

The exemptions in the present bills are substantially identical with the corresponding provisions of pending Senate bills (S. 1160, S. 1336) to amend section 3 of the Administrative Procedure Act, and those in turn are the outgrowth of earlier versions in the last Congress, one of which, S. 1666, passed the Senate. No doubt they reflect a bonafide effort to find a basis for accommodation between, on the one hand, a legitimate concern, in a democracy, for the widest public access to information about the activities of the Government and, on the other hand, the necessity of limiting that access in some matters in the public interest itself or in the interest of fairness to those who have submitted needed information to the Government in confidence. The effort, however, has not been successful, and this altogether apart from the question of basic approach discussed under point 1 of this report.

For example, clause (5) would exempt interagency or intraagency memorandums or letters "dealing solely with matters of law or policy." Just as in executive sessions of legislative committees, so in internal communication within and between executive agencies (as well as their advisory committees), the freest interchange of ideas and views is essential in the development of policy, whether the subject be a legislative proposal or program considered for submission to Congress, a possible change in administrative policy on the conduct of a program, or whatnot, and this is as true when matters of fact enter the picture as when, if ever, they do not. So, too, is complete latitude and freedom necessary for the exchange of views between members of an adjudicative body in an executive agency, just as it is in the judicial conference room or in communication between a judge and his law clerk. Such freedom would, inevitably, be seriously inhibited in all such cases by throwing such communications (when in writing) open to random public inspection. It should be emphasized that executive accountability to the public is in any event assured at the point of action, whether in the form of a legislative proposal submitted and justified to Congress, and administrative policy, or an adjudication, without subjecting such internal communications to public inspection.

Again, to mention another example, while the bills exempt from the requirement of public access certain types of records the disclosure of which would constitute an unwarranted invasion of personal privacy or reveal confidential business data, there is no general exemption of information obtained by the Government in confidence or of other matters involving the right of privacy, and even the specific exemptions are qualified in a way that makes their scope uncertain. We believe that in the absence of some compelling public interest in disclosure in a particular case, all information submitted to the Government in confidence, whether or not specifically exempted from disclosure by statute, should be held in confidence, and that any matter which, if disclosed, might constitute an unwarranted invasion of the rights of privacy of any individual or group should be carefully protected from indiscriminate disclosure.

3. Even if the bills' basic approach to assuring the proper discharge of executive accountability and informational responsibility; i.e., making all records that are not within specifically excepted categories available to any person, were itself a sound one, the enforcement provision is so devised as to make possible, in effect, nullification of the exceptions. Under this provision, agency officers could, on pain of punishment for contempt, be compelled, in an injunction suit, to make records and information available to any person unless the agency, through evidence adduced de novo in court, carries the burden of satisfying the court that the record or other information is excepted from the duty of disclosure. To demonstrate to the court that a particular record or information is excepted from the duty of disclosure might, in itself, necessitate disclosure of the privileged matter in open court. (It is also difficult to see why a complainant seeking access to records in, for example, Washington, D.C., should be entitled to sue where he resides, e.g., San Francisco, rather than being required to sue where the agency is or the records are.)

4. Finally, in view of the above-mentioned pendency of proposed amendments to the Administrative Procedure Act, we believe that whatever approach, if any, may be adopted by the Congress to the problems of the availability of agency records and disclosure of information, it is desirable to avoid duplication and overlap in the provisions of mutually independent statutes in this respect.

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

Sincerely,

WILBUR J. COHEN,
Assistant Secretary.