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APR 29 1966

MEMORANDUM

TO: Mr. Frank M. Wozencraft
Assistant Attorney General
Office of Legal Counsel
Department of Justice

FROM: Leonard C. Meeker
The Legal Adviser
Department of State

SUBJECT: The Freedom of Information Bill, "S. 1160, to amend Section 3 of the Administrative Procedure Act."

I refer to your memorandum of April 27, 1966, which requested a brief summary of specific examples or situations in which the Department of State would encounter serious problems by reason of particular provisions of S. 1160. In the relatively few hours since the arrival of your memorandum, there has been insufficient time to conduct a thorough and exhaustive survey within the Department. There are, however, some problems that come quickly to mind, and the comments that follow will deal with these by way of illustration.

The concern of the Department relates initially to the scope of the exemption at Section 3(e)(1) of S. 1160, namely "specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy". It is assumed that this language is designed to encompass at least the coverage of the present Executive Order 10501, as amended, rather than to restrict further such coverage.

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As presently interpreted by the Attorney General in his letter of April 17, 1954, that Executive Order in its protection of the "interests of national defense" includes the safeguarding of information and material developed in the course of conduct of foreign relations of the United States whenever it appeared that the effect of the unauthorized disclosure of such information or material upon international relations or upon policies being pursued through diplomatic channels could result in serious damage to the nation. However, even this present interpretation of Executive Order 10501, as amended, is not adequate to protect many of the activities of the Department of State in dealing on a day to day basis with foreign governments. It is only the present Section 3 of the Administrative Procedures Act, providing "[e]xcept to the extent there is involved (1) any function of the United States requiring secrecy in the public interest * * *", which protects from disclosure these dealings not properly classified under Executive Order 10501. It is conceivable, however, that under Section 3, as amended by S. 1160, a registered foreign agent of one country could gain access to all unclassified records relating to State Department dealings with another country. These records could include diplomatic notes and memoranda of conversation, as well as messages to and from our diplomatic missions abroad. If this bill becomes law it might well result in a serious impediment to free expression of views and exchange of intelligence information between the United States and foreign governments, who would be seriously concerned that communications made to the Department of State could subsequently be subject to public inspection, even if this were not actually the case. Accordingly, the Department would be seriously affected in maintaining its frank, open, and heretofore privileged negotiations with foreign governments if it were unable to respect the confidences entrusted to it. It would be essential that Executive Order 10501 be further amended to protect these and related unclassified activities of the Department of State upon the basis in Section 3(e)(1) that they may "be kept secret in the interest * * * of foreign policy."

Reference is made also to the Directive of President Truman, dated March 13, 1948, which requires that all reports,

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records and files relative to the loyalty of employees or prospective employees be maintained in confidence. This Directive is important for if the investigation of employees under Executive Order 10450, as amended, is to be fully effective, the working papers, the tentative conclusions and final evaluations of the investigative process must be protected from disclosure. It is not known whether subparagraph (6) of Section 3(e) of S. 1160 would afford the necessary protection to these records, but subparagraph (7) would not appear to protect them, its coverage being limited to "investigatory files compiled for law enforcement purposes."

The Department of State accepts and processes numerous passport applications yearly. Information given by applicants on the forms utilized for this purpose should, in the Department's view, receive the protection of Section 3(e)(6) which includes in its coverage: " * * * and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"; we believe the availability of passport files should be restricted to the applicants and their representatives.

Actions are taken by the Department's Office of Munitions Control in regulating the export and import of arms. Determinations as to the exportability of arms vary daily with the changing international situation and internal political conditions in a given country. Many of these situations are very sensitive and invariably the disclosure of information, including unclassified information, on which judgments might be based would be prejudicial to the national interest. This was clearly demonstrated in the recent India-Pakistan confrontation where on orders from the White House the Department suspended forthwith all pending and existing licenses for both countries. If the Department had been under a requirement to reveal the information on which this action was based, it would have been clearly detrimental to the national interest. Similarly, the mere disclosure of factual information concerning international arms traffic may in certain circumstances be contrary to our foreign policy interests; for example, it could be prejudicial to the United States to be forced to disclose the details of arms transactions with a country such as Israel, thereby making the information available to other middle eastern countries.

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The Department, finally, has some concern over its ability to fulfill the requirements of Section 3(b) and (c) which require that records be made available, under certain conditions, to "any person." If this requirement is to apply to the operations of the Department's 290 or more Foreign Service posts abroad, and to every American citizen, or even to aliens who there make appropriate requests for records, then a significant disruption of the Department's functions could occur. It is hoped this problem could adequately be met by issuance of a published rule under Section 3(c) which would establish that records would only be made available in Washington, D. C.

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