GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

11 October 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Ash:

This is in response to your request for the views of the Department of Defense on the enrolled enactment of H. R. 12471 of the 93d Congress, to amend Section 552 of Title 5, United States Code, known as the Freedom of Information Act.

This department cannot recommend that the President sign the enrolled H. R. 12471, 93d Congress, in view of the remaining technical deficiencies in some of the provisions. More specifically:

(1) The Department of Defense is opposed to the authority of district courts all over the country to review classified documents on a de novo basis for the purpose of determining whether they "in fact" meet the criteria of the executive order authorizing their classification. Under this provision no presumption in favor of the validity of the classification is specified and, therefore, judges without background in the subject matter of the questioned record will be asked to "second guess" the justification for the classification. This formidable burden on the courts, many of which have had little or no experience with such documents, will necessitate extensive effort by the Department of Defense to explain to deciding judges foreign policy and national security matters which are often of great sensitivity and complexity. To relieve this burden to some extent it would be appropriate to recommend to the Congress that they adopt the language proposed by the Senate Committee on the Judiciary in Report No. 93-854, 93d Congress, endorsing amendment of this Act. After carefully studying this difficult problem, the Judiciary Committee recommended language which, in effect, directed the courts to sustain the classification of a document unless "the withholding is without a reasonable basis." A further desirable qualification would be to restrict suits challenging classification determinations to the Seat of Government in order that there could be uniformity of treatment and development of an expertise in a single District Court.

(2) The proposed time limits for responding to Freedom of Information Act requests are unduly rigid and may promote litigation by requiring the agency to make negative determinations on requests for records when there has been inadequate opportunity to locate and evaluate them. Moreover, these time limits create priority for Freedom of Information Act requests that may be inconsistent with the public interest. Officials required to review and evaluate documents to determine their releasability will be diverted from other important government duties that may be far more significant to the public than a random request for a record by "any person", no matter what his purpose or motive.

(3) The potential sanction against personnel who appear to have arbitrarily and capriciously withheld records may create a climate in which records which should be withheld in the interest of privacy, national security, or agency efficiency will be released in order to avoid the possibility of punishment. Moreover, the Act might be interpreted to authorize Civil Service Commission determinations of whether disciplinary action is warranted against those responsible for withholding records, even when the responsible official is a member of the armed forces. This prospect is wholly inappropriate. Members of the armed forces are entitled to carefully prescribed procedures for the impositions of administrative sanctions, and these are not compatible with the sanction provision of the enrolled bill.

(4) The modification of subsection (b)(7) to prescribe the circumstances under which investigative records may be withheld from public requesters is inadequate in its protection of information contained in some investigative files that cannot qualify as involving criminal investigations or security intelligence investigations. Although the Conference Report alludes to background security investigations as coming within the area of protection, it is by no means clear that courts will interpret the term "national security intelligence investigation" to encompass all investigative records requiring such protection.

If it is determined that this enrolled bill should be vetoed, we strongly urge that the veto message avoid language which seems to pose burdensome interpretations of the bill that are not inevitable. Such language is likely to prove difficult to overcome in litigation where government agencies seek to justify the withholding of records under ambiguous language which lends itself to differing interpretations. For example, it is undesirable to suggest that a judge must rule on behalf of a requester in a situation in which he finds the government justification for security classification no more persuasive than the requesters

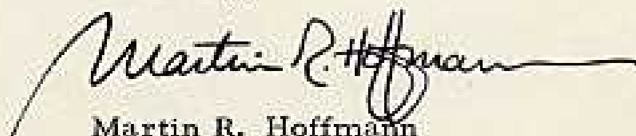
position that the classification is unjustified. As a practical matter such contingency seems unlikely, and we believe it is inadvisable to overemphasize in the veto message the extent of the Government's burden under the de novo review requirements.

We also urge that any veto message avoid raising issues not contained in President Ford's letter of August 20, 1974. To do so is likely to subject the Executive Branch to the accusation that it has shifted its ground after Congress attempted to meet it halfway. It would be preferable to argue that the concessions mentioned in the letter of September 23, 1974 from Subcommittee Chairmen Kennedy and Moorhead were inadequate to meet legitimate concerns and responsibilities of the President.

Finally, we recommend that if the President does not veto the enrolled bill that he issue a signing statement that emphasizes his continuing responsibility as Commander-in-Chief and Chief Executive under the Constitution to protect records in the interests of national defense and foreign policy. This is consistent with the action taken by President Johnson in signing the original Freedom of Information Act, P. L. 89-487, on July 4, 1966. In addition, a signing message should include language that will emphasize the responsibility of the agencies to issue regulations which will interpret these statutory amendments in a manner that makes them workable and consistent with the overall intent of Congress. Such a statement would lay the foundation for agency regulations designed, for example, to mitigate time limits by prescribing appropriate forms and recipient offices for requests, thereby avoiding some of the difficulties that may be encountered from misdirected and inadequately described requests.

We would welcome the opportunity to comment further on a proposed veto message or signing statement.

Sincerely,



Martin R. Hoffmann

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