

THE WHITE HOUSE
WASHINGTON

September 25, 1974



MEMORANDUM FOR: THE PRESIDENT

FROM: KEN COLE

SUBJECT: H. R. 12471, AMENDMENTS TO THE FREEDOM OF INFORMATION ACT

House and Senate conferees recently concluded action on H. R. 12471, the amendments to the Freedom of Information Act.

Senator Hruska remains the only conferee who has withheld signing the Conference Report, pending your decision on acceptability of the legislation. His opposition to the Conference Report is, of course, essential to sustaining a veto should that course be pursued.

Although progress was made in conference after your letter of August 20th, there remain two objectionable issues:

1. In Camera Review of Classified Documents. You stated you could not accept a judicial review of classification which could risk exposure of military or intelligence secrets. But that you could accept a provision that included (1) an express presumption that the classification was proper and (2) a standard of arbitrary, capricious or without a reasonable basis governing the judge's review of the classified documents.

The bill provides that a court (1) may determine de novo whether classified documents are properly classified and (2) may examine the documents in camera in making its de novo determination.

Because both bills were virtually identical on this point, the conferees refused to consider any amendments to the provision. However, they did put language in the Conference Report designed to ameliorate some of the concerns with such a provision. The Report now states that (1) in camera inspection of the documents should not be automatic -- the judge should look at the documents only if he cannot determine the

propriety of the classification on the basis of the affidavits and (2) an agency affidavit averring that the document is properly classified shall be entitled to substantial weight.

New language inserted into the conference report does not alter the bill's basic principle of primary judicial control over national security information. Your principal intelligence agencies CIA and FBI, oppose this vigorously.

2. Exemption 7 -- Investigatory Files. You pointed out two problems with respect to the amendment to this exemption which authorizes the withholding of investigatory files compiled for law enforcement purposes: (1) the amendment could threaten the right to privacy; and (2) the amendment could hamper the ability of law enforcement agencies to maintain the identify of a source in confidence.

In the conference, two changes were made: The first deleted the word "clearly" in the phrase an agency may withhold records that "constitute a (clearly) unwarranted invasion of privacy." The second change is more significant. It authorizes a criminal law enforcement agency to withhold all confidential information furnished by a confidential source.

The investigatory files exemption, as now written, is so narrow and detailed that a simple request from a scholar could compel a document-by-document and indeed paragraph-by-paragraph search (uncompensated) of an investigatory file as massive as that in the Rosenberg spy case. The CIA, the FBI and the Criminal Division of Justice feel its provisions unworkable.

We expect State, Justice, Defense and the CIA to recommend veto. The Civil Service Commission and your Privacy Committee staff will recommend that you sign the legislation.

There is little question that the legislation is bad on the merits, the real question is whether opposing it is important enough to face the political consequences. Obviously, there is a significant political disadvantage to vetoing a Freedom of Information bill, especially just before an election, when your Administration's theme is one of openness and candor.

There is no likelihood of the Conferees altering their report to accommodate your objections to these two issues. Your response, if negative, will set the stage for a major veto. Timmons is not at all sure such a veto could be sustained in either House.

However, Timmons believes there is some potential in the Senate for sustaining a veto (33 votes against the Investigatory Files section and 29 votes against the judges determination section with 5 absentees who might support a veto).

SIGNAL VETO _____

SAY I WILL SIGN _____

OTHER _____

