THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE
WASHINGTON

June 23, 1966

Dear Mr. Schultze:

This is in response to your request for an expression of our views and recommendations on 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."

The complexity and the cloudiness of portions of the bill prevent us from forecasting its full impact on this Department if it should become law. However, we do envision a number of serious problems which are set forth below and are more fully explained in the attached staff memorandum. The magnitude of those problems leads us to conclude that the public interest would be best served if the current bill were not permitted to become law, especially if other departments and agencies are faced with similar or even greater problems.

If the President decides to let the bill become law, we hope that he would issue a statement basing his action on his understanding of the bill in the light of its legislative history (including especially the House report) and an appropriate memorandum from the Attorney General supporting that interpretation.

The President may also wish to consider appointing a small (3 to 5 members) advisory group of distinguished private citizens to review the administration of the Act and recommend any changes necessary to maintain a proper balance between

the public's right to know and confidentiality necessary to the public interest.

I am aware that language has been inserted in the House report in the hope of mitigating the expected difficulties by broadening the literal import of some of the exemptions in the bill. In some instances, however, the language of the bill provides little or no support for the construction put on it by the House report.

As indicated above, the following problems raised by the bill concern this Department:

1. Courtesy would be breached and our relationships with the State and local governments, institutions, organizations, and individuals would be impaired if our vast correspondence with them were opened immediately to public inspection without their permission. For example, such disclosure could hinder our negotiations under our State grant-in-aid programs.

2. Our research grant programs, particularly those of the National Institutes of Health, would be seriously undermined by our inability to maintain confidentiality of the content of applications for research grants and of reports of study groups, advisory committees and consultants evaluating such applications and resulting progress reports. The opinions and reports of study groups, advisory committees, and consultants often contain very frank expressions of views concerning an applicant's competence or the worth of his proposal and performance. Their disclosure could be seriously embarrassing to the applicant and to those who issued the opinions and soon would make people reluctant to serve in these capacities or to express themselves freely when they do serve.

3. Administration of the Social Security programs would be impeded by an unqualified requirement that staff manuals and instructions be made available for public inspection and copying. Public disclosure of those provisions which permit adjudicators to indulge in presumptions favorable to the claimant in passing on the adequacy of evidence as to

entitlement for benefits in our social insurance program would invite fraud. Similar considerations apply in other programs to manual material the disclosure of which would benefit only the dishonest and make detection of fraud extremely difficult.

4. Considering the potential demands for inspection and copying of material in our files, enactment of this bill is likely to result in inestimable costs and in a manpower burden that might strain our resources and seriously interfere with the administration of our programs. Assuming that fees were chargeable and in fact charged for some of these services, we still would have no authority to reimburse our appropriations from these fees.

Sincerely,

Secretary

Honorable Charles L. Schultze
Director, Bureau of the Budget
Washington, D. C. 20503

Enclosure

HEW Staff Memorandum on S. 1160 (enrolled)

This bill, while cast in the form of a revision of the public-information section (§3) of the Administrative Procedure Act, deals only in part with the informational aspects of the basic subject-matter of that Act, i.e., procedural fairness in the pursuit of the regulatory and adjudicative functions of Government agencies. The major thrust of the bill, and the impetus in pushing it through the Congress, was derived from the bill's addition to §3 of a new and unrelated dimension involving the issue of the general public's "right" to delve indiscriminately into the papers and records of Government agencies without regard to whether the agency considers release of the information compatible with the public interest or whether the person seeking the information has any business with the agency.

S. 1160, despite the pretensions of reasonableness embodied in its exemptions, would, if it became law, pose grave problems for this Department as respects the "new dimension" above mentioned and, also, as respects that aspect of the bill truly germane to the subject of administrative procedure. Some of the more troublesome problems we envision are referred to below.

1. The "right to know"--Its cost, manpower, and program implications.

The bill blends, and in our view confuses, the basic accountability and informational responsibility of executive agencies to the American people with the quite separate and only tangentially related policy of the present Administrative Procedure Act to make available, to those individual members of the public who have business with an agency or are affected by agency action in the conduct of their affairs, the records and other information needed by them in that connection and in the agency's possession.

Our objection on this score should not be construed as a disinclination to keep the general public properly informed about our activities and to be publicly accountable for our stewardship. On the contrary, it is the Department's policy, and we believe that we have an obligation, to make available to the public, as soon as practicable, all information concerning programs and activities of the Department and its operating agencies which can be legitimately made available, and which will be of use to the public in evaluating the effectiveness of these programs and activities and will aid the public in achieving improved health, education,and welfare.

This policy or obligation, however--the correlative of the so-called "right (of the people) to know"--should, we believe, be primarily carried out through regular program publications and informational services, published reports to the President and to Congress, press conferences,

public addresses by agency officials, and the like. It could not, without inordinate and incommensurate expense, be carried out by sifting the vast material in our files, as the bill seems to envision, in order to screen out that which, under the narrow exceptions stated in the bill, could legitimately be withheld from disclosure, and to open the rest (in effect) to random public inspection as distinguished from inspection by persons properly and directly concerned. It would require the hiring of additional personnel throughout the Department to compensate for the ensuing decrease of man hours that would be available for employment upon our programs. While authority to charge fees for specific services rendered in this connection might exist (see 5 U.S.C. 140)--though the House report mentions only fees for copying of records--we have no authority to use such fees to reimburse our appropriations and the bill confers none. Moreover, physical segregation of disclosable from nondisclosable material for the purposes of this bill could seriously interfere with the classification and arrangement of file material from the point of view of its greatest effectiveness in serving our program functions.

The burdens we envision are not imaginery. For example, there are non-governmental groups with a "mission", such as the National Health Federation (health food faddists) or Krebiozen supporters, constantly demanding access to the Food and Drug Administration's records. Again, the Food and Drug Administration has many requests for records from attorneys representing litigants in actions against other private parties. Each request would require hours of searching, extracting pertinent material, and copying extensive records. This time would have to be diverted from time now spent administering FDA's primary program responsibilities.

It should be emphasized in this connection that this bill is in no way concerned--indeed it expressly excludes from its scope--the question of the reach of the investigative power of the Congress vis-a-vis executive agencies. Nor should the issue of general public access to agency files be confused with the question of the extent to which information from such files should be made available to the Government Accounting Office and its staff, or to the courts in appropriate cases.

2. Some of the areas important to D/HEW that should be, but under the bill are not, privileged against disclosure, or where the protection from the disclosure requirement is doubtful.

The bill (subsection (e)), in addition to exempting from the duty of disclosure "matters specifically exempted from disclosure by statute", e.g., records protected from disclosure under §1106 of the Social Security Act--thus saving such statutes from implied repeal--provides for eight more or less closely circumscribed, to some extent overlapping, categories of records that are to be excepted from the duty of disclosure. These are

designed to narrow very substantially the subject-matter areas privileged against disclosure under the ground rules laid down in the present §3 of the APA which accords a right of access to official records only to "persons properly and directly concerned" (instead of all and sundry) and which, moreover, exempts from disclosure not only records protected from disclosure by other laws but also any records to the extent that there is involved any function of the United States "requiring secrecy in the public interest" or "relating solely to the internal management of an agency" and any "information held confidential for good cause found".

The exemptions in S. 1160 are the outgrowth of earlier versions that evolved through several Congresses, and they reflect to some degree the impact of arguments presented on those versions through the years by Government agencies as well as others. They do constitute a recognition that the "right to know" cannot be an absolute; that there are some areas of information in the hands of Government agencies, even besides the obvious one of national defense, that in the national interest or in common decency ought to be secure against disclosure. Virtually every exemption, however, except that protecting the confidentiality of information obtained from business and financial sources, is hedged about in the bill with restrictions so vague and uncertain that it is likely to take many years of litigation to ascertain their meanings. Moreover, even if given the broadest meaning of which they appear to be susceptible, these exemptions would seem to leave unprotected important areas in which information is submitted to agencies in confidence and in which the protection of that confidence is in the interest both of simple fairness and of the success of the program involved.

There are, to be sure, some passages in the House report, inserted in an obvious effort to buttress the bill's exemptions from disclosure, which might possibly be used successfully in defense of disclosure suits where the language of the bill is unclear and is reasonably susceptible to the interpretation put upon it by the House Committee. We doubt, however, that this could be done with the bootstrap language of the report (page 10) which asserts that clause (4) of subsection (e) of the bill--exempting from the disclosure requirement "trade secrets and commercial or financial information obtained from any person and privileged or confidential"--includes information <u>of any kind</u> obtained by the Government from <u>any</u> source upon assurance that it would not be disclosed. This would in effect make clause (4) read "trade secrets and commercial or financial information obtained from any person, and <u>any other information, obtained from any source, which is privileged or confidential</u>." The acceptance by the courts of such an "interpretation" of the bill can hardly be relied upon.

Some of the more important specific areas, of concern to this Department, in which enactment of the bill would seem to cast in doubt or destroy protection against indiscriminate disclosure to the public now enjoyed by our records are the following:

a. Interagency and intra-agency communications. Clause (5) of subsection (e) of the bill exempts from the disclosure requirement both "inter-agency and intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." The "which" phrase casts a cloud of uncertainty over the extent of this exemption. The Senate report states that the purpose of this clause "is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties." The House report states, on the one hand, that "advice from staff assistants and the exchange of ideas among agency personnel" is intended to be exempt from disclosure and, on the other hand, that "any internal memorandums which would routinely [sic] be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." In view of the uncertainty and conflict in decisions as to how far discovery may reach in litigation between a private litigant and the Government, this exemption in the bill is a most unsatisfactory protection on a matter of the most vital importance to every Government agency. We have repeatedly faced the issue of discovery of our internal memoranda in actions to which the Government was a party and we cannot, on the basis of experience, place reliance on this exemption in the bill.

b. Records of negotiations with State and local governmental agencies, etc. In very large measure, the Department's programs are programs of grants to States, cities, or other local agencies under statutory provisions requiring the submission of a plan or application meeting certain requirements and conditions. The development of such plans or applications, their amendment (frequently resulting from changes in Federal legislation), or issues of conformity with Federal law arising in the administration of such programs by grantees, often require extended and sometimes delicate negotiations. Such negotiations may include not only this Department and the grantee or applicant for a grant, but also members of Congress, governors, State legislators, and other groups. If the correspondence involved were to be made prematurely public, there would be less sense of freedom to negotiate the best possible solutions and, even so, situations of potential embarrassment would be likely to arise. Yet there appears to be no exemption in S. 1160 to cover such situations. It is not likely that correspondence between the Department and such outside agencies or persons would be construed by the courts as "interagency" memoranda or letters within the meaning of subsection (e)(5).

c. Applications for research grants, evaluations thereof, and progress reports of researchers. The Public Health Service, and indeed most of the other agencies of the Department, are heavily committed to programs which award funds to individuals or institutions for research on the basis of applications and their evaluation through peer group judgment. The research grants programs of the National Institutes of Health illustrate the type. For such programs confidentiality in program processes is essential. Applications for research grants in the fields involved include detailed descriptions of the approach proposed, the experimental protocols, the method of procedure, and other details which, if disclosed, would in many cases compromise proprietary information. In highly competitive fields of research many investigators would not apply to the Government for support if this meant early revelation of the modes of attack in the problem in question. Unless we were to rely upon the assertion of the House report that all information supplied to the Government upon assurance of confidentiality is proof against disclosure, which we believe we could not do, applicants could not be counted on to participate as fully in the program as they now do. This is true also of interim research progress reports by research grantees. These reports frequently consist of incomplete, unsubstantiated, or undifferentiated information which can be easily misinterpreted and which is usually altered or eliminated as further experimentation progresses and additional data are obtained. The release of such information would compromise the investigator's work and could ruin the design of his experiments or encourage false hopes of "breakthroughs" or "cures". Finally, the disclosure, to the public, of evaluations of research applications made by technical study groups and advisory committees would go far to render such groups and committees useless.

We cannot be certain that these matters would be protected from the disclosure requirement by exemptions now in the bill, such as clause (5) relating to "intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency", or clause (6) relating to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Even if these uncertainties should eventually be resolved in favor of nondisclosure there would in the meantime be the clear probability that a major sector of the programs' structure would be undermined. It is difficult to see how, pending resolution of this uncertainty in the event of enactment of the bill, we could continue to make commitments of confidentiality to applicants for research awards in the future.

d. Internal staff manuals and instructions. Subsection (b) of the bill provides, among other things, that every agency shall, in accordance with published rules, make available for public inspection and copying certain materials, including "administrative staff manuals and instructions to

staff that affect any member of the public unless such materials are promptly published and copies offered for sale." This requirement, if given full effect by the courts, would require this Department to make information available to the public which, in the public interest, should remain confidential. This is true, for example, in the case of the Claims Manual and the Disability Insurance Manual of the Social Security Administration. The Claims Manual, for instance--which is not binding on hearing examiners before whom a claimant is entitled to an opportunity for a hearing and who are in a separate bureau--contains internal working rules that are essential to the speedy and uniform initial adjudication of the staggering workload of claims that must be handled in this program. Among other things, they allow adjudicative personnel to indulge in certain working presumptions in favor of claimants which, because of the danger of manipulation and fraud, it would not be safe to indulge in if the manual were made public. Also, they outline methods of detecting or preventing fraud which for obvious reasons must be kept confidential. Similar considerations apply to the Bureau of Federal Credit Union's Examiners' Guide which spells out some of the procedures followed in making examinations and the disclosure of which to the public could benefit only dishonest credit union officials or employees. Examples of instructions in other program agencies of the Department, which describe a method of screening or otherwise checking reports or activities and the disclosure of which to the public would make the detection of fraud extremely difficult, might be cited.

It is true that the House report, in explaining subsection (b) of the bill, states 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." However, there is nothing in the bill to support this interpretation unless--which is at least doubtful--it were the above-quoted clause (5) of subsection (e) relating to intra-agency memoranda "which would not be available by law to a private party in litigation with the agency."

3. Enforcement of disclosure.

Even if the bill's basic approach to assuring the proper discharge of executive accountability and informational responsibility--i.e., making "all records" that are not within specifically excepted categories available "to any person"--were itself a sound one, the enforcement provision is so devised as to make possible, in effect, nullification

of the exceptions. Under this provision, agency officers could, on pain of punishment for contempt, be compelled, in an injunction suit, to make records and information available to any person unless the agency, through evidence adduced de novo in court, had carried the burden of satisfying the court that the record or other information was excepted from the duty of disclosure. To demonstrate to the court that a particular record or information is excepted from the duty of disclosure might in itself necessitate disclosure of the privileged matter in open court. (It is also difficult to see why a complainant seeking access to records in, for example, Washington, D. C., should be entitled to sue where he resides, e.g., San Francisco, rather than being required to sue where the agency is or the records are.)