

THE WHITE HOUSE
WASHINGTON

August 12, 1974

MEMORANDUM FOR

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FROM

KEN COLE

SUBJECT

MEETING WITH SAXBE ON FREEDOM
OF INFORMATION ACT

I understand you will be meeting with Attorney General Saxbe this afternoon, at his request, to discuss the pending Freedom of Information Act Amendments which is now in conference.

I have attached an update of the original options paper which was sent to President Nixon. As you will recall, he decided against a clear Presidential veto threat and chose instead the option of attempting to work with the conferees to clean up the bill. That option is now no longer viable since the conference is about to conclude with all of the objectionable provisions still intact.

I doubt that Saxbe has anything new to add, but is using this meeting as an opportunity to show that he wants to be a team player.

The only option not covered in this proposed paper for the President is the possibility that Timmons can work out some sort of delay in this and other objectionable bills so that President Ford is not forced to take positions on substantive legislation until after he has had a chance to put his new Administration together.



THE WHITE HOUSE

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ACTION

MEMORANDUM FOR THE PRESIDENT
FROM KEN COLE
SUBJECT FREEDOM OF INFORMATION ACT
AMENDMENTS (H.R. 12471)

Some time within the next two weeks Senate and House conferees will report on H.R. 12471, which would tighten up the Freedom of Information Act to promote greater disclosure of government information. Although there are differences between the House and Senate versions, each contains provisions of serious concern to a number of agencies -- with some raising constitutional issues as well.

Background

On March 14, 1974, the House passed their version 383 to 8. There was little discussion of or reaction to the bill, and many members were probably unaware of its contents. The bill included amendments to current law which would:

- require the prompt publication by all agencies of document indexes to advise the public of categories of available information;
- set specific and stringent time limits for responding to requests for information and appeals from denials;
- permit in camera judicial examination of any withheld document (including classified material) to determine whether the withholding was appropriate, with the burden of proof on the withholding agency;
- allow courts to award attorney fees and costs to plaintiffs if the government does not prevail in litigation over withheld information; and



- provide for expedited trials whenever a member of the public decides to bring suit over a denial of information.

Efforts were made on the Senate side to secure a more favorable bill out of the Judiciary Committee, and a compromise version was produced on May 16. Although the reported bill moderated some of the above features, it contained a highly undesirable provision not in the House bill which would authorize a complainant to ask a court to find a withholding "without reasonable basis in law", following which the court would have to direct the agency head to suspend the responsible employee without pay for up to 60 days.

The Senate voted 64 to 17 to pass its version on May 30, but not before some harmful amendments were added by Senators Muskie and Hart. The Muskie amendment voided one of the key compromise actions by deleting the special procedures for in camera inspection of classified documents which contained a presumption in favor of sustaining classification, giving the provision essentially the same effect as the House counterpart on in camera inspection described above. The Hart amendment modified the 7th exemption under present Freedom of Information disclosure requirements to provide greater public access to investigatory files.

Discussion

Although the conference is not quite concluded, the membership is not particularly favorable, and at this point the odds are strongly against your receiving an acceptable bill. Both the Senate and House bills have several objectionable features in common, such as the provisions permitting in camera inspection of all documents, allowing attorney fees and costs to plaintiffs, and requiring responses to requests for information within established time limits. Although the Senate provision for court-imposed sanctions against employees who withhold information is not in the House bill, and therefore could be dropped in conference, our information is that most House conferees appear eager to accept this provision.



Agencies affected by this legislation are very concerned about its potential effect on their operations, although some provisions are of greater concern to certain agencies than others. The employee sanctions provision is highly troublesome to the Civil Service Commission, while CIA and Justice find the in camera inspection and investigatory files provisions very objectionable. And wholly apart from the issue of inspection, any provision for judicial review of the merits of an executive decision to classify information is opposed by White House Counsel as unconstitutional. All would undoubtedly recommend vetoes if those sections survive.

Options

1. Decide now to veto the bill, informing our friends so that they can work to build support for a clear Presidential veto.

Approve _____ Disapprove _____

2. Have Ash and Saxbe say they will recommend a veto, but postpone any Presidential decision until after final Congressional passage.

Approve _____ Disapprove _____

3. Decide now not to veto the bill and begin work on a carefully drafted signing statement.

Approve _____ Disapprove _____

