphasize that, as to a large part of the material in the Commission's files which is not made public, the primary reason for privacy is to protect the rights and interests of private persons having business before the Commission. The statutes administered by the Commission have an impact on a wide variety and great number of business transactions and arrangements; consequently, businessmen very often must determine the effect of these statutes upon proposed transactions and arrangements and the steps necessary to be taken in planning and executing them so that there will be no delays resulting from questions that might otherwise be raised as to full compliance with the securities law. To enable these matters to be resolved properly, full details of proposed transactions such as mergers, acquisitions, and financing plans are given to and discussed with the Commission's staff, often substantially in advance of the consummation of the transactions. Businessmen expect, and we believe have a right to expect, that their confidence in disclosing these matters will be respected; otherwise the administration of the Federal securities laws would be greatly complicated and the ability of American and international business organizations to plan and execute important transactions within time schedules required by economic circumstances would be impaired. These transactions may be of international importance and sometimes directly involve foreign governments. Without these informal discussions by which business problems are resolved in a businesslike way, administration of the securities laws would be greatly impaired and, indeed, it is doubtful that these laws could be effectively administered. The Commission has repeatedly been commended for evolving such informal procedures for advising persons seeking to comply with the law. Professor Loss has stated:³ "This practice—which a task force of the second Hoover Commission reported as having been 'most effectively used' by the SEC⁴—is an essential and popular service with the bar and the securities industry. Thousands of such opinions are given each year."

Privacy is essential to this process. Businessmen should not be compelled to give premature publicity to proposed business transactions which they would otherwise keep strictly confidential for the protection of their business, simply because, as a practical matter, it is necessary that they consult the Commission in advance. Moreover, premature and unplanned disclosure of contemplated business transactions which are discussed with the Commission could affect the markets for the securities of the companies involved⁵ and afford an opportunity to overreach the investing public to those persons who first gained access to the information.

Similarly it would be impossible as a practical matter for the Commission to enforce its proxy rules if it were unable to keep preliminary proxy material nonpublic. The Commission's proxy rules, which relates to corporate elections and corporate actions requiring the vote of security holders and which are applicable to all corporations listed on national securities exchanges as well as to numerous other companies, provide that material to be sent to stockholders

³ Loss, "Securities Regulation" (1961), p. 1395.

⁴ Commission on Organization of the Executive Branch of the Government, Task Force Report on Legal Services and Procedures (1955) 189.

⁵ See Report of Special Study of the Securities Markets of the Securities and Exchange Commission, H. Doc. 95, pt. 3, 88th Cong., 1st sess. (1963), pp. 70-93.

shall be filed first in preliminary form with this Commission. The examining staff make certain suggestions so that the material will not be in any way misleading and it is only after the participants have had an opportunity to make the changes suggested by the staff that the definitive material is sent out to the shareholders. By reason of the nonpublic nature of the preliminary material we have been able with a minimum of litigation to see to it that American investors have had fairly presented to them the matters upon which they must vote. Were the preliminary material public and susceptible to being reprinted in the press, there would be no opportunity for staff processing of the material and the Commission's only remedy would be to seek injunctive relief in the courts. That alternative, besides being time consuming and expensive, can rarely provide full relief and may require postponement of corporate meetings and generally disrupt the affairs of the business community.

Accordingly, while we believe that the foregoing types of information, as well as the staff's work product in connection therewith, are intended to be included in exemption (4) of the bill for matters that are "trade secrets and commercial or financial information obtained from the public and privileged or confidential," we urge that this be made clear.

Other material in the Commission's files is nonpublic primarily to protect persons against the possibility of adverse publicity if it should ultimately be determined that charges against them have not been substantiated. In the event that charges should not be proved in such cases, not even the Commission's opinion would be made public. We are concerned about possible arguments that such material is not "specifically exempted from disclosure by statute" (exception (3)) or otherwise exempted. Where the Commission institutes proceedings pursuant to rule 2(e) of its rules of practice to disqualify a practitioner before it, the proceedings are nonpublic. With respect to proceedings for the revocation or denial of registration of brokers and dealers in securities or of investment advisers, section 22 of the Securities Exchange Act of 1934 and section 212 of the Investment Advisers Act of 1940 have been interpreted to permit private proceedings for they say that hearings ordered by the Commission thereunder "may be public."⁶ Whether the Commission makes these revocation or denial proceedings public depends upon considerations present in the particular situations. Thus, broker and dealer denial or revocation proceedings may be made public where they are based upon facts established in public records, as for example, where proceedings are based upon an injunction, a criminal conviction, or a prior determination by the Commission in an order or decision which has become public that violations were committed by a particular person. If the Commission has previously determined in a revocation or denial proceeding that a particular individual willfully violated the Securities Act or the Securities Exchange Act, a subsequent proceeding arising out of an application for registration by that person or a proceeding involving a registrant controlled by or controlling such person and based upon the prior finding as to that person, would normally be public. The proceedings may be made public because substantial charges of fraud are involved or it otherwise appears that the investing public should be alerted to the situation prior to the completion of the proceedings. Another reason for ordering public proceedings may be to alert injured investors to the possibility of a civil remedy prior to the running of the statute of limitations. Likewise, proceedings may be made public to alert the securities industry to the fact that the Commission has taken action with respect to the particular practices to be involved in the proceedings. It should be noted that where the Commission directs that a proceeding be nonpublic the privacy can, of course, be waived by the subject of the proceeding.

The American Bar Association has indicated its view that such Commission proceedings should be made public only on an even more limited basis and should normally be nonpublic. It has urged the Commission " * * * to provide that disciplinary proceedings involving brokers, dealers, or other persons engaged in the securities business will be conducted in private and without publicity as to their pendency or the facts developed therein * * *" except where the Commission has determined in an independent private proceeding that the disciplinary proceeding should be conducted publicly. See Resolution IV, February 17, 1964, House of Delegates, American Bar Association.

We are also concerned that it might be argued that exception (5) for "interagency or intra-agency memorandums or letters dealing solely with matters

⁶ See also sec. 19 of the Public Utility Holding Company Act of 1935, sec. 320 of the Trust Indenture Act of 1939, and sec. 41 of the Investment Company Act of 1940.

of law or policy" is not applicable if such documents deal with law or policy in the context of specific facts. This argument would convert such work product of the professional staff of the Commission, and of the Commissioners themselves, into public documents. We do not see what purpose would be served by giving the general public access to such material or to such other memorandums as those recording conferences among the Commissioners, between the Commission and the staff, or between representatives of this and those of other agencies, such as the Department of Justice, relating to specific factual situations. We can see no reason why such memorandums exchanged between Commissioners and the staff should be treated differently from those between Federal judges and their assistants.

The proposed amendments also would authorize district courts to order the production of information improperly withheld from any person. We assume no change is intended in the normal requirement of exhaustion of administrative remedies, for surely a refusal by the staff where Commission review is available but not invoked should not support interference by a district court.

We also assume that the provision entitling a person to a district court trial de novo of the propriety of an agency's withholding of requested material is not to be construed to defeat confidential treatment where properly given. Thus, we would suppose that any examination of the information sought would consist of an in-camera inspection by the judge.

Finally, we suggest that subsection (a) of the bill be amended by inserting the words "and Agency" immediately after "Department" in the first line thereof (line 5, p. 1 of the bill) and inserting the words "or Agency" immediately after "Department" in the third line thereof (line 7, p. 1). This suggestion is made on the assumption that subsection (c) is intended to permit agencies as well as departments to maintain the confidentiality of material in the exempted categories. The present structure of the bill may give rise to arguments that the authority for nondisclosure provided in subsection (c) relates only to governmental bodies to which subsection (a) applies.

Should the foregoing views not be adopted, the Commission would feel constrained to oppose the bill in its present form.

REPLY FROM SELECTIVE SERVICE SYSTEM

SELECTIVE SERVICE SYSTEM,
Washington, D.C., May 7, 1965.

Hon. JOHN E. MOSS,
Chairman, Foreign Operations and Government Information Subcommittee of the
Committee on Government Operations, Rayburn House Office Building,
Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to furnish my comments as you requested in your letter of March 25, 1965, on H.R. 5012, a bill 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 Selective Service System has in the past pointed out that legislation in this area would jeopardize Selective Service operations unless it contained an exception for the material in the files of registrants obtained in confidence and heretofore protected from disclosure by law or regulation.

H.R. 5012 includes an exception from disclosure of personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. That language appears to assure the confidentiality of registrant files essential to the continued operation of Selective Service.

With that exception included, the bill, if it became law, would permit the Selective Service System to continue to obtain from registrants the information necessary for their proper classification which is basic to the proper selection of individuals for service in the Armed Forces as needed.

In another respect, however, a provision of the bill would so adversely affect the operations of the System that I have to oppose its enactment. The bill would protect from disclosure only those internal agency working papers which are interagency or intraagency memorandums or letters dealing solely with matters of law or policy. This restriction is far too narrow. It would leave available to the public practically everything reduced to writing other than such

memorandums or letters. Any reference or statement in a memorandum or letter concerning any matter other than law or policy would apparently remove it from protection.

The Bureau of the Budget has advised that it has no objection to the submission of this report to your committee.

Sincerely yours,

LEWIS B. HERSHEY, *Director.*

VETERANS' ADMINISTRATION

VETERANS' ADMINISTRATION,
Washington, D.C., March 15, 1965.

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

DEAR MR. CHAIRMAN: This is in response to your request for a report by the Veterans' Administration on H.R. 5012, H.R. 5013, H.R. 5014, H.R. 5015, H.R. 5016, H.R. 5017, H.R. 5018, H.R. 5019, H.R. 5020, and H.R. 5021, identical 89th Congress bills, each entitled "A bill 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."

These bills would amend section 161 of the Revised Statutes of the United States (5 U.S.C. 22) by adding thereto new subsections (b) and (c).

Subsection (b) would provide that every agency "shall, in accordance with published rules stating the time, place, and procedure to be followed, make all its records promptly available to any person." In addition, it would provide for judicial enforcement, vesting jurisdiction in the district courts of the United States to enjoin an agency from withholding records or information, other than records or information specifically excluded from the scope of the bill, determining the matter de novo, with the burden upon the agency to sustain its action. It further specifically authorizes punishment of responsible officers for contempt where there is noncompliance with the court's order and gives precedents under this section precedence on the docket over all other causes, except such other causes as the court deems of greater importance.

Subsection (c) would authorize withholding information from the public or limiting the availability of records to the public in eight instances; specifically matters (1) that are required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to the internal personnel rules and practices of the agency; (3) exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intraagency memorandums or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes, except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.

Under the provisions of these bills, veterans' claims matters would continue to be exempt from disclosure because of section 3301 of title 38, United States Code, which provides in part: "All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration shall be confidential and privileged, and no disclosures thereof shall be made except as follows."

Following the quoted language, certain specific exemptions are made under which material otherwise confidential may be released. In general, these pertain to disclosures to the claimant or his duly authorized agent or representative as to matters concerning himself alone, or when information is required by process of a U.S. court or by any department or other agency of the U.S. Government. One exemption is the requirement that the amount of pension, compensation, or dependency and indemnity compensation of any beneficiary shall be made known to any person who applies for such information. Likewise, these bills would exempt from disclosure internal rules and practices dealing with personnel and internal communications dealing solely with matters of law or policy.

While the exceptions provided in these bills remove many of the areas of major concern, it is believed that, if enacted into law in their present form, there would be a resultant adverse impact on this agency. Purely as a matter of good business management and efficiency, it would be undesirable to create a situation under which agency officials would be reluctant to reduce anything to writing unless it was so innocuous that it could be made available to any person including the press, private counsel, speculators, Government contractors, or even the idly curious, at any time, present or future. It would seriously impede the effectiveness of administrative investigations, the successful conduct of which is no less dependent on their confidential nature, than an investigation conducted for law enforcement purposes. It is difficult to conceive a successful procurement program were contractors to be afforded access to the agency's records, such as estimates of costs, prior to bidding.

Administratively it is believed that, if enacted into law, these bills would give rise to many complex and costly problems. They are so broad in scope that they could, and probably would, create excessive demands on an agency for information, requiring costly duplication and transfer of records in order to make them available. Further, the easy access to the courts provided in the bill could give rise to extensive litigation, which in many instances, would be unwarranted by the circumstances. The impact of this problem is greatly magnified by the failure of the bill to limit in any way the persons to whom the records must be made available, subjecting the agency to requests which could be frivolous, without purpose, and in some cases, made for the purpose of harassment only.

The Veterans' Administration is not opposed to the principle of furnishing to the public as complete information concerning our operations as is feasible. To the contrary, we take great pains to see that information of interest to the public is made available. The policy of the Veterans' Administration is set out in Veterans' Administration manual MP-1, chapter 4, section 405.01 providing: "Both the veteran and the public are entitled to full information about VA. The Administrator's policy is that VA will release all available information about its activities, freely and frankly, to all information media. This policy must be carried out."

If a bill, such as those under consideration, is to be enacted into law, it is urged that consideration be given to the following changes:

The phrase "any person" appearing in line 3, page 2, of the proposed subsection (b) of section 161 of the Revised Statutes be defined to include only those having a demonstrated legitimate interest in the records requested and the phrase "and the burden shall be upon the agency to sustain its action." appearing in lines 12 and 13, page 2 thereof, be deleted.

The exception appearing in proposed subsection (c) (2), lines 3 and 4, page 3, be amended to read, "related solely to the internal personnel rules, and management practices of any agency," and proposed subsection (c) (7), lines 12, 13, and 14, page 3, be amended to read, "investigatory files compiled for law enforcement or administrative purposes except to the extent available by law to a private party."

It must be our view that any public information requirement must preserve to the agency's discretion the right to determine the extent to which it is feasible or in the public interest to make its records available for random public inspection. Consequently, we cannot recommend favorable consideration of these bills by your committee.

We are advised by the Bureau of the Budget that there is no objection from the standpoint of the Administration's program to the presentation of this report to your Committee.

Sincerely,

W. J. DRIVER, *Administrator.*

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Analysis of Agency Comments on S. 1666

During the 88th Congress the Administrative Practice and Procedures Subcommittee of the Senate Judiciary Committee held hearings on S. 1666. During the hearings many objections were advanced by executive branch agencies to the bill as introduced. These objections were based on the variety and types of Government information which the agencies claimed would be open for disclosure should the bill, in its original form, become law.

Following are tables listing the major recognizable types of Government information listed in statements and testimony of Government witnesses at hearings before the Subcommittee on Administrative Practice and Procedure, October 28-31, 1963. (See the subcommittee's hearings, 88th Cong., 1st sess., pp. 161-166, 194-205, 224-320.)

The tables list seven major categories of information which Government agencies contended should not be disclosed. Since each category is based on the agencies' own statements and testimony, there is some overlap and duplication of categories. In order to reflect as much of the context of the agencies' comments as possible, little attempt has been made to draw up a systematic table of mutually exclusive Government information categories. The duplication is based on the differences of perspective, emphasis, and context in the statements of the various agencies.

The seven major categories of information in the table are: (1) Personnel records; (2) intra-agency and interagency internal opinions, recommendations, and advice; (3) instructions to employees; (4) investigation information; (5) voluntarily reported information; (6) business, financial data, and income tax information; and (7) foreign, diplomatic, and international affairs information. These categories which represent the general thrust of the Government objections to S. 1666 were developed from the more or less specific examples given during the testimony, or in the form of agency comments, to the Senate subcommittee.

Under "Personnel records," for example, are listed medical records of inmates, medical records of personnel in the Armed Forces, and medical records of all Government personnel; general record; family, financial, and salary information which can be found in Government personnel files; character and reliability evaluations; aptitude test results; information gathered in Government recruitment of personnel; physical examination records; efficiency ratings; personnel review files; memorandums on personnel; Veterans' Administration claims and records.

Those specific and general examples of Government information which Government witnesses felt were threatened by S. 1666 in the category of "Instructions to employees," include instructions to investigators; directions to be used for contract negotiations; Government examination questions and answers; internal management directives, Internal Revenue Service manuals, and Secret Service files.

"Intra-agency and interagency internal opinion, recommendations and advice" examples are staff views of investigations required by law (such as investigators' views in airplane accident investigations); procurement planning records; correspondence with other Government agencies; votes in courts-martial, selection boards, and the like; preparation for legislation and/or budget; internal opinion and advice memorandums; intra-agency memorandums; candid advisory papers; correspondence and memorandums between agencies; attorney-client confidence with the Government as client; litigation files; legal research and advice; litigation regarding courts-martial; pending litigation; and proposed and actual enforcement proceedings.

Investigation files Government witnesses thought threatened by S. 1666 include information leading to detection of violations; investigative activities; interviews in investigations; uncorroborated and unevaluated information; investigatory techniques; preemployment investigation files; advice, communications, and intelligence regarding possible orders to show cause; the names of informants and/or complainants; information derived by investigations required by law; personnel investigations and employee authorizations.

Witnesses argued that voluntary reporting programs would be threatened by the passage of S. 1666 by revealing, in their opinion; lending and licensing information; statistics from commercial or industrial firms; complaints from the public; information on contract bids; confidential information from private sources and medical and other records of nonemployees.

Trouble in the business world as well as possible inefficiency in tax collection would be the result of S. 1666, some Government agency representatives claimed. They cited the following business, financial, and income tax information which the bill would disclose prematurely: trade secrets; lending and leasing policies; commodity market information; interest rates and good transactions; support purchases; scientific reports; the value of securities; patent applications and procurement and/or disposal plans. Other areas of financial information which Government agencies felt threatened by S. 1666 include matters regarding financial institutions; tests made for private companies by Government agencies; details of proposed transactions such as mergers, acquisitions, financing plans; proxy files in corporate elections; Internal revenue records not otherwise protected by specific statute; information derived from administration of retail and excise taxes; information on savings-bonds holders and Government secrets in the production of currency.

A variety of foreign and diplomatic information would be threatened by S. 1666, agency representatives claimed. These are: advice to the President on foreign air transportation; individual trade date; unclassified information from foreign governments; information regarding diplomatic affairs; information from foreign banks.

In each of the categories, agencies cited statutes authorizing confidentiality which witnesses felt would either be overruled by, or at least put in doubt by, S. 1666.

Each of the following tables covers one of the seven major categories. A "X" in the column identifying specific information indicates that the department or agency identified in the left-hand column claimed that type of information should be exempt from disclosure.

Personnel records

	Medical records of inmates	Family, financial, and salary information	Character and liability evaluations	Aptitude test results	Armed Forces "201" and other files	Information gathered in recruitment	Physical examination records	Efficiency ratings	General and medical records	Personnel review board files	Memo-randums on personnel	Statute authorizes confidentiality of record ¹	Veterans' Administration claims and records
Executive departments:													
Department of Agriculture													
Department of Commerce													
Department of Defense					X		X		X	X			
Department of the Interior					X	X							
Department of Justice	X	X	X	X	X			X					
Department of State													
Department of Treasury			X		X	X	X		X				X
Independent agencies:													
U.S. Atomic Energy Commission													
U.S. Civil Aeronautics Board													
U.S. Civil Service Commission													
Federal Aviation Agency													
Federal Coal Mine Safety Board of Review									X				
Federal Communications Commission													
Federal Home Loan Bank Board													
Federal Reserve System									X		X		
Federal Trade Commission													
General Services Administration													
Interstate Commerce Commission													
National Aeronautics and Space Administration													
National Mediation Board													
Post Office Department									X				
U.S. Railroad Retirement Board													
Securities and Exchange Commission													
Selective Service System				X	X		X					X	
Tennessee Valley Authority									X				
Veterans' Administration													X

¹Sec. 7 of Public Law 26.

Instructions to employees

	Instructions to investigators	Directions for contract negotiations	Government examination questions and answers	Internal management directives	Internal Revenue Service manuals	Secret Service plans for Presidential safety
Executive departments:						
Department of Agriculture.....						
Department of Commerce.....		X	X			
Department of Defense.....						
Department of the Interior.....						
Department of Justice.....						
Department of State.....	X				X	X
Department of Treasury.....						
Independent agencies:						
U.S. Atomic Energy Commission.....						
Civil Aeronautics Board.....				X		
U.S. Civil Service Commission.....						
Federal Aviation Agency.....						
Federal Coal Mine Safety Board of Review.....						
Federal Communications Commission.....						
Federal Home Loan Bank Board.....						
Federal Reserve System.....						
Federal Trade Commission.....						
General Services Administration.....						
Interstate Commerce Commission.....						
National Aeronautics and Space Administration.....						
National Mediation Board.....						
Post Office Department.....						
U.S. Railroad Retirement Board.....						
Securities and Exchange Commission.....						
Selective Service System.....	X					
Tennessee Valley Authority.....						
Veterans' Administration.....						

(I) Intra- and inter-agency internal opinion, recommendations, advice

Staff views of investigation required	Procurement planning	Preliminary memoranda and logs	Correspondence with other agencies	Votes				Statutes authorize or direct confidentiality of records ¹	Preparation for legislation and/or budget
				Courts-martial	Selection boards	Discharge review boards	Records corrections boards	In relevant agency	
Executive departments:									
Department of Agriculture									
Department of Commerce									
Department of Defense	X	X			X	X	X	X	X
Department of the Interior									
Department of Justice									
Department of State									
Department of Treasury									
Independent agencies:									
U.S. Atomic Energy Commission									
Civil Aeronautics Board									
U.S. Civil Service Commission									
Fed. Civil Service Agency									
Federal Aviation Agency									
Federal Coal Mine Safety Board of Review									
Federal Communications Commission									
Federal Home Loan Bank Board	X								
Federal Reserve System			X						X
Federal Trade Commission									
General Services Administration		X						X	
Intrastate Commerce Commission								X	
National Aeronautics and Space Administration									
National Mediation Board									
Post Office Department									
U.S. Railroad Retirement Board									
Securities and Exchange Commission									
Selective Service System									
Tennessee Valley Authority									
Veterans Administration									

See footnotes at end of table, p. 270.

Investigation information

Information leading to detection of violations	Investigation activities	Inter-views in investigation	Uncoor- roborated and unevaluated information	Investi- gatory tech- niques	Preem- ployment inves- tigation files	Advice, commu- nications, and in- telligence regarding possible orders to show cause	Names of infor- mants and/or com- plainants	Investi- gation files, materials, reports, logs	Direc- tive : au- thorizes confidentially	Investi- gation required by law	Personnel inves- tigation	Employee author- izations
Executive departments:												
Department of Agriculture							X	X				
Department of Commerce							X				X	
Department of Defense												
Department of the Interior												
Department of Justice	X	X	X	X				X	X			
Department of State												
Department of Treasury	X			X	X		X					
Independent agencies:												
U.S. Atomic Energy Commission												
Civil Aeronautics Board												
U.S. Civil Service Commission	X		X					X		X		
Federal Aviation Agency								X				
Federal Coal Mine Safety Board of Review								X				
Federal Communications Commis- sion												
Federal Home Loan Bank Board								X				
Federal Reserve System												
Federal Trade Commission												
General Services Administration							X			X		
Interstate Commerce Commission												
National Aeronautics and Space Administration							X	X				
National Mediation Board												
Post Office Department								X				
U.S. Railroad Retirement Board				X				X		X		X
Securities and Exchange Commis- sion			X				X	X				
Selective Service System												
Tennessee Valley Authority												
Veterans' Administration												

Voluntarily reported

	Tending information	Licensing information	Statistics from commercial or industrial firms	Complaints from public	Information contract bids	Confidential information from private sources	Scientific and financial information	Medical and other records of non-employees
Executive departments:								
Department of Agriculture	X							
Department of Commerce					X			
Department of Defense			X		X			
Department of the Interior								
Department of Justice	X	X						
Department of State								
Department of Treasury								
Independent agencies:								
U.S. Atomic Energy Commission								
Civil Aeronautics Board								
U.S. Civil Service Commission								
Federal Aviation Agency								
Federal Coal Mine Safety Board of Review				X				
Federal Communications Commission								
Federal Home Loan Bank Board								
Federal Reserve System				X				
Federal Trade Commission				X				
General Services Administration								
Interstate Commerce Commission							X	
National Aeronautics and Space Administration								
National Mediation Board								
Post Office Department						X		
U.S. Railroad Retirement Board								X
Securities and Exchange Commission								
Selective Service System								
Tennessee Valley Authority								
Veterans' Administration								

Business, financial data, income tax information

	Trade secrets	Statute authorizes confidentiality of record ¹	Possible conflict with statutes requiring confidentiality ²	Protection from speculation and/or from special interests						Review copies of scientific reports	Value of securities	Patent applications
				Lending and leasing policies	Commodity market information	Interest rates, gold transactions	Support purchases including foreign currencies	Records on special programs				
Executive departments:												
Department of Agriculture.....			X								X	X
Department of Commerce.....												
Department of Defense.....												
Department of the Interior.....	X											
Department of Justice.....	X	X	X	X	X	X	X					
Department of State.....												
Department of Treasury.....		X	X			X	X					
Independent agencies:												
U.S. Atomic Energy Commission.....												
Civil Aeronautics Board.....												
U.S. Civil Service Commission.....												
Federal Aviation Agency.....	X											
Federal Coal Mine Safety Board of Review.....												
Federal Communications Commission.....												
Federal Home Loan Bank Board.....												
Federal Reserve System.....												
Federal Trade Commission.....												
General Services Administration.....												
Interstate Commerce Commission.....												
National Aeronautics and Space Administration.....				X						X		
National Mediation Board.....												
Post Office Department.....												
U.S. Railroad Retirement Board.....												
Securities and Exchange Commission.....												
Selective Service System.....												
Tennessee Valley Authority.....												
Veterans' Administration.....												

28 U.S.C. 7213 and 6103 and 36 U.S.C. 122.

¹ 18 U.S.C. 1905.

Foreign and diplomatic and international affairs

	Advising President on foreign air transporta- tion	Individual trade data	Unclassified information from foreign governments	Diplomatic affairs	Foreign banks information	Provisions for nondis- closure ¹
Executive departments:						
Department of Agriculture						
Department of Commerce		X				X
Department of Defense		X				
Department of the Interior		X				
Department of Justice			X	X		
Department of State						
Department of Treasury						
Independent agencies:						
U. S. Atomic Energy Commission					X	
Civil Aeronautics Board						
U. S. Civil Service Commission	X					
Federal Aviation Agency						
Federal Coal Mine Safety Board of Review						
Federal Communications Commission						
Federal Home Loan Bank Board						
Federal Reserve System						
Federal Trade Commission						
General Services Administration						
Interstate Commerce Commission						
National Aeronautics and Space Administration						
National Mediation Board						
Post Office Department						
U. S. Railroad Retirement Board						
Securities and Exchange Commission						
Selective Service System						
Tennessee Valley Authority						
Veterans' Administration						

¹ Bureau of International Commerce and Business Defense Services Administration have provisions for nondisclosure.

Other

	Improve- ments in language of bill	Court provision hamper discharge of functions	Bill does not apply in most or all cases	Executive privilege	Assume no change in requirement to exhaust administra- tive remedies	Puts burden of proof on agencies objected	Depart- ment is better than court in defining disclosure	Presumes guilt of agency	Judicial recourse already exists	Clutter up Federal Register with trivia
Executive departments:										
Department of Agriculture.....										
Department of Commerce.....		X		X						
Department of Defense.....				X		X				
Department of the Interior.....										
Department of Justice.....	X			X		X				
Department of State.....										
Department of Treasury.....										
Independent agencies:										
U.S. Atomic Energy Commission.....	X							X		
U.S. Aeronautics Board.....		X								
U.S. Civil Service Commission.....			X							
Federal Aviation Agency.....			X							
Federal Coal Mine Safety Board of Review.....									X	
Federal Communications Commission.....										
Federal Home Loan Bank Board.....										
Federal Reserve System.....										
Federal Trade Commission.....										X
General Services Administration.....										
Interstate Commerce Commission.....		X								
National Aeronautics and Space Administration.....										
National Mediation Board.....										
Post Office Department.....										
U.S. Railroad Retirement Board.....	X									
Securities and Exchange Commission.....										
Selective Service System.....					X					
Tennessee Valley Authority.....										
Veterans Administration.....										

1 Sec. 402(a) Communications Act (477 U.S.C. 402(a) and Judicial Review Act of 1950 (5 U.S.C. 1301-1042)), p. 290.