NATIONAL LABOR RELATIONS BOARD

Washington 25, D.C.

June 22, 1966

Mr. Wilfred H. Rommel
Assistant Director for Legislative Reference
Executive Office of the President
Bureau of the Budget
Washington, D.C. 20503

ATTENTION: Mrs. Garziglia

Dear Mr. Rommel:

Pursuant to your request of June 21, 1966, I am setting forth a brief summary of the views of this Agency on Bill S. 1160.

At the outset may I say that we fully agree with the general purposes of the Bill to assure access by the public, to the fullest extent practicable, to information concerning its Government. In our view, however, certain of the subsections of the Bill are disturbingly ambiguous and lend themselves to conflicting interpretations which may require protracted and substantial litigation to resolve. That we are not dreaming up "horribles" to parade is apparent from an examination of two reports on the Bill prepared by the Senate and House of Representatives respectively.

Only last Monday during House debate prior to passage, Congressman Moss remarked that "S. 1160 is a moderate Bill and carefully worked out," and Congressman Rumsfield added:

> The legislation was initially opposed by a number of agencies and departments, but following the hearings and issuance of the carefully prepared report -- which clarifies legislative intent -- much of the opposition seems to have subsided.

It is true that this Agency's opposition subsided to some extent with the issuance of the House Report on the Bill's provisions. But there is also the Senate Report of last year which does not echo the House interpretations and which causes us to retain grave reservations concerning this Bill. Some of these reservations are as follows:

Subsection (b) provides that "every agency shall ... make available for public inspection and copying ... (C) administrative staff manuals and instructions to staff that affect any member of the public ..." As we continually noted in our objections to this provision, such a requirement opens up to public inspection matters of internal management -- matters which at most may affect the public only indirectly, such as trial tactics and criteria for prosecution or settlement of cases. While the House Report specifically construes this provision as exempting such matters, the Senate Report is silent thereon, thereby creating a serious ambiguity in the legislative history of an important subject.

Subsection (c) requires agencies to make their records "available to any person." The phrase "any person," as the administrative law authority, Professor Davis, pointed out, is unduly embracive and could lead to a disruption of the Government's business by opening the door to unjustified requests for information by curiosity seekers and irresponsible persons.

In addition, subsection (c) provides for judicial review of agency denials of information and requires in the ensuing Court proceeding that "the burden shall be upon the agency to sustain its action." Where the alleged withholding of information takes place in an administrative proceeding, normal procedure for judicial review of final agency orders provides an adequate remedy to an aggrieved party without causing inroads into the salutary principle of exhaustion of administrative remedies approved years ago by the Supreme Court. Since, under Section 10(f) of the National Labor Relations Act, an aggrieved party may have a final order of the Board reviewed by an appropriate United States Court of Appeals, the provision for direct judicial review in Subsection (c) is unnecessary and may serve to delay an agency's disposition of the merits of an administrative proceeding. Furthermore, placing the onus upon an agency to sustain its denial of information is contrary to the burden of proof rule even in ordinary civil discovery proceedings, where discovery will be ordered by the Court only if a party sustains his burden of showing good cause therefor (see Rule 34 of the Federal Rules of Civil Procedure). There appears to be no good reason to reverse normal procedure when an agency of the Government is the holder of records sought by a litigant.

Subsection (e), setting forth nine exemptions from disclosure, presents numerous problems of statutory interpretation. In view of the Senate and House Reports on the subsection, it is impossible to be reasonably certain of the meaning of the Bill's language. For example, exemption (2) is applicable to matters "related solely to the

internal personnel rules and practices of any agency." The Senate Report describes this exemption as pertaining to "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." On the other hand, the House Report indicates that:

> Operating rules, guide lines, and manuals of procedure for Government investigators or examiners would be exempt from disclosure, but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law.

A court interpreting this subsection of the statute would be likely to find these statements to be mutually inconsistent and contradictory. If the House interpretation is favored, we would have little objection to the subsection, despite the House Report's greater limitation on the relatively minor matter of employee relations and the like. But if the Senate's view were to prevail, much of our instructional material for attorneys and field examiners handling our cases, including that relating to trial strategy and settlement, would become records subject to public scrutiny, thereby hampering this agency's law enforcement activities. (See in this connection our comments on Subsection (b) herein.)

Exemption (7) involving "investigatory files compiled for law enforcement purposes" is also subject to differing interpretations. The Senate Report limits this exemption to "files prepared by Government agencies to prosecute law violators ... except to the extent they are available by law to a private party." Under this narrow interpretation, the prehearing affidavits in the Board's investigative files may be subject to disclosure beyond the requirements of the Jencks rule, because our representation case files do not involve prosecution of "law violators;" and a similar argument may be advanced with respect to our unfair labor practice case files on the ground that we do not "prosecute" offenders of our Act. The House Report, on the other hand, states that "this exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws." Further, the House Report makes clear that the Bill "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 proceedings." This would appear to insulate the Agency's prehearing affidavits from premature and unjustified disclosure, considering that about 90 percent of the unfair labor practice charges filed with the Agency are settled, withdrawn or dismissed and never result in a hearing, so that the identity of employee affiants is not disclosed to those employers and unions who might be inclined to take punitive action against them.

In sum, the language of the Bill, standing alone, is unduly broad and potentially disruptive of the Agency's operations. Moreover, we cannot be confident that the interpretations of various provisions of the Bill contained in the House Report will be followed. In these circumstances, we cannot unqualifiedly recommend that S. 1160 be signed by the President, although this Agency believes that it could live with the Bill if it were construed in accordance with the House Report. We therefore trust that it is in order to suggest that the President, when signing the Bill, issue a statement emphasizing that the House Report reflects his understanding of the meaning to be attached to the law.

Sincerely yours,

William Feldesman

William Feldesman
Solicitor