

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OCT 16 1974

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 12471 - Freedom of Information
Act amendments
Sponsor - Rep. Morehead (D) Pennsylvania and 11 others

Last Day for Action

October 19, 1974 - Saturday

Purpose

To amend the Freedom of Information Act.

Agency Recommendations

Office of Management and Budget	Disapproval (Veto message attached)
Department of Justice	Disapproval (Draft veto message attached)
Central Intelligence Agency	Disapproval
Department of the Treasury	Disapproval
Department of Commerce	Disapproval (informally)
Department of Defense	Disapproval (informally)
Civil Service Commission	Disapproval
Department of State	Disapproval (informally)
General Services Administration	No objection (informally)
Department of Health, Education and Welfare	Defers (informally)

Discussion

In 1958 the Congress enacted an amendment to the 1789 "housekeeping" statute which had authorized Federal agencies to establish files and maintain records. The 1958 amendment provided that the housekeeping statute did not authorize withholding information from the public. In 1966 the Freedom of Information Act established procedures by which the public could acquire documents in order to know about the business of their government. That law

provided for de novo Federal court review of agency decisions to withhold information and placed on the government the burden to prove that the withholding was proper.

In 1971, a comprehensive review of the administration of the 1966 Act was undertaken culminating, after extensive studies and hearings, in H.R. 12471.

H.R. 12471 is intended to provide more prompt, efficient, and complete disclosure of information.

Specifically, H.R. 12471 would:

- require that indexes be made available of information such as final opinions and orders in adjudication of cases, statements of policy not published in the Federal Register, staff manuals and instructions and other material. It further provides for an exception to the requirement for publication under prescribed circumstances.
- require information be made available in response to a request which "reasonably describes" the information. This is essentially a codification of existing case law.
- require agencies to promulgate a fee schedule for document search and duplication and for a waiver of charges where release of information would be of benefit to the general public.
- authorize courts in their discretion to examine agency records in camera to determine whether the records can be properly withheld under the Act.

The enrolled bill would reverse the Supreme Court decision in Environmental Protection Agency v. Mink, et al., 410 U.S. 73 (1973), which held that judicial review of classified documents pursuant to Freedom of Information Act litigation was limited to ascertaining whether the document was in fact classified and precluded an in camera review to insure the reasonableness of the classification. The decision was based on the legislative history of the classified documents exemption to the Freedom of Information

Act and therefore Constitutional issues were not addressed. Present law permits de novo review of Freedom of Information Act complaints. The enrolled bill would additionally authorize a review of the classified documents in camera to determine whether the documents were properly classified and to release them if the court found they were not properly classified. The burden of proof would be on the agency to sustain its action of classification.

Your August 20 letter to the Conferees stated that "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." The Conferees did not alter the language of the bill but urged in the Conference Report on the bill that courts give "substantial weight" to the "agency's affidavit concerning the details of the classified status of the disputed records."

The Justice Department believes that this provision is unconstitutional because of the degree of proof that agencies must demonstrate to a court to maintain the classification. All affected agencies strongly urge a veto as a result of this provision. Although some judicial review may well be permissible except for those documents with a direct Presidential nexus, documents classified in the interest of our national security should be disclosed only if the classification was unreasonable and in camera judicial review should be utilized only if the evidence presented does not indicate that the document was in fact reasonably classified pursuant to the standards of the Executive order.

Since this provision may be unconstitutional, the provision could be eliminated or altered by court decision. Signing the bill and litigating this provision would result in a judicially constructed review provision instead of a statutory procedure. Vetoing the bill and simultaneously submitting curative language would risk an override and criticism for vetoing a "truth and candor" bill.

- provide for a limit of 10 days on determinations whether to comply with a request for documents and a limit of 20 days on determination of an appeal from any withholding. Treasury in its views letter on the enrolled bill states categorically that this limit would be impossible for them to meet in view of the nearly 100 million records in nearly 100 locations. Treasury would need at least 30 days for its initial determination. In your letter to Senator Kennedy you called the time limits "unnecessarily restrictive." In his response dated September 23, Senator Kennedy states that the Conference Committee adopted the Senate version which granted agencies additional time and provided for additional time by the court. Administratively, this provision could have the most significant cost and operational impact upon the agencies, and the time limits may be unworkable.
- provide for a limit of 30 days on the time during which an agency must respond to a complaint and for priority treatment of these cases in the courts.
- provide for court assessment, against the United States, of attorney fees and litigation costs incurred in any case in which the complainant has substantially prevailed.
- provide for CSC action to determine whether an employee should be disciplined in any case where a court issues a finding that information has been arbitrarily or capriciously withheld. CSC would, after consideration, submit its findings and recommendations to the agency concerned and the agency must follow those recommendations. In your letter to Senator Kennedy you stated that personnel discipline should be left with the agency and judicial involvement then follow in the traditional form. Senator Kennedy replied that the Conference version was substantially modified to place disciplinary proceedings in CSC and then only after a "written finding by the court that circumstances raise questions whether agency personnel acted arbitrarily or capriciously."

-- amend the law enforcement investigatory files exemption to permit withholding of documents only if their disclosure would result in any one of the following six specific occurrences:

- a. interfere with enforcement proceedings;
- b. deprive a person of a right to a fair trial or an impartial adjudication;
- c. constitute an unwarranted invasion of personal privacy;
- d. disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential sources;
- e. disclose investigative techniques and procedures; and
- f. endanger the life or physical safety of law enforcement personnel.

The agency would have to bear the burden of proof in demonstrating to a court that the record would result in one of these events. Current law generally exempts all such files compiled for law enforcement purposes and has been given an expansive interpretation by the courts consistent with its legislative history.

Your August 20 letter urged deletion of the words "clearly unwarranted" from the personal privacy exemption to disclosure (item c above). The Conference deleted the word "clearly" from the bill. The letter further expressed concern that this provision not "reduce our ability to effectively deal with crimes." The bill was altered following your letter to exempt material which would disclose a

confidential source. However, when combined with the provision of the bill which would permit disclosure of any reasonably segregable portion of a record, this provision would require a detailed review of a large number of records to identify each portion as disclosable or not. There are concerns with this provision which stem primarily not from the conditions for withholding, but from the sheer administrative burden of screening through each requested record and applying the provisions of this exemption to each reasonably segregable portion of the record. Although most other agencies screen records in the manner that law enforcement activities would be required to do under this provision, there are a tremendous number of these records and the cost of compliance would be significant. This administrative impact appears to be, however, the only credible objection to the provision. The only solution to this would be movement back towards the current provision.

- provide for release to a claimant of any "reasonably segregable portion of a record..." This is essentially a codification of existing case law.
- provide for annual reports and record keeping.
- provide for an expanded definition of "agency" to include the Postal Service and the Postal Rate Commission, government corporations or government-controlled corporations, and the Executive Office of the President except for those units whose sole function is to advise and assist the President.

In view of the foregoing, we recommend disapproval and have prepared the attached draft of a veto message for your consideration.

(Signed) Roy L. Ash
Director

Enclosures



TO THE HOUSE OF REPRESENTATIVES

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I was graciously afforded an opportunity to review this proposed legislation. On August 20, because I believe so strongly in the need for a more open Executive branch, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. I stated that I would go more than halfway to accommodate Congressional concerns with this legislation, and I am very pleased that Congress has also demonstrated a spirit of cooperation and accommodation.

In my letter, I stated that, notwithstanding my preferences, I would accept several provisions in the bill which would be burdensome. I am certain that Congress made similar adjustments. However, I am still deeply concerned with some provisions of the enrolled bill.

First, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could prove to a court -- separately for each paragraph of each document -- that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents.

Second, as I previously stated "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." That provision remains unaltered in the enrolled bill.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. I am not, however, able to accord the courts what amounts to a power of initial decision rather than a power of review, in a most sensitive and complex area where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security would have to be overturned by a district judge if, even though it was reasonable, the judge thought the plaintiff's position just as reasonable. And if the district judge's decision of equal reasonableness is based upon a determination of fact, it cannot even be undone by a higher court unless "clearly erroneous." Such a provision would violate constitutional principles and it would give less weight before the courts to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters.

I propose, therefore, that where classified documents were requested the courts could review the classification but would have to uphold the classification if there is reasonable

basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

I shall shortly submit language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

THE WHITE HOUSE

October , 1974