OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.
JUN 28 1966

Honorable Charles L. Schultze
Director, Bureau of the Budget
Washington, D. C.

Dear Mr. Schultze:

This is with reference to your request for the views of this Department on the enrolled bill (S. 1160), "To amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and protect the right of the public to information, and for other purposes."

At the outset, the Department notes that the bill raises constitutional issues. In some circumstances strict application of its provisions would result in invasion of the constitutionally-derived responsibility of the Executive to protect from disclosure records which in its judgment the public interest requires to be held confidential, and could transfer final responsibility in this regard to the courts.

A major problem with the bill is that it is lamentably drafted. The exemptions on which the Executive branch must rely are vague and inadequate. Yet unless an agency can prove that one should apply, a court can require it to disclose any document in its possession to any person who requests it. The result is that there is quite likely to be substantial difficulty in legitimate agency efforts to protect Executive branch records from public disclosure. Attached is a memorandum dealing with some of the practical problems which may result.

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Balanced against the foregoing is the principle of freedom of information and minimizing secrecy in Government, which certainly deserves Executive support. After careful consideration of the factors involved and recognizing that a veto would raise serious problems, the Department of Justice does not urge withholding of Executive approval. However, the Department recommends that in connection with his approval of the bill the President issue a statement along the lines of the attached draft. We hope that such a statement, together with the explanatory language in the House report on the bill (H. Rept. No. 1497), and perhaps the issuance of an Attorney General's Manual with respect to its provisions, will clarify the purpose and application of the bill in a way which may tend to overcome many of its deficiencies.

Unlike the present section 3, which can be invoked only by "persons properly and directly concerned," the bill's purpose is to provide a "true Federal public records statute." It gives any member of the public a right, without any showing of need or interest, to examine or to have a copy of any document or record in the possession of any officer or agency in the Executive branch, unless the requested material is described in one of the nine limited exemptions summarized below. If a request for a record is refused, the right is enforceable in an injunctive action in the federal courts, with authority in the court to punish the responsible Federal official for contempt if he does not comply with an order for disclosure.

The bill applies to every "record" in the possession of the Executive branch. The present "public interest" and "good cause" exceptions of the present section 3 are replaced by nine specific categories of records entitled to confidential treatment. The first exempts matters determined by the President to affect the national defense or foreign policy. This exemption, however, covers only matters "specifically required by Executive order to be kept secret," with the possibility that the President's determination can be judicially reexamined.

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The eight additional exempt categories include, among others, matters related solely to internal agency personnel rules, matters expressly exempted by some other statute, trade secrets and commercial or financial information obtained from any person and privileged or confidential, inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency, and investigatory files compiled for law enforcement purposes except to the extent available by law to a private party. The scope of these exempted categories is uncertain , and any person claiming that a particular record does not fall within an exemption has the right of litigating the question, with the burden on the agency to establish that the withholding was proper.

It should be pointed out that hearings in both the Senate and House evidence severe criticism by experts of the bill as drafted. Professor Kenneth Culp Davis testified that the bill "clearly" would be unconstitutional in some applications and badly "overshoots" its purpose. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess., on S. 1336, at pages 143-149 and 186 (1965). Professors Gellhorn and Frankel of Columbia University Law School expressed similar criticism. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 88th Cong., 2d Sess., on S. 1663, p. 678 (1964).

This bill deals with matters basic to Executive operation. The position of the Department of Justice, consistently maintained over a period of several years and explained fully in the Senate and House hearings, is that there are many situations in which official records should not be publicly disclosed. because of the need to protect individual privacy or the public interest. These instances require sensitive evaluations on the part of Executive officials. The attempt in this bill to apply simple word-formulas to every such case without permitting any exercise of Executive discretion involves both difficulties and dangers which are compounded because these formulas are so poorly drafted.

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Attempts by the Department, after passage of the bill by the Senate in late 1965, to have the House Subcommittee consider a substitute bill were unsuccessful. The Department was also unsuccessful in its efforts to have the House Committee adopt any of the six brief amendments which it proposed as appropriate solutions to some of the more difficult aspects of the bill in the form passed by the Senate. However, the Department did express its views in detail to the Committee staff, and the House report on the bill (H. Rept. No. 1497) does contain explanatory language which goes into considerably more detail than the Senate report. If the courts follow the language contained in the House report, it should resolve many of the more pressing problems which could result from narrow interpretations of some of the exemptions.

There remains, of course, the basic difficulty of relying in statutory construction upon portions of the legislative history to determine the meaning of statutory provisions. In this context the issuance of an approval statement by the President regarding the scope of the bill and the meaning attributed to its provisions by the Executive branch would seem especially desirable.

The bill provides that it will not become effective until one year following its enactment. During this period it will be important to prepare a revision of Executive Order 10501 to broaden its provisions to the full scope of national defense and foreign policy permitted by the first exemption. It will also be important for this Department to work with the Executive departments and agencies in preparing a Manual to provide guidance in interpreting the new law. Conceivably it may become necessary or desirable to seek amendments to clarify or expand some of the exemptions.

Sincerely,

Ramsey Clark

Ramsey Clark
Deputy Attorney General

Attachments

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DRAFT APPROVAL STATEMENT
TO BE ISSUED UPON THE SIGNING OF S. 1160

Twenty years ago this month, Congress enacted the Administrative Procedure Act. The Act established uniform procedural requirements to assure due process in the administrative proceedings of all Federal departments and agencies. Its enactment was a significant milestone in the dynamic development of American administrative law, which affects the daily lives of all our people.

The measure I ~~now~~ today sign revises section 3 of the (Administrative Procedure) Act to provide guidelines ~~which will govern~~ for the public availability of ~~agency~~ the Federal departments and agencies records ~~, rules, opinions, orders, and other materials of the administrative process.~~

This legislation ~~, however, is much more than a revision of one section of the 1946 Act. It goes beyond administrative proceedings to~~ ~~reaffirm~~ implements a principle of paramount importance to our system of government - the right of the people to know the facts about their Government.

A democracy functions best ~~guided by the composite judgments of its citizens, will succeed only to the extent that those judgments~~

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when
are based on adequate information. The people must have access to information about their Government. They must be able to ascertain the rules by which it operates and the policies which it will apply. The Government should not be able to hide its mistakes by simply pulling the curtains of secrecy around a decision which has already been made and which can be revealed without injury to the public interest. Good government functions best in openness, in the full light of day.

At the same time, there are situations where everyone agrees that the welfare of the nation or the rights of individuals may require that some documents to be withheld. As long as threats to peace exist there must be military secrets. A citizen must have the right to complain to his government and to give it information in confidence. without being betrayed. Fairness to individuals requires that the information accumulated in their personnel files be protected withheld from disclosure. Officials within government must be able to communicate with one another exchange ideas in writing fully and frankly, free from the glare of publicity. An agency cannot operate effectively or fairly if they are required to its must disclose information pre-

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maturely. It cannot afford to publish confidential manuals instructing its staff on how to protect against possible loopholes in the law which it must enforce.

I know that the sponsors of this bill, Senator Edward Long and Congressman John Moss, who did such an able job of guiding this measure through the Congress, both recognize these important interests. This legislation is intended to provide for both the need of the public for access to official information and the need of Government to protect information, in situations such as those I have just mentioned. Both needs are vital to the welfare of all the people.

There are some who have expressed concern that the language of this legislation will be construed in such a way as to impair government operations. I do not share this concern. It goes without saying that no legislation can impair the President's power under our Constitution to provide for confidentiality when the national interest so requires.

I have always felt that freedom of information is so important to our form of government that it should not be

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restricted except when there is an important reason for doing so. I am hopeful that all the needs which I have mentioned can be served through a constructive approach toward the wording and spirit and legislative history of this measure. I know that everyone in this Administration will work conscientiously to make information available to the fullest extent consistent with individual privacy and the national interest.

I sign this measure with a deep sense of pride that our Nation, unlike some nations, values highly the right of the people to know how their government is operating.

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THE PRINCIPAL PROBLEMS PRESENTED BY S. 1160

1. Limitation upon the President's Authority - The measure would raise a constitutional question if viewed as a Congressional attempt to limit the President's authority to withhold from public disclosure Executive records which he determines must be withheld in the public interest. It would permit nondisclosure of matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Otherwise, however, Executive records could be withheld only under standards prescribed by Congress and subject to judicial review as set forth in section 2 below.

The President has a constitutionally-derived responsibility to protect from disclosure Executive records which, in his judgment, the public interest requires to be held confidential. Under the separation of powers doctrine this responsibility cannot be infringed by Congress.

The House report on S. 1160 (H. Rept. No. 1497, 89th Cong., 2d Sess. 10) refers to Executive Order 10501 as the kind of order which the bill contemplates might be issued to protect Executive records. Since that order is general in its terms and application, the reference tends to allay concern over limiting the manner in which the Executive may exercise his authority. However, the question of subject-matter limitation remains.

2. Judicial Remedy - S. 1160 presents a further constitutional question involving separation of powers if it is construed as an attempt to transfer from the Executive to the courts ultimate authority to order the production of Executive records.

The provisions for a judicial remedy are not stated in terms of judicial review of administrative action. Rather, the bill empowers the district courts to determine disclosure questions de novo, without reference to exhaustion of adminis-

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trative remedies or the existence of a case or controversy. Any person, presumably whether or not he has a legitimate interest in disclosure, is given the standing to bring suit for disclosure. Moreover, in the suit the burden of proving that nondisclosure is authorized is on the agency. However, the House report on the bill, at page 9, does include a statement that where a denial of the request for records is "by an agency subordinate," the person making the request is to be entitled to "prompt review by the head of the agency." The judicial proceeding which may follow is characterized (on pages 2 and 9) as an "appeal" available to an "aggrieved citizen." The reason for a determination de novo, the report explains, is "so that the court can consider the propriety of the withholding," with attention to the "reasons for the agency action." Finally, the court is to order the production of records "whenever it considers such action equitable and appropriate."

These statements in the House report tend to cast the court remedy appropriately as a proceeding for judicial review of final administrative action which presents a case or controversy, and should discourage a rigid application of the naked delegation of judicial power provided by the bill. However, the statutory language remains easily susceptible of unconstitutional application.

3. Confidential Internal Standards and Instructions - Agency statements of general policy and substantive rules or interpretations of general applicability are required by subsection (a) of the bill to be published in the Federal Register, subject to the sanction that "no person shall in any manner be adversely affected" by any such matter which is not published. Subsection (b) would require the indexing and availability of all other statements of policy and interpretations, as well as "administrative staff manuals and instructions to staff that affect any member of the public," subject to the provision that no such matter may be "relied upon, used, or cited as precedent" unless it has been indexed and made publicly available. The Senate Report on the bill (S. Rept. No. 813, 89th Cong., 1st Sess. 2) explains that the limitation of the requirement to

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"administrative" manuals and instructions "protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action."

Even with the Senate report's embellishment, this provision causes concern. Frequently agencies adopt confidential internal standards for the guidance of agency staff involving not law violations but the negotiation of contracts, the settlement of cases, the conduct of audits and inspections, and many other functions with respect to which agency policy and procedure cannot be disclosed without frustrating the legitimate purposes which these functions serve. For example, an agency's instructions to its contracting officers setting the outer limits of what may be conceded on behalf of the Government in negotiating a contract cannot be divulged to private contractors without seriously prejudicing the agency's ability to negotiate a favorable contract.

The House report is more helpful. It explains, in connection with subsection (b), that "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases" (page 7). Moreover, the explanation of exemption (2), for "matters related solely to the internal personnel rules and practices of any agency," states that "operating rules, guidelines, and manuals of procedure for Government investigators or examiners" are within that exemption (page 10).

While the problem of the underlying statutory language remains, these committee statements should be of substantial aid in persuading courts to protect necessary confidential internal instructions and standards. The problems which are unresolved lie in the necessity for explaining the broad mandates of subsections (a) and (b) by reference to the report language concerning subsection (b), and for considering the matters noted on the basis of the exemption relating to "internal personnel rules and practices."

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4. Information Received in Confidence - The predecessor bill, S. 1666, 88th Cong., contained an exemption for "trade secrets and other information obtained from the public and customarily privileged or confidential." The Senate report on that bill (S. Rept. No. 1219, 88th Cong., 2d Sess. 13) explained that the exemption included not only commercial information, but also "information customarily subject to the doctor-patient, lawyer-client, and other such privileges."

S. 1160, in exemption (4), replaces the term "other information obtained from the public" with the words "commercial or financial information obtained from any person" and deletes the word "customarily" in the phrase "customarily privileged or confidential." This is the only reference in S. 1160 to privilege or confidentiality. In an apparent effort to atone for this inadequacy, the Senate report on S. 1160 (at page 9) states that the exemption is intended to include "information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges."

Building from this base, the House report goes further. It acknowledges that a citizen should be able to confide in his government, and agencies should be able to respect confidences. Accordingly, the following statement is made on page 10 with reference to this exemption: "It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." The House Report also explains, at page 7, that the requirement concerning "advisory interpretations" does not require the publication of "any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person."

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5. Internal Communications Available through Discovery - Exemption (5) in S. 1160 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." What may or may not be available to a party in litigation depends upon its relevance to the issues and the need of the party for disclosure. The limitation upon exemption (5) therefore cannot be applied in the abstract, but it evinces an intention to narrow the scope of available items in this category along the lines applied by the courts in discovery proceedings in litigation. The House report includes a sentence explaining that any internal memorandum which "would routinely be disclosed to a private party" would be available under S. 1160. On page 5, after citing three examples of what the House Committee viewed as cases of flagrant abuse of the present section 3 of the APA, the House report states as follows: "On the other hand, in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. There may be legitimate reasons for nondisclosure, and S. 1160 is designed to permit nondisclosure in such cases."

Without a satisfactory exemption for internal communications, of course, there can be no frank discussion among staff members, and the problems of premature disclosure could be substantial. In discussing this exemption (on page 10) the House report notes that: "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate efficiently if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision, or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy."

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Although the foregoing report language should be useful in seeking appropriate protection for a wide range of internal agency records, the inadequacy of the statutory language can be expected to produce extensive controversy, misunderstanding, and litigation.

6. Personnel and Medical Files - Exemption (6) is for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." While the statutory language might be construed as requiring that such files are to be disclosed absent a showing that disclosure in a particular case constitutes a clearly unwarranted invasion of personal privacy, the House report (p. 11) indicates that this limitation is intended to provide "a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Application of such a standard would probably take care of most problems in this area.

7. Investigatory Files - Exemption (7) in S. 1160 protects "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." The Senate report (at page 9) states that the files exempt under this provision are "the files prepared by Government agencies to prosecute law violators." An application of a resident alien for entry of his parents, the appointment of a Federal official, and an inquiry into the effectiveness of a social welfare program may also involve confidential investigations, equally in need of nondisclosure of resulting files. The exclusion from the exemption of records "to the extent available by law to a private party" presents a problem similar to that discussed under 5. above.

In the effort to meet these problems with appropriate report language, the House Committee states in its report (p. 11): "This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation

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and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceeding."

The difficulty which remains is that of construing the words "compiled for law enforcement purposes" in line with the House report language, notwithstanding the narrower explanation in the Senate report.

8. Orders in the Adjudication of Cases - To the extent required to prevent a clearly unwarranted invasion of personal privacy, subsection (b) of S. 1160 would permit deletion of "identifying details" from opinions required to be indexed and publicly available, provided the reasons for the deletions are fully explained in writing. The bill contains no such relief with respect to the publication of orders. Therefore, the millions of orders issued in Social Security, Veterans, Immigration and Naturalization Service, and social welfare cases would be required to be indexed and made available to anyone who wished to see them without regard for the damage which may result to the innocent individuals who are named therein.

The requirement is difficult to reconcile with the explanation of the provision on page 8 of the House report, which evidences a clear intention to protect personal privacy. The Department urged the Committee to restrict the indexing requirement to matters "having precedential significance." The report incorporates this limitation. However, the language of the provision remains unchanged. Because of the volume of orders involved and their interest in many instances to relatives, creditors, and others eager to pry into orders which heretofore have received confidential treatment, the discrepancy between the language of the bill and that of the report is likely to present substantial problems.

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