THE FREEDOM OF INFORMATION ACT

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

H.R. 5425

TO AMEND SECTION 552 OF TITLE 5, UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT

AND

H.R. 4960

TO AMEND SECTION 552 OF TITLE 5 OF THE UNITED STATES CODE TO LIMIT EXEMPTIONS TO DISCLOSURE OF INFORMATION, TO ESTABLISH A FREEDOM OF INFORMATION COMMISSION, AND TO FURTHER AMEND THE FREEDOM OF INFORMATION ACT

MAY 2, 7, 8, 10, AND 16, 1973

Printed for the use of the Committee on Government Operations

Approved For Release 2000/09/14 : CIA-RDP75B00380R000600070001-2

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CONTENTS

APPENDIX

Approved For Release 2000/09/14 : CIA-RDP75B00380R000600070001-2

THE FREEDOM OF INFORMATION ACT

WEDNESDAY, MAY 2, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bill Alexander, Bella S. Abzug, James V. Stanton, John N. Erlenborn, Paul N. McCloskey, Jr., Gilbert Gude, Charles Thone, and Ralph S. Regula.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, professional staff member; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The subcommittee will come to order.

I might open these hearings with the words "once upon a time," for to some Members of Congress and to some members of the press it was the dim and distant past when representatives of both groups first got together to consider the status of the people's right to know the facts of government.

It was less than 18 years ago when this subcommittee held its first hearings. It was less than 7 years ago when Congress passed the Federal Government's first freedom of information law. That certainly is not a dim and distant past as time is measured by the calendar, but it seems a long time ago because there has been a great increase in the flow of Government information.

Nearly 200 court cases under the freedom of information law, and thousands of other cases when the law has been used to break down Government secrecy without going to court, have made the difference. But the difference between the high wall of secrecy 18 years ago and the lower wall today is not nearly enough of a difference.

In the first place, we are nowhere near the goal of a fully informed public in a democratic society which was the hope of those who started the freedom of information fight. In the second place, the freedom of information law did not become the weapon the free press needed to fight against secrecy. We may have fallen short of our goal of open government largely because the weapon was inadequate to accomplish the job we planned.

The press has made little use of the law that they had a large share in creating. Part of the blame must be shouldered by the press, itself.

A large share of the blame lies with the administrators of the freedom of information law. Not one executive branch agency, not one Government official testified in favor of the bill during the subcommittee's hearings prior to its passage in 1966.

And we in Congress must share the blame. The freedom of information law was the product of legislative compromise and, therefore, it is not the perfect instrument that the representatives of the free and responsible press sought.

That is why this subcommittee has called those representatives back again.

One of the questions we want to direct to you gentlemen is whether the need for public access to Government information is as pressing today as it was in 1955.

Our witnesses are a very distinguished panel:

J. R. Wiggins, former editor of the Washington Post; former president of the American Society of Newspaper Editors; a participant in this subcommittee's very first hearings in November 1955. He is now the publisher of the Ellsworth-American in Ellsworth, Maine, and he is highly regarded as an historian and an author.

Clark Mollenhoff also participated in the subcommittee's first hearings and, I sometimes think, almost every other hearing the subcommittee has held so far. He is by far the most outspoken opponent of government secrecy. He is now the head of the Des Moines Register-Tribune bureau in Washington. He has won almost every journalism prize available. He has written numerous books and has served in the White House early in the Nixon administration—long before Watergate.

Herbert Brucker first appeared before this subcommittee formally in March 1963, but his personal advice and his books and articles had long provided guidance. He was then editor of the Hartford Courant and president of the American Society of Newspaper Editors. He has been a journalism educator on the east and west coasts and has recently published another book on information and democracy.

Creed Black accompanied Herb Brucker in 1963, and he appeared before this subcommittee again in 1965, testifying on the freedom of information bill as a representative of the American Society of Newspaper Editors. He has been editor of a number of newspapers, served in the Department of Health, Education, and Welfare, and is now editor of the Philadelphia Inquirer.

Richard Smyser testified in March 1965, on the bill which became the freedom of information law. He was speaking for the Freedom of Information Committee of the Associated Press Managing Editors—and is now a vice president—and was then, as now, editor of the Oak Ridger, Oak Ridge, Tenn. He, too, has advised the subcommittee at other times, particularly on the problem of anonymous news sources.

Today, we will be discussing with these experts the broad problems of free information in a free society. The next 2 weeks we will be discussing the narrow details of legislation to help solve these broad problems.

[The bills, H.R. 5425 and H.R. 4960, follow:]

93D CONGRESS
1ST SESSION

H. R. 5425

IN THE HOUSE OF REPRESENTATIVES

MARCH 8, 1973

Mr. MOORHEAD of Pennsylvania (for himself, Ms. ABZUG, Mr. ALEXANDER, Mr. BADILLO, Mr. BURTON, Mr. CLAY, Mr. CONYERS, Mr. COTTER, Mr. DRINAN, Mr. ECKHARDT, Mr. EDWARDS of California, Mr. WILLIAM D. FORD, Mr. FRASER, Mr. FUQUA, Mr. GUDE, Mr. HARRINGTON, Mr. HECHLER of West Virginia, Mr. HOWARD, Mr. KOCH, Mr. LEGGETT, Mr. MCCLOSKEY, Mr. MOSS, Mr. OBEY, Mr. REES, and Mr. REID) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) The fourth sentence of section 552 (a) (2) of title 5, United States Code, is amended by striking out "and make available for public inspection and copying" and inserting in lieu thereof ", promptly publish, and distribute (by sale or otherwise) copies of".

(b) Section 552 (a) (3) of title 5, United States Code, is amended by striking out "on request for identifiable records made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedure to be followed," and inserting in lieu thereof the following: "upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedures to be followed,".

(c) Section 552 (a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(5) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor;

"(B) in the case of a determination not to comply with any such request, immediately notify the person making such request that such person has a period of twenty days (excepting Saturdays, Sundays, and legal public holidays), beginning on the date of receipt of

such notification, within which to appeal such determination to such agency; and

"(C) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal.

Any person making a request to an agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or subparagraph (C) of this paragraph. Upon any determination by an agency to comply with a request for records, such records shall be made available as soon as practicable to such person making such request."

(d) (1) The third sentence of section 552 (a) (3) of title 5, United States Code, is amended by inserting immediately after "the court shall determine the matter de novo" the following: "including by examination of the contents of any agency records in camera to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) and the burden is on the agency to sustain its action."

(2) Section 552 (a) (3) of title 5, United States Code, is amended by inserting the following new sentence immediately after the third sentence thereof: "In the case of any

agency records which the agency claims are within the purview of subsection (b) (1), such in camera investigation by the court shall be of the contents of such records in order to determine if such records, or any part thereof, cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States."

(e) Section 552 (a) (3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "Notwithstanding any other provision of law, the United States or an officer or agency thereof shall serve an answer to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed."

SEC. 2. (a) Section 552 (b) (2) of title 5, United States Code, is amended by inserting "internal personnel" immediately before "practices", and by inserting "and the disclosure of which would unduly impede the functioning of such agency" immediately before the semicolon at the end thereof.

(b) Section 552 (b) (4) of title 5, United States Code, is amended by inserting "obtained from a person which are privileged or confidential" immediately after "trade secrets",

and by striking out "and" the second time that it appears therein and by inserting in lieu thereof "which is".

(c) Section 552 (b) (6) of title 5, United States Code, is amended by striking out "files" both times that it appears therein and inserting in lieu thereof "records".

(d) Section 552 (b) (7) of title 5, United States Code, is amended to read as follows:

"(7) investigatory records compiled for any specific law enforcement purpose the disclosure of which is not in the public interest, except to the extent that—

"(A) any such investigatory records are available by law to a party other than an agency, or

"(B) any such investigatory records are—

"(i) scientific tests, reports, or data,

"(ii) inspection reports of any agency which relate to health, safety, environmental protection, or

"(iii) records which serve as a basis for any public policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency;".

SEC. 3. Section 552 (c) of title 5, United States Code, is amended to read as follows:

"(c) (1) This section does not authorize withholding

of information or limit the availability of records to the public, except as specifically stated in this section.

"(2) (A) Notwithstanding subsection (b), any agency shall furnish any information or records to Congress or any committee of Congress promptly upon written request to the head of such agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee, as the case may be.

"(B) For purposes of this paragraph, the term 'committee of Congress' means any committee of the Senate or House of Representatives or any subcommittee of any such committee or any joint committee of Congress or any subcommittee of any such joint committee."

SEC. 4. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Each agency shall, on or before March 1 of each calendar year, submit a report to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations of the Senate which shall include—

"(1) the number of requests for records made to such agency under subsection (a);

"(2) the number of determinations made by such

agency not to comply with any such request, and the reasons for each such determination;

"(3) the number of appeals made by persons under subsection (a) (5) (B);

"(4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;

"(5) the number of complaints made under subsection (a) (3);

"(6) a copy of any rule made by such agency regarding this section; and

"(7) such other information as will indicate efforts to administer fully this section;

during the preceding calendar year."

SEC. 5. The amendments made by this Act shall take effect on the ninetieth day after the date of enactment of this Act.

93D CONGRESS
1ST SESSION

H. R. 4960

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 28, 1973

Mr. HORTON (for himself, Mr. ERLENBORN, Mr. GUDE, Mr. HANRAHAN, Mr. MCCLOSKEY, Mr. MOORHEAD of Pennsylvania, Mr. PRITCHARD, Mr. REGULA, and Mr. THONE) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5 of the United States Code to limit exemptions to disclosure of information, to establish a Freedom of Information Commission, and to further amend the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—LIMITING FREEDOM OF INFORMATION ACT EXEMPTIONS

SEC. 101. Section 552(a) of title 5 of the United States Code (the Freedom of Information Act) is amended by adding at the end thereof the following new paragraph:

"(5) In any proceeding pending before a district court

of the United States under this section in which an agency has refused to furnish records to the complainant on the grounds that such records are exempted from being made available under subsection (b) of this section, the court shall examine in camera such records, including records classified under statute or Executive order, to determine if they are being improperly withheld. In carrying out its responsibilities herein, the court may require the assistance of the Freedom of Information Commission."

SEC. 102. Paragraph (3) of section 552 (a) of title 5, United States Code, is amended by adding immediately after the first sentence the following new sentence: "Where records containing both portions that are required to be made available under this subsection and portions that may be withheld under subsection (b), an agency shall make the required portions available unless (A) a serious distortion of meaning would result if the required portions were read separately from the exempt portions, or (B) the required portions are so inextricably intertwined with the exempt portions that disclosure of the required portions would seriously jeopardize the integrity of the exempt portions."

SEC. 103. The following paragraphs of section 552 (b) of title 5, United States Code, are amended to read as follows:

(a) "(4) trade secrets and commercial or financial

information which the agency has obtained from a person under a statute specifically conferring an express grant of confidentiality to the extent the agency receiving the information confers confidentiality under an express written pledge."

(b) "(5) interagency or intraagency memorandums or letters which contain recommendations, opinions, and advice supportive of policymaking processes."

(c) "(7) investigatory records complied for law enforcement purposes, but only to the extent that the production of such records would constitute (A) a genuine risk to enforcement proceedings, (B) a clearly unwarranted invasion of personal privacy, or (c) a threat to life."

TITLE II—FREEDOM OF INFORMATION COMMISSION

ESTABLISHMENT

SEC. 201. There is established a commission to be known as the Freedom of Information Commission (hereinafter referred to as the "Commission").

SEC. 202. The Commission shall be composed of seven members as follows:

(a) two appointed by the Speaker of the House of Representatives, both of whom shall not be of the same political party;

(b) two appointed by the President pro tempore of the Senate, both of whom shall not be of the same political party; and

(c) three appointed by the President, of whom not more than two shall be of the same political party.

A vacancy in the Commission shall be filled in the manner in which the original appointment was made.

SEC. 203. Of the members first appointed—

(a) one appointed by the Speaker of the House of Representatives, one appointed by the President pro tempore of the Senate, and one appointed by the President shall be appointed for a term of five years;

(b) one appointed by the Speaker of the House of Representatives, one appointed by the President pro tempore of the Senate, and one appointed by the President shall be appointed for a term of three years; and

(c) one appointed by the President shall be appointed for a term of one year.

SEC. 204. Successors to members first appointed shall be appointed for a term of five years, except that any individual appointed to fill a vacancy shall be appointed only for the unexpired term of his predecessors. No member may serve more than one term, but a member may serve until his successor has been appointed and qualified.

96-576 O - 73 -- 2

SEC. 205. No member of the Commission shall actively engage in any business, vocation, or employment other than that of serving as a member of the Commission.

SEC. 206. Four members of the Commission shall constitute a quorum.

SEC. 207. The Chairman and Vice Chairman of the Commission shall be elected from the membership by the members of the Commission for a term of two years.

SEC. 208. The Commission shall meet at the call of the Chairman or a majority of the members.

SEC. 209. Members of the Commission shall be responsible for maintaining the confidentiality of material in their custody, and all security procedures prescribed by law and Executive order shall be followed in the safeguarding of classified material.

SEC. 210. Section 5315 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(95) Members, Freedom of Information Commission."

SEC. 211. The Commission shall appoint an Executive Director who shall be hired by the Commission. Section 5316 of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(131) Executive Director, Freedom of Information Commission."

POWERS

SEC. 212. The Commission is authorized to—

(a) appoint such personnel as may be necessary subject to the provisions of title 5, United States Code, governing appointments in the competitive service, and shall be paid in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(b) prescribe such rules and regulations as may be necessary to effectuate the provisions of this title;

(c) hold hearings, administer oaths, take testimony, receive evidence, require persons to appear and to furnish information, and sit and act at such times and places as is deemed advisable, to the extent that such actions are relevant to its duties;

(d) employ experts and consultants in accordance with section 3109 of title 5, United States Code, and compensate individuals so employed for each day (including traveltime) at rates not in excess of the maximum rate of pay for grade GS–18 as provided in section 5332 of title 5, United States Code, and while such experts and consultants are so serving away from their homes or regular place of business, to pay such em-

ployees travel expenses and per diem in lieu of subsistence at rates authorized by section 5703 of title 5, United States Code, for persons in Government service employed intermittently;

(e) use the United States mails in the same manner and upon the same conditions as other agencies; and

(f) adopt an official seal which shall be judicially noticed.

SEC. 213. (a) The Commission shall have the power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation by the Commission. Such attendance of witnesses and the production of such evidence may be required from any place within the United States at any designated place of hearing within the United States.

(b) If a person issued a subpena under subsection (a) refuses to obey such subpena or is guilty of contumacy, any court of the United States within the judicial district within which the hearing is conducted or within the judicial district within which such person is found or resides or transacts business may (upon application by the Commission) order such person to appear before the Commission to produce evidence or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(c) The subpenas of the Commission shall be served in the manner provided for subpenas by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(d) All process of any court to which application may be made under this section may be served in the judicial district wherein the person required to be served resides or may be found.

SEC. 214. Upon request made by the Commission, each Federal agency is authorized and directed to allow access to and furnish to the Commission all information, documents (including those classified under law or Executive order), data, and statistics in the agency's possession which the Commission may determine to be necessary for the performance of its duties.

SEC. 215. The Commission shall transmit to the Congress and the President an annual report not later than March 30 of each year, covering the previous calendar year, and such other reports as it deems advisable regarding its activities and containing such recommendations for legislation or other governmental action as the Commission determines to be appropriate.

SEC. 216. The Commission shall make available for public inspection at reasonable times in its office a record of its proceedings and hearings, except that the Commission shall

(c) The subpenas of the Commission shall be served in the manner provided for subpenas by a United States district court under the Federal Rules of Civil Procedure for the United States district courts.

(d) All process of any court to which application may be made under this section may be served in the judicial district wherein the person required to be served resides or may be found.

SEC. 214. Upon request made by the Commission, each Federal agency is authorized and directed to allow access to and furnish to the Commission all information, documents (including those classified under law or Executive order), data, and statistics in the agency's possession which the Commission may determine to be necessary for the performance of its duties.

SEC. 215. The Commission shall transmit to the Congress and the President an annual report not later than March 30 of each year, covering the previous calendar year, and such other reports as it deems advisable regarding its activities and containing such recommendations for legislation or other governmental action as the Commission determines to be appropriate.

SEC. 216. The Commission shall make available for public inspection at reasonable times in its office a record of its proceedings and hearings, except that the Commission shall

Federal agency has its principal place of business, or the private party resides.

DUTIES

SEC. 219. The Commission shall initiate an investigation requested by a court of the United States, the Congress of the United States, a committee of the Congress, the Comptroller General of the United States, or a Federal agency concerning any allegation that information in the possession of a Federal agency is being improperly withheld under section 552 of title 5, United States Code.

SEC. 220. The Commission shall initiate, upon the vote of at least three of its members, an investigation requested by a private citizen concerning allegations that information is being improperly withheld by a Federal agency under section 552 of title 5, United States Code.

SEC. 221. The Commission shall act expeditiously in response to any request initiated under section 219 or 220 and shall report its findings within thirty days of receipt of a request, except in case of unusual circumstances where fairness and accuracy require a reasonable delay.

SEC. 222. A determination by the Commission that a Federal agency has improperly withheld records requested of it shall be prima facie evidence against such agency in any action or proceeding brought by any party against such agency under section 552 of title 5, United States Code, or

in enforcement of a subpena issued by Congress, a committee of Congress, the Comptroller General, or a Federal agency.

SEC. 223. For the purposes of this title, the term "Federal agency" means any agency, department, corporation, independent establishment, or other entity in the executive branch.

SEC. 224. There are authorized to be appropriated such sums as are necessary to carry out the provisions of this title.

SEC. 225. The Commission shall commence operations sixty days after enactment of this title.

TITLE III—IMPROVING THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

SEC. 301. The phrase "has jurisdiction to enjoin" in the second sentence of section 552 (a) (3) of title 5, United States Code, is amended to read "shall enjoin".

SEC. 302. Section 552 (a) (3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "The court shall award reasonable attorneys' fees and court costs to the complainant if it issues any such injunction or order against the agency."

SEC. 303. Section 552 (a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(6) (A) Each agency, upon a request for records made under paragraph (1), (2), or (3) of this subsection, shall either comply with or deny the request within ten days (excepting Saturdays, Sundays, and legal public holidays) of its request unless additional time is required for one of the following reasons:

"(i) the requested records are stored in whole or part at other locations than the office having charge of the records requested;

"(ii) the request requires the collection of a substantial number of specified records;

"(iii) the request is couched in categorical terms and requires an extensive search for the records responsive to it;

"(iv) the requested records have not been located in the course of a routine search and additional efforts are being made to locate them; and

"(v) the requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: (I) exempt from disclosure under the Freedom of Information Act, and (II) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

"(B) When additional time is required for one of the

above reasons, the agency should acknowledge the request in writing within the ten-day period and should include a brief notation of the reason for the delay and an indication of the date on which the records would be made available or a denial would be forthcoming.

"(C) An extended deadline adopted for one of the reasons set forth above shall not exceed an additional twenty days (excepting Saturdays, Sundays, and legal public holidays) beyond the original ten-day period, except that in cases involving novel or complicated issues, the head of the agency personally may authorize an extended period of delay not exceeding thirty days upon informing the party requesting the records in writing the reasons for the additional delay and the date upon which a response shall be forthcoming.

"(D) If an agency does not dispose of a request within the ten-day period, or within an extended deadline period as authorized above, the requesting party may petition the officer handling appeals from denials of records for action on the request without additional delay.

"(E) Final action of an appeal shall be taken within twenty days (excepting Saturdays, Sundays, and public legal holidays) from the date of filing the appeal, except that in cases involving novel or complicated issues, the head of an agency personally may authorize an extended period of delay not exceeding thirty days upon informing the party request-

ing the records in writing the reason for the delay and the date upon which the appeal will be decided.

"(F) Denials of initial requests and appeals shall be in writing and shall set forth the exemption relied upon, how it applies to the records withheld, and the reasons for asserting it.

"(G) Any person making a request to an agency for records under paragraphs (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such a request if the agency fails to comply with subparagraphs (A), (B), (C), (E), or (F) of this paragraph.

"(H) Upon any determination by an agency to comply with a request for records, such records shall be made available as soon as practicable to the person making the request."

SEC. 304. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(d) Each agency shall, on or before March 1 of each year, submit a report covering the preceding calendar year to the Committee on Government Operations of the House of Representatives and the Committee on the Judiciary of the Senate which shall include—

"(1) the number of requests for records made to such agency under subsection (a);

"(2) the number of determinations made by such agency not to comply with any such request, and the reasons for each such determination;

"(3) the number of appeals made by persons under subsection (a) (6) (D);

"(4) the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal;

"(5) the number of complaints made under subsection (a) (3);

"(6) a copy of any rule or regulation made by such agency regarding this section; and

"(7) the total amount of fees, the average fee, and the maximum and minimum fees collected for making records available under this section."

Mr. MOORHEAD. I have asked President Nixon to designate an administration spokesman to help us work out those details, for he has expressed his personal commitment to "the principle of a fully informed public in our open and democratic society." In a letter to the American Society of Newspaper Editors, just before the 1972 election, President Nixon commented on the "many constructive recommendations" which came out of the subcommittee's hearings on the freedom of information law. And he offered support of legislative revisions to improve the administration of the law.

This is the spirit of nonpartisan cooperation which has motivated the members of this subcommitteee over the years and which has motivated so many members of the press whose professional life is a commitment to public knowledge. In this spirit we can solve the legislative and administrative problems which have made the freedom of information law a less useful weapon for the free press than had been hoped. And with these improvements, I am confident that the editors and reporters can solve their own problems of how to use the sharpened weapon.

That is not my complete statement; you will have trouble believing that. But, without objection, I would like to have the full statement made a part of the record.

Mr. Thone, if you or Mr. Copenhaver, have any opening statement to submit, we would be pleased to receive it.

Mr. THONE. I just want to acknowledge the fact that Congressman Erlenborn is marking up the minimum wage legislation so he will not be here for the entire hearing this morning; but he will try to stop by.

Mr. MOORHEAD. I understand that he has an opening statement, which, without objection, will be made a part of the record at this point, along with other material relative to the hearings.

[The material follows:]

PREPARED STATEMENT OF HON. WILLIAM S. MOORHEAD, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND CHAIRMAN, FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE

I might open these hearings with the words "once upon a time", for to some Members of Congress and to some members of the press it was the dim and distant past when representatives of both groups first got together to consider the status of the people's right to know the facts of government.

It was less than 18 years ago when this subcommittee held its first hearings. It was less than seven years ago when Congress passed the Federal Government's first Freedom of Information Law. That certainly is not the dim and distant past as time is measured by the calendar, but it seems a long time ago because there has been a great increase in the flow of government information.

Nearly 200 court cases under the Freedom of Information Law, and thousands of other cases when the law has been used to break down government secrecy without going to court, have made the difference. But the difference between the high wall of secrecy 18 years ago and the lower wall today is not nearly enough of a difference.

In the first place, we are nowhere near the goal of a fully-informed public in a democratic society which was the hope of those who started the freedom of information fight. In the second place, the Freedom of Information Law did not become the weapon the free press needed to fight against secrecy. We may have fallen short of our goal of open government largely because the weapons was inadequate to accomplish the job we planned.

That is what the Foreign Operations and Government Information Subcommittee discovered after 41 days of hearings with 141 witnesses last Congress, discussing the administration of the Freedom of Information Law. We found that

bureaucratic foot dragging—five years of it in Democratic and Republican administrations—made the law a dull weapon in the hands of reporters and editors.

The press has made little use of the law that they had a large share in creating. Part of the blame must be shouldered by the press, itself. Too few reporters and editors know how to use the Freedom of Information Law and the agency regulations implementing it; too many are slaves to the pressures of tomorrow's deadlines and will not take the time to use the law to force open government secrets.

A large share of the blame lies with the administrators of the Freedom of Information Law. Not one Executive Branch agency, not one government official testified in favor of the bill during the Subcommittee's hearings prior to its passage in 1966. When it was passed over their opposition, they reluctantly administered the letter and ignored the spirit of the law.

And we in Congress must share the blame. The Freedom of Information Law was the product of legislative compromise and, therefore, it is not the perfect instrument that the representatives of the free and responsible press sought. That is why this subcommittee has called those representatives back again.

We want your advice on the current status of the people's right to know. We want your advice on the amendments to the Freedom of Information Law which we have developed to make it a better weapon for the press to use in the fight for the people's right to know.

In the letter inviting you to participate in an informal discussion with the Subcommittee, I asked to consider—

—Whether the need for public access to government information is as pressing today as it was in 1955;

—Whether there is easier access to government information today, and

—What Congress might do to increase the flow of information.

The men we have asked to discuss these questions with the Subcommittee certainly are highly qualified by virtue of their past—and their present—commitment to the people's right to know. They are:

J. R. Wiggins, former editor of the *Washington Post*; former president of the American Society of Newspaper Editors; a participant in this subcommittee's very first hearings in November, 1955. He is now the publisher of the *Ellsworth-American* in Ellsworth, Maine, and he is highly regarded as an historian and an author.

Clark Mollenhoff also participated in the Subcommittee's first hearings and, I sometimes think, almost every other hearing the Subcommittee has had, for he is by far the most outspoken opponent of government secrecy. He is now the head of the *Des Moines Register-Tribune* bureau in Washington. He has won almost every journalism prize available. He has written numerous books and has served in the White House early in the Nixon Administration—long before Watergate.

Herbert Brucker first appeared before this subcommittee formally in March, 1963, but his personal advice and his books and articles had long provided guidance. He was then editor of the *Hartford Courant* and president of the American Society of Newspaper Editors. He has been a journalism educator on the East and West Coasts and has recently published another book on information and democracy.

Creed Black accompanied Herb Brucker in 1963, and he appeared before this subcommittee again in 1965, testifying on the Freedom of Information bill as a representative of the American Society of Newspaper Editors. He has been editor of a number of newspapers, served in the Department of Health, Education, and Welfare, and is now editor of the *Philadelphia Inquirer*.

Richard Smyser testified in March, 1965, on the bill which became the Freedom of Informaton Law. He was speaking for the Freedom of Information Committee of the Associated Press Managing Editors (and is now a Vice President) and was then—as now—editor of *The Oak Ridger*, Oak Ridge, Tennessee. He, too, has advised the Subcommittee at other times, particularly on the problem of anonymous news sources.

Today, we will be discussing with these experts the broad problems of free information in a free society. The next two weeks we will be discussing the narrow details of legislation to help solve those broad problems.

I have asked President Nixon to designate an administration spokesman to help us work out those details, for he has expressed his personal commitment

to "the principle of a fully informed public in our open and democratic society." In a letter to the American Society of Newspaper Editors just before the 1972 election, President Nixon commented on the "many constructive recommendations" which came out of this subcommittee's hearings on the Freedom of Information Law. And he offered support of legislative revisions to improve the administration of the law.

This is the spirit of non-partisan cooperation which has motivated the Members of this subcommittee over the years, and which has motivated so many members of the press whose professional life is a commitment to public knowledge. In this spirit we can solve the legislative and administrative problems which have made the Freedom of Information Law a less useful weapon for the free press than had been hoped. And with these improvements, I am confident that the editors and reporters can solve their own problems of how to use the sharpened weapon.

PREPARED STATEMENT OF HON. JOHN N. ERLENBORN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. Chairman, the initiation of hearings today to amend the Freedom of Information Act complements the hearings recently held on Executive Privilege and the forthcoming report on security classification.

The subject of all three is information and information—if current, accurate and pertinent—is that which keeps government honest, alert and responsive to the need of the people.

All governments, under all administrations, are inclined toward making available information favorable to them and withholding information of an embarrassing nature. These hearings—and the legislation considered herein—must not be looked upon in a partisan manner or as an attack upon the incumbent officials. The fact is that the reluctance to make information public appears to have increased as the size of government has increased. This, of course, compounds the problem of Members of Congress and the private citizen because their need to know increases as the complexity of government and society increases.

To check and reverse this dangerous trend, I have drafted legislation (cosponsored by many other Members) to restrict the Executive Branch's use of Executive Privilege thereby enhancing Congress' right to know. This has already been the subject of hearings. The subcommittee will soon consider a report calling for legislation restricting the amount of information that can be classified. That subject must be fully explored in the future. Today, we begin hearings on legislation co-authored by Congressman Horton and me (together with many other Members) to expand the public's right to receive information by amending the Freedom of Information Act.

The FOI Act was signed into law about 7 years ago. Almost revolutionary in form, it established a charter of informational freedom in behalf of the public by providing that the duty lies with the Government to make information available to the public unless it falls into certain limited categories of exemption. Failure to comply makes an agency subject to judicial process.

While limitations upon freedom must always be questioned, the exemptions to the FOI Act were necessary to safeguard essential government secrets, investigations and internal processes while protecting personal privacy and trade secrets.

During the 92nd Congress, this subcommittee conducted lengthy oversight hearings of the Act. While some may disagree with me, I believe those hearings revealed that compliance with the Act was far more successful than many would have predicted at the time of its enactment. We must keep in perspective that this legislation attempted at one blow to reverse a bureaucratic state of being. The large amount of information freed compared to the relatively limited number of complaints lodged against the Act's wrongful administration shows generally a favorable balance.

Yet, mistakes and errors have been committed. In particular, the hearings disclosed that certain of the exemptions were too broad or provided too great a leeway for misinterpretation. Also, many agencies administered provisions of the Act in too negative and restrictive a manner. Other defects included: agencies' failure to recognize their burden of proof if information is withheld, delays in responding to requests, charging excessive fees, and failure to establish clear channels of authority for administering the law.

Out of the hearings grew the recognized need, therefore, to amend the Act to correct those deficiencies which cannot reasonably be adjusted by remedial reform put into effect by the agencies themselves. H.R. 4960—co-authored by Congressman Horton and me—is designed to provide these corrections. Legislation proposed by Chairman Moorhead would accomplish many of the same purposes.

The first major provision of H.R. 4960 is designed to overturn the Supreme Court decision earlier this year in *EPA* v. *Mink* wherein the court held, in effect, that a lower court may not question a Federal agency's security classification of information and is not required to question an agency's withholding of information relating to alleged internal procedures.

The decision in this case should not stand. In the instance of security classification, as developed in hearings last year, an extremely large amount of information classified by the Government does not deserve to be classified and can be made public without harm to national security. To overcome this defect, H.R. 4960 directs the courts when deciding whether requested information should be made public to examine the information, including classified data, and to order such information to be made public which is being improperly withheld.

Regarding the other category of information dealt with by the *Mink* decision—internal proceedings—H.R. 4960 amends exemption 5 of the FOI Act in order that only internal memos and letters may be withheld from the public if they contain recommendations, opinions or advice supportive of policymaking processes. The main purpose for maintaining internal communications in confidence is to protect the policymaking processes by assuring that individuals may render opinions, advice or recommendations without fear of being embarrassed or questioned hostilely elsewhere. This I seek to safeguard in the legislation. Nothing else do I believe should be so exempted, whereas, under existing law, this exemption is widely misused by agencies in withholding requested information.

Coupled with the above provisions in the proposed legislation is authority for the courts to make available those parts of a document—classified, internal communications, or otherwise—which do not meet the exemption requirements. This is designed to overcome a practice by some agencies to comingle information in order to bring all of it under the umbrella of an exemption.

H.R. 4960 amends two other major exemptions of the FOI Act in an effort to close loopholes made apparent in the subcommittee's hearings last year.

One amends exemption 4 on trade secrets so that only those documents containing alleged trade secrets may be withheld which are authorized to be held confidential by another statute and which the agency has received under an express grant of confidentiality. This amendment serves two purposes. First, it does not turn the FOI Act into a vehicle for conferring a trade secret exemption, as the present language of that statute has been interpreted to do in some cases. Second, it makes certain that an agency does not thoughtlessly or inadvertently confer a trade secret exemption merely through the receipt of information. Instead, such may only come about through a positive grant of trade secret status.

The other involves an amendment to exemption 7, relating to investigatory records compiled for law enforcement purposes. Under the existing FOI Act, this exemption has been given an unduly broad interpretation, exempting records from the public even though a particular investigation is no longer active or the release of information relating thereto could in no way constitute a threat to the investigation. H.R. 4960 seeks to narrow this exemption so that only those records will be exempted which, if made public, would constitute a genuine risk to enforcement proceedings, a clearly unwarranted invasion of personal privacy, or a threat to life.

An additional provision of importance in H.R. 4960 prescribes limited time periods in which an agency must respond to a request by an individual for information. Generally, a request must be responded to within 10 days. Only in five specific situations—spelled out in the bill—may an additional 20 days be allowed, except where novel or complicated issues are involved when an additional 30 days are allowed. Appeals within an agency also must be resolved within 20 days except in novel or complicated cases when an additional 30 days are allowed.

I recognize that a case can be made for more stringent time requirements. Yet, I believe that too great stringency may be unreasonable and even self-defeating in those instances when an agency has difficulty locating the information or in gathering it together. A little more leeway, I submit, may in the long run provide greater amounts of information more expeditiously.

Enactment of legislation has little meaning, frequently, if the means does not exist to enforce it effectively. Such has been the case under the FOI Act because the need to enforce the Act's provisions in court has frequently proven too confusing, costly and time-consuming. In addition, especially in the area of classified information but also in the areas of trade secrets, investigatory files, and internal communications, I suspect courts may be reluctant or at a disadvantage in deciding issues on their merits because they lack expertise of the subject matter.

To overcome this, H.R. 4960 creates a 7-member Freedom of Information Commission which, upon request of a court, Congress, the General Accounting Office, or a member of the public (if 3 members of the Commission concur), is authorized and directed to investigate whether an agency has improperly refused to make information available. The Commission is not itself authorized to order information made available. Only a court may do that as in the case under existing law. But, the bill makes a Commission finding *prima facie* evidence—meaning that the Government must assume the burden of proof that the withholding was legal.

From the court's standpoint, creation of the Commission will provide a source for reviewing large amounts of information of a technical nature, thereby relieving the court of this burden. From the standpoint of Congress, the public and the GAO, a Commission of this type can save large amounts of money and time. The Commission must act expeditiously and with a minimum of procedural redtape. This means that the requesting party and a government agency will get a fast, unbiased decision on the status of information under the FOI Act.

While the Commission lacks authority to order information to be made available, knowledge by an agency that an adverse finding will be treated as *prima facie* evidence against it by a court should generally tilt the scales toward making the information public. Equally compelling may be the fact that H.R. 4960 authorizes a court to confer attorney's fees and court costs in favor of a requesting party if information has been improperly withheld, while the Commission is authorized to levy against an agency costs and attorneys fees for improperly withholding information at the agency level.

In closing, may I express my pleasure at your early scheduling of these hearings, Mr. Chairman. This is clearly a bipartisan matter, as Members of all persuasion have joined in co-sponsoring our respective bills. In that spirit, I know we can choose what is best in your bill, what is best in my bill, and together we can report out legislation which will greatly benefit the public's need for a freer flow of information.

BILLS IDENTICAL TO H.R. 5425 AND THEIR COSPONSORS

H.R. 5426—Mr. Reuss, Mr. Rosenthal, Mr. Roybal, Mr. Thompson of New Jersey, Mr. Thone.

H.R. 5873—Mr. Matsunaga.

H.R. 6261—Mrs. Mink, Mr. Adams, Mr. Bingham, Mr. Brademas, Mr. Brown of California, Mrs. Chisholm, Mr. Dellums, Mr. Green of Pennsylvania, Mr. Hawkins, Ms. Holtzman, Mr. Mazzoli, Mr. Seiberling, Mr. Stokes, Mr. Van Deerlin.

H.R. 6792—Mrs. Burke of California, Mr. Rangel, Mrs. Schroeder.

BILLS IDENTICAL TO H.R. 4960 AND THEIR COSPONSORS

H.R. 7472—Mr. Anderson of Illinois, Mr. Fascell, Mr. Fauntroy, Mr. Hansen of Idaho, Mr. Heinz, Mr. Parris, Mr. Riegle, Mr. Rooney of Pennsylvania, Mr. Ruppe, Mr. Thompson of New Jersey.

H.R. 7709—Mr. Cohen, Mr. Coughlin, Mr. Esch, Mr. Mallary, Mr. Mitchell of Maryland, Mr. Owens, Mr. Price of Illinois, Mr. Stark.

H.R. 8085—Mr. Cleveland.

H.R. 8399—Mr. Rinaldo.

96-576—73——3

[From the Congressional Record of March 8, 1973]

MOORHEAD INTRODUCES LEGISLATION TO STRENGTHEN THE FREEDOM OF INFORMATION ACT (5 U.S.C. 552)

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Pennsylvania (Mr. MOORHEAD) is recognized for 5 minutes.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I am today introducing a bill, the "Freedom of Information Amendments of 1973." It is cosponsored by many of our House colleagues on both sides of the aisle, and is also being introduced today in the other body by the distinguished Senator from Maine (Mr. MUSKIE), also with bipartisan cosponsorship.

The bill contains a series of amendments to the Freedom of Information Act (5 U.S.C. 552) designed to strengthen the operation of the act, to broaden the public's right to know, and to plug loopholes which secrecy-minded bureaucrats have found in the present law. The measure is based upon weeks of hearings last year by the Foreign Operations and Government Information Subcommittee and on the unanimous report adopted last September by the House Government Operations Committee entitled "Administration of the Freedom of Information Act"—House Report 92–1419.

Mr. Speaker, the legislative history of the act, which became effective on July 4, 1967, clearly sets forth the rights of all Americans to know what the Federal Government is doing in their name—subject only to nine specific exemptions. The law was the result of some 11 years of investigations, studies, and hearings by our subcommittee under the dedicated leadership of the gentleman from California (Mr. Moss), who presently serves as ranking Democratic member on our subcommittee. But our investigations and hearings last year on the operation of the act during the past 5 years showed that in too many instances the Federal bureaucracy has been able to stall, distort, and otherwise thwart efforts of many citizens to obtain information or documents to which they are clearly entitled under the Freedom of Information Act.

Our unanimous report recommended a number of administrative reforms by Federal agencies to attack some of the deficiencies in the administration of the act. Our follow-up efforts to implement these recommendations have resulted in pledges from virtually all of the Federal agencies that they will implement our administrative reform proposals. In this connection, I placed into the RECORD last month the text of the new Department of Justice regulations which incorporate most of these recommendations. I urge other Federal agencies to follow the leadership of the Justice Department. RECORD, February 20, 1973, page E894–7. However, we concluded that many of the barriers to the free flow of information that Congress intended to remove when it passed the Freedom of Information Act in 1966 can only be overcome by legislation that will clarify, strengthen, and improve existing language in the act. That is what the bill introduced today seeks to accomplish.

Mr. Speaker, because of the wide interest in the proposed amendments to the act, I will describe each of them briefly:

AMENDMENTS TO SECTION 552(A)

Agencies would be required to "publish and distribute" their opinions made in the adjudication of cases, policy statements and interpretations adopted, and administrative staff manuals and instructions to staff that affect the public, rather than merely making them "available for public inspection and copying," as provided in the present law.

Agencies would be required to respond to requests for records which "reasonably describes such records." This language is substituted for the term "identifiable records," which we discovered was used by the bureaucracy in many cases to avoid making information available.

Agencies would be required to respond to requests under the act within 10 days—excepting Saturdays, Sundays, and legal public holidays—after receipt of the request and within 20 days—with the same exceptions—on administrative appeals following denials to the requesting party. These time periods are the result of a 1971 study and recommendations on improving the operation of the act as adopted by the Administrative Conference of the United States and would provide a positive mechanism to correct one of the most glaring deficiencies uncovered during our hearings—that of agency stalling and foot-dragging tactics to avoid public disclosure.

The Government could be required by the courts to pay "reasonable attorney es and other litigation costs" of citizens who successfully litigate cases under ıe act. This amendment is directed toward another major deficiency of the resent law revealed during our hearings—the high costs to the average citizen /hen attempts to obtain records under provisions of the act are frustrated y arbitrary or capricious acts of the bureaucracy or by foot-dragging tactics. iuch assessment would be at the option of the court and has been successfully ısed in numerous civil rights cases in past years.

Agencies would be required to file answers and other responsive motions to itizens' suits under the act within 20 days after receipt. Under normal rules f Federal civil procedure, the Government is given 60 days to file such sponses, although the private citizen has only 20 days to respond to Govern- ent motions; this amendment would plug a major loophole used by the Govern- ent and revealed in our hearings, involving cases where repeated filing of elaying motions by the Government stalled court consideration of Freedom f Information Act cases for as long as 140 days. Such stalling tactics make mockery of the law and often make the information, if finally made available the citizen, virtually useless to him.

New provisions proposed to section 552(a) would clarify the original intent f Congress in connection with the interpretation of the "de novo" requirements laced on the courts in their consideration of cases under the act. Such amend- ıent is made necessary by the Supreme Court's decision in the case of *Mink . EPA*, (410 U.S. —) decided on January 22, 1973, when the Court held that udges may not examine in camera documents in dispute where the Govern- ıent claims secrecy by virtue of exemption 552(b)(1), dealing with the national efense or foreign policy, and are not required to exercise such in camera judg- ıent in cases involving exemption 552(b)(5), dealing with interagency or ntraagency memorandums. The amendments make it clear that Congress ntended and still intends that "de novo" as used in the law means that since he burden of proof for withholding is on the Government, courts must examine ıgency records in camera to determine if such records as requested by the plaintiff in a suit under the act, or any part thereof, should be withheld under any of the nine permissive exemptions of 552(b). It also makes it clear in cases where exemption 552(b)(1) is claimed by the agency, the Court must examine such classified records to see if they are a proper exercise of such Executive rder classification authority and that disclosure of the information requested vould actually be "harmful to the national defense or foreign policy of the Jnited States."

AMENDMENTS TO SECTION 552(B)

Permissive exemption (b)(2) would be amended to require disclosure of nformation about an agency's internal personnel rules and internal personnel practices, so long as such disclosure would not "unduly impede the functioning of such agency."

Permissive exemption (b)(4) would be amended to modify the exemption for trade secrets by requiring that such types of information be truly privi- leged and confidential, as is already provided in the case of commercial or financial information under this exemption.

Permissive exemption (b)(6) would be amended to limit its application to medical and personnel "records," instead of "files" as in the present law; this would close another loophole in the act whereby releasable information is often commingled with other types of information in a single "file," and therefore withheld.

Permissive exemption (b)(7) would also be amended to substitute the word "records" for "files" as in (b)(6), for the same reason—to curb agency com- mingling of information to avoid public disclosure. The amendment would also narrow the exemption to require that such records be compiled for a "specific law enforcement purpose, the disclosure of which is not in the public interest." It also enumerates certain categories of information that cannot be withheld under this exemption such as scientific tests, reports, or data, inspection reports relating to health, safety, or environmental protection or records serving as a basis for a public policy statement of an agency, officer, or employee of the United States, or which serve as a basis for rulemaking by an agency.

AMENDMENT TO SECTION 552(C)

The amendment proposed to section (c) clarifies the position that Congre upon written request to an agency, be furnished all information or records i the Executive that is necessary for Congress to carry out its functions. Langua in the present law merely states that the Freedom of Information Act does n authorize "withholding of information from Congress."

NEW SECTION 552(D)

Establishes a mechanism for congressional oversight by requiring annu reports from each agency on their record of administration of the act, requiri certain types of statistical data, changes in their regulations, and similar ty of information.

Finally Mr. Speaker, the bill provides that these amendments shall take eff 90 days after enactment so as to provide adequate time for the executive agenci to promulgate necessary changes in their regulations and operational guidelin

Mr. Speaker, the Freedom of Information Act has always enjoyed broad bip tisan support. Our subcommittee has been forthright in criticizing bureaucra secrecy during the past four administrations—two Republican and two Dem ocratic—when it has infringed on the right of the American people to know wh their Government is doing in their name.

Our hearings on the administration of the act last year produced much distu ing evidence that the vast Federal bureaucracy is withholding great amounts information from the American people by a variety of loopholes in the prese law and other devices. Contrary to general opinion, much of the information bei hidden by Government agencies has little to do with hydrogen bombs, weapo systems, state secrets, or other sensitive types of classified data that require safeguarding. We found that a large number of government denials of inform tion requested under the act involved matters connected with the day-to-da activities of Federal agencies in their handling of various domestic program financed out of our tax dollars or to avoid embarrassing bureaucratic mistakes scandal, maladministration, or other actions directly contrary to the intent o Congress and the public interest.

Our bill will help reverse the dangerous trend toward "Government behin closed doors" that threatens our free press, our free society, and the efficien operation of hundreds of important programs enacted and funded by Congres It will help restore the confidence of the American people in their Governmen and its elected leadership by removing the veil of unnecessary secrecy tha shrouds vast amounts of Government policy and action.

We must eliminate to the maximum extent possible Government's preoccupa tion with secrecy and closed door policy formulation, because it cripples th degree of participation of our citizens in governmental affairs that is so essentia under our political system. Government secrecy is the enemy of democracy. Secrecy subverts, and will eventually destroy, any representative system—jus as it is necessary to maintain a totalitarian dictatorship.

The enactment of legislation in this Congress to strengthen the Freedom o Information Act to make it more difficult for the Federal bureaucrat to withhold vital information from the Congress and the public is of paramount importance.

The bipartisan nature of this effort is shown by the fact that members of both parties in both the House and the Senate are cosponsoring this bill. Bipartisan work has been responsible for the investigations, hearings, and the unanimous Government Operations Committee report issued last year. Last week, the gentleman from New York (Mr. HORTON), ranking minority member of the full committee, and the gentleman from Illinois (Mr. ERLENBORN), ranking minority member of our subcommittee, introduced H.R. 4960, a separate bill to strengthen the Freedom of Information Act. I was most pleased to cosponsor their bill also to demonstrate the truly bipartisan approach that our committee follows in this area. Both have been diligent over the years in fulfilling their commitment to the principles of the act.

Mr. Speaker, hearings will be scheduled on these bills to make needed amendments to the act following the Easter congressional recess. I invite other Members who share our concern for strengthening the Freedom of Information Act to join as cosponsors or to testify during our hearings. I am confident that our committee will succeed in reporting a workable and meaningful bipartisan bill to the House that all Members can enthusiastically support.

* * * * * * *

PUBLIC LAW 90-23, 90TH CONGRESS, H.R. 5357, JUNE 5, 1967

AN ACT

o amend section 552 of title 5, United States Code, to codify the provisions of Public Law 80-487

Be it enacted by the Senate and House Representatives of the United States f America in Congress assembled, That section 552 of title 5, United States Code, amended to read:

§ 552. Public information; agency rules, orders, records, and proceedings

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal egister for the guidance of the public—

"(A) descriptions of its central and field organization and the established aces at which, the employees (and in the case of a uniformed service, the mem- rs) from whom, and the methods whereby, the public may obtain informa- on, make submittals or requests, or obtain decisions;

"(B) statements of the general course and method by which its functions are anneled and determined, including the nature and requirements of all formal id informal procedures available;

"(C) rules of procedure, descriptions of forms available or the places at hich forms may be obtained, and instructions as to the scope and contents of all apers, reports, or examinations;

"(D) substantive rules of general applicability adopted as authorized by law, nd statements of general policy or interpretations of general applicability ormulated and adopted by the agency; and

"(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms hereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions, including concurring and dissenting opinions as well as orders, made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by any agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof.

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin

the agency from withholding agency records and to order the production any agency records improperly withheld from the complainant. In such a case th court shall determine the matter de novo and the burden is on the agency to su tain its action. In the event of noncompliance with the order of the court, th district court may punish for contempt the responsible employee, and in th case of a uniformed service, the responsible member. Except as to causes th court considers of greater importance, proceedings before the district court, a authorized by this paragraph, take precedence on the docket over all other cause and shall be assigned for hearing and trial at the earliest practicable date an expedited in every way.

"(4) Each agency having more than one member shall maintain and mak available for public inspection a record of the final votes of each member in ever agency proceeding.

"(b) This section does not apply to matters that are—

"(1) specifically required by Executive order to be kept secret in the interes of national defense or foreign policy;

"(2) related solely to the internal personnel rules and practices of an agenc

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not b available by law to a party other than an agency in litigation with the agency

"(6) personnel and medical files and similar files the disclosure of which woul constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory files compiled for law enforcement purposes except to th extent available by law to a party other than an agency;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regula tion or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells.

"(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

SEC. 2. The analysis of chapter 5 of title 5, United States Code, is amended by striking out:

"552. Publication of information, rules, opinions, orders, and public records."

and inserting in place thereof:

"552. Public information; agency rules, opinions, orders, records, and proceedings."

SEC. 3. The Act of July 4, 1966 (Public Law 89-487, 80 Stat. 250), is repealed.

SEC. 4. This Act shall be effective July 4, 1967, or on the date of enactment, whichever is later.

Approved June 5, 1967.

LEGISLATIVE HISTORY

House Report No. 125 (Comm. on the Judiciary).
Senate Report No. 248 (Comm. on the Judiciary).
Congressional Record, Vol. 113 (1967):
Apr. 3: Considered and passed House.
May 19: Considered and passed Senate, amended.
May 25: House agreed to Senate amendments.

[From the Congressional Record of April 30, 1973]

HEARINGS ANNOUNCED BY FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE ON LEGISLATION TO STRENGHTEN THE FREEDOM OF INFORMATION ACT

(Mr. MOORHEAD of Pennsylvania asked and was given permission to extend his remarks at this point in the RECORD and to include extraneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I call to the attention of our colleagues the scheduling of hearings by the Foreign Operations and Government Information Subcommittee on bills to strengthen the Freedom of Information

Act of (5 U.S.C. 552). These measures—H.R. 5425 and H.R. 4960—are sponsored by myself and the gentleman from New York (Mr. HORTON) and are cosponsored by several score of our colleagues in the House. They are designed to improve the administration of the act and to plug numerous loopholes discovered during the subcommittee's investigative hearings last year and discussed in detail in the unanimous Government Operations Committee report based on these hearings. (H. Rept. 92–1419).

The legislative hearings will begin on Wednesday, May 2, at 10 a.m. in room 2154, Rayburn House Office Building, and will continue through Thursday, May 16. The first day of hearings will consist of a panel of distinguished members of the news media, all of whom testified many years ago at hearings of the subcommittee on freedom of information matters when the gentleman from California (Mr. Moss) was its chairman. They include:

Mr. J. R. Wiggins, former editor of the Washington Post and former president of the American Society of Newspaper Editors. He is presently publisher of the Ellsworth American, Ellsworth, Maine;

Mr. Clark Mollenhoff, Washington Bureau Chief of the Des Moines Register-Tribune and former special assistant to President Nixon until 1970;

Mr. Herbert Brucker, former editor of the Hartford Courant and a former president of the American Society of Newspaper Editors;

Mr. Creed Black, now editor of the Philadelphia Inquirer, who most recently served as HEW's Assistant Secretary for Legislation; and

Mr. Richard Smyser, editor of the Oak Ridger, Oak Ridge, Tenn. and a vice president of the Associated Press Managing Editors.

Members of Congress will be heard on Monday, May 7, beginning at 10 a.m. in room 2203, Rayburn House Office Building. Those wishing to testify should contact the subcommittee office—Extension 5-3741 by Thursday, May 3. The hearing record will be open for statements until Friday, May 25.

Witnesses from the Justice and Defense Departments and from the Administrative Conference of the United States will be heard on Tuesday, May 8, beginning at 10 a.m. in room 2154, Rayburn House Office Building.

Outside organizations and individual witnesses will be heard on Thursday, May 10, beginning at 10 a.m. in room 2154, and on Wednesday, May 16, beginning at 10 a.m., Rayburn House Office Building, in room 2247, Rayburn House Office Building.

Mr. Speaker, the subcommittee began its inquiries into the "people's right to know" back in 1955. Eleven years later, Congress enacted the Nation's first Freedom of Information Act (5 U.S.C. 552), which was intended to provide the widest possible citizen access to information and records of the Federal Government—subject only to nine limited areas of exemption that could be claimed by Government officials in denying requested information.

Since the law took effect on July 4, 1967, there have been nearly 200 freedom of information court cases and many thousands of other cases when the law has been successfully used to obtain information or records from Federal agencies without going to court. But vast numbers of examples of unnecessary Government secrecy still remain entrenched within the Federal bureaucracy. Thus, we are nowhere near the goal of a fully-informed public in a democratic society which was the hope of those who launched the freedom of information fight almost two decades ago.

Moreover, the law did not become the weapon the free press needed to fight against Government secrecy. We may have fallen short of our goal of open Government largely because the statutory weapon was inadequate to do the job. One of the major conclusions reached after some 41 days of the subcommittee's investigative hearings during the last Congress, at which more than 140 witnesses testified, was that bureaucratic foot dragging—5 years of it in both Democratic and Republic administrations—made the law a dull weapon in the hands of reporters and editors.

The press has made little use of the law that they had a large part in helping to enact. Too few reporters and editors know how to use the freedom of information law and the agency regulations implementing it.

A large share of the blame lies with the administrators of the law. Not one executive branch witness testified in favor of the bill during the subcommittee's hearings prior to its passage in 1966. When it was enacted over their opposition, they reluctantly administered the letter, but ignored the spirit of the law.

Congress must also share part of the blame. The law was the product of legislative compromise and therefore, is not a perfect instrument that is fully usable by representatives of the free and responsible press and the public. Legislation to be considered at our May hearings is designed to clarify, strengthen, and to thus make the Freedom of Information Act a much more effective tool in prying loose the tightly held secrets of the Federal bureaucracy—very often kept from the public to hide waste, inefficiency, scandal, or to protect the political careers of individual Government officials.

Mr. Speaker, I am confident that the broad bipartisan support for strengthening amendments to the Freedom of Information Act that exists within our committee will result in favorable House action on the bill which emerges from these hearings. I solicit the support and assistance of all Members in this effort.

HOUSE FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
Washington, D.C., April 13, 1973.

Hon. RICHARD M. NIXON,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: I know you are concerned about the flow of information from the government to the people, for you stated your position on the issue during the 1968 Presidential campaign and again during last year's campaign. And last year you commented specifically on the many constructive recommendations for improvements in the Freedom of Information Act made in a Congressional report (H. Rept. 92–1419) following extensive hearings by the Foreign Operations and Government Information Subcommittee.

Those recommendations have been translated into legislative proposals, and the Subcommittee plans hearings on the proposals next month. The legislation (H.R. 5425 and H.R. 4960) has been sent to all Executive Branch agencies for comment.

In view of the emphasis you have given this important subject, I am confident you will want the legislation to have top-level consideration. Executive Branch witnesses are scheduled to testify on May 8 and 10, 1973, and I am sure you will want the Administration's position clearly and effectively set forth.

I am asking, therefore, that you designate the knowledgeable Administration spokesman to testify at the opening of the hearings on May 8th. The Subcommittee will contact additional departmental witnesses, as necessary, to discuss technical questions in later testimony.

I hope that this designation of the Administration spokesman will be made as soon as possible so that the Subcommittee can confirm arrangements for the legislative hearings.

With best regards,
Sincerely,

WILLIAM S. MOORHEAD, *Chairman.*

THE WHITE HOUSE,
Washington, April 17, 1973.

Hon. WILLIAM S. MOORHEAD,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I wish to acknowledge and thank you for your April 13 letter to the President asking that an Administration spokesman testify on May 8 at the opening of hearings on H.R. 5425 and H.R. 4960.

You may be assured your letter will be called to the attention of the President and the appropriate members of the staff. You will hear further as soon as possible.

With warm regards,
Sincerely,

RICHARD K. COOK,
Deputy Assistant to the President.

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., April 24, 1973.

HON. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: In further response to your letter to the President of April 13, 1973, the Attorney General has been requested to provide an appropriate spokesman to present the Administration's position on H.R. 5425 and H.R. 4960 at the upcoming hearings of your Subcommittee.

Representatives of the Department of Justice will be in touch with your staff in the immediate future to provide the name of the individual designated to present such testimony and to work out the details of his appearance.

The opportunity to present the Administration's position on this important subject is greatly appreciated, and you may be sure that these legislative proposals will continue to receive the careful consideration they deserve.

Sincerely,

STANLEY EBNER, *General Counsel.*

Mr. MOORHEAD. Would you gentlemen come forward, please? We will start the hearings now.

We should also recognize the distinguished gentleman from California, Mr. McCloskey. Our colleague from Arkansas (Mr. Alexander) is in the wings. Before we get started, Ms. Abzug also came by.

Do you have any opening comments about the enactment of the Freedom of Information Law?

Mr. MCCLOSKEY. I do not think so. I look forward to the testimony.

Mr. MOORHEAD. We are now very pleased to hear from you, Mr. Wiggins. Then we will hear from the other witnesses. Then the subcommittee members would like to pose questions.

Do you have any comments before we start, Ms. Abzug?

Ms. ABZUG. No.

STATEMENT OF J. R. WIGGINS, PUBLISHER, ELLSWORTH-AMERICAN, ELLSWORTH, MAINE

Mr. WIGGINS. Mr. Chairman, members of the committee, I am sure you will not think it inappropriate if I commence by paying tribute to those who launched this congressional effort in 1955, John Moss and his colleague Dante Fascell, who is on this committee; and particularly to the late Harold Cross, who was counsel for the American Society of Newspaper Editors, and I suppose appropriately regarded as the real father of congressional effort in this field; James Pope who was active in the hearings and who is very active in this.

I remember very well when the committee launched its work with a survey that Mr. Moss conducted of the practices in the Government agencies at that time which has a bearing on what you described as the attitude of the bureaucracy toward the Freedom of Information Act. We discovered then that an early bar that was being cited frequently is amendment 5, U.S.C. 22, the old Government housekeeping statute, which was being used by many bureaucrats as authority for withholding information.

That overcome, the committee moved on to the Freedom of Information Act, amendments of which are now present before this committee.

I think that it is due this committee to say that throughout the years in addition to producing legislation, the Freedom of Information Act and the amendment 5, U.S.C. 22, this committee functioned frequently as a sort of ombudsman, as a place to which newspapermen and other citizens denied information by Government could come with their complaints.

I think that not the least of its contributions to the facilitating of information about Government was its constant job to prod and encourage Government agencies to be more forthcoming about their information.

At the time that these hearings commenced, it was realized that the difficulties in getting information about the Federal Government have been enormously increased, not necessarily by the deliberate purpose of persons in the executive branches of the Government but by the changing character of the Government itself, under which activities hitherto undertaken by the legislative branch, which is relatively open, by the delegation of powers which have been more and more exercised by the executive branch, which is traditionally operated in a less accessible way.

In addition to that there is no doubt that we still suffer as we suffered—it was apparent in 1955—from the habit of secrecy induced by the anxiety about the security of the Nation, and that shadow has lingered over every subsequent administration, and I suppose it will be a long time dissipating if it ever can be dissipated, because of the nature of world society as it makes people more deferential toward secrecy in Government operations when the security of the Nation is invoked as a reason for it. It becomes difficult sometimes to separate its security as a real reason, from security as an excuse.

I note that you are addressing the opinions of those who are back here after 18 years to testify as to whether the public access to Government information is as pressing a need today as it was in 1955. I should say from everything I know that it certainly is.

In the kind of world in which we now live it is even more important than it ever has been before for the people to be fully informed. There was a time in the history of this country and the history of the world when an electoral error or a legislative failure or a citizen breakdown might produce a malfunction in Government for an interval, and you could rely upon the country surviving, but in a thermonuclear world there is some question as to whether a democratic system periodically at the mercy of a transient electorate really is going to have as good an opportunity to second guess its mistakes.

A tragic mischance in the Democratic system might have consequences infinitely more serious than they would have had 50 or 100 years ago.

And, of course, it has been clear from the beginning of the founding of this Government that access to information was an essential element of a democratic society constituted as ours is, and every President in the early years made frequent witness to the importance of this.

George Washington very wisely said that concealment itself is a form of deceit. He emphasized the necessity of disclosure. And Thomas

Jefferson spoke numerous times on it and said one thing which I think is often overlooked by persons in Government and that is when he said, "It is by all means the duty of Government to give out information so that it may be thrown back to the Government in the various forms in which public ingenuity may throw it."

The late Justice Robert Jackson has referred to this as the "inspector general law of the press."

We are frequently inclined to think of the press as being an adversary situation related to the executive department of the Government. But it can be a useful agent and assistant to the executive department of the Federal Government in calling to their attention failures and shortcomings in this system of government which may have escaped the attention of official bodies, and which, if the Government is quick and alert to utilize this enormous volunteer fact-gathering inspector general, can make great use of the press as an institution for checking on the Government itself.

You ask in your letter whether there is easier access to Government information today or not, and I think that is a matter of which more active practitioners in the profession than I are are better informed. But I should say that we are engaged, I think, in a race between the expanding size and complications of Government and the progress that this legislative committee can make in opening up the avenues to information.

And, even if you make a great deal of progress absolutely in getting more and more information out of the Government, the growing complexity of the Government and the increasing difficulty of the problems with which it deals, and the sheer size of the bureaucracy imposes a necessity of constantly keeping at this project.

I would like to revert for just a moment to the point you made about the fact that newspapers themselves had not conspicuously utilized the provisions of the Freedom of Information Act. While I think it is regrettable, newspapers—generally, I believe, as Harold Cross frequently remarked—are far too reluctant to litigate matters of this kind and frequently do not press in the law courts on the issues that they ought to press for access to Government.

While this is a defect, I think it would be a mistake to assume that because the newspapers have not frequently used it that the law has not served a very important function.

One of the reasons, of course, why newspapers do not use this is the time element, and I notice that some of your amendments are addressed to this. It takes a period of weeks or months to get information, so newspapers are less inclined to use the apparatus than they would be if they could get it within a more limited time.

But, whether they formally use the act by initiating litigation or not, the presence of the law accomplishes a great purpose by making available to those who do wish to use it, citizens and press alike, a legal means of getting at information in Government.

I would like to say in passing that this struggle from 1955 on has been marked by a wish of the media, so far as I have knowledge of it and one frequently adverted to, to obtain the legal means of acquiring information about the Government. The foundation of this effort has been an effort to gain through legislation and through law and by

normal process of government a better information for the general public about the processes of their own Government.

I have looked at some of the amendments that I have seen narrowing the exception; I think that it is a very difficult thing to contrive, as it was in the beginning, statutory exemptions from the application of the act that either do not go too far or that do not go far enough.

I appreciate the difficulties with which the committee is confronted in this area.

I think I would like to close by saying that I think the continuing work of this committee, the ongoing work of this committee, is as important as any other particular piece of legislation that they produce in any particular session of Congress, and I think it would be much too hopeful to expect that this committee, or the Senate committee, or Congress as a whole, can completely eliminate ambiguities in the governmental structure that relate to the right of the public, the right of the people, to have an access to information.

The exercise of these rights in the long run depends in great part on the continuing interest of Congress, on the continuing energy of the press itself, and upon the unending scrutiny by the legislative branch of the practices of the executive branch. Without that ongoing work, any particular piece of legislation is going to fail to meet your ultimate goal of widening the public's source of information about their own Government.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Wiggins. I can understand why my distinguished predecessor as chairman (Mr. Moss) called upon you at the first hearings on freedom of information legislation.

The subcommittee would now like to hear from someone I believe might possibly be characterized as the "designated pinch hitter" for the subcommittee, Mr. Clark Mollenhoff.

STATEMENT OF CLARK MOLLENHOFF, WASHINGTON BUREAU CHIEF, DES MOINES REGISTER

Mr. MOLLENHOFF. Thank you, Mr. Chairman.

I do not know when I have been before a committee under better circumstances. With the Watergate affair, the Nixon administration has proved everything that I warned about back in 1955, and it seems doomed to provide more dramatic examples as the days go by.

I might say that executive privilege, which I stressed at that particular period of time, was the problem then, and thanks to the President, John Dean, and Mr. Kleindiest, we have had a very dramatic demonstration of how evil this kind of doctrine can be. The whole tragedy of Watergate is obsession with secrecy on the part of Mr. Haldeman and Mr. Ehrlichman. It has destroyed a number of young subordinates at the White House during that period of time.

Whatever happens to Ehrlichman and Haldeman at this stage, they well deserve it. They were the leaders.

What happened to some of the other young men—Magruder, Hugh Sloan, and miscellaneous others—is the real tragedy. I do not feel that those people would have knowingly done anything wrong. But they were caught within the power of Mr. Haldeman and Mr. Ehrlichman

and would have done anything they were asked without question. This was their downfall.

No, what we had in this Watergate matter was an atmosphere of total secrecy over the White House. I tried to work against this when I was over there as Special Counsel to the President. In a few cases I actually overruled the Justice Department and provided material for this committee, among others.

There was a foreign aid matter in Vietnam on which Congressman Moss was interested in obtaining records. The AID Agency used executive privilege to bar him from doing so. The Justice Department backed the AID Agency and the State Department. But on a Saturday I overruled them and gave Congressman Moss the records.

I might say that that caused some little consternation in Mr. Mitchell's shop. When he asked me for an explanation, I gave him an extended explication which went into all the reasons and the law behind the matter. I concluded it with a very effective quote from Richard Nixon on this subject, made before the House, April 22, 1948. I would like to quote that for the record here because it so dramatically stands out against what Mr. Mitchell has been doing recently.

On April 22, 1948 Representative Nixon said:

> I say that this proposition cannot stand from a Constitutional standpoint or on the basis of the merits for this very good reason. It would mean the President could have arbitrarily issued an executive order in the Bennett-Meyers Case, the Teapot Dome Case or any other case denying this Congress of the United States information it needed to conduct an investigation of the Executive Department, and the Congress would have had no right to question his decision.

That is precisely what Mr. Nixon was doing in January, February, and early March. He was laying down the flat rule that he would not permit his Counsel or other White House staff members to go before either the Judiciary Committee or at that time the Senate Select Committee headed by Senator Ervin. That was a policy doomed to failure from the outset, and it is amazing to me that Mr. Nixon did not realize how untenable it was.

The events that unfolded involved Mr. Dean in some aspects of the crimes. I think it is ironic that John Dean (who is drawing up Mr. Nixon's statement on executive privilege which includes not only present Government employees, but past employees) was one of those involved in the cases. It is now apparent that the policies he was setting forth there, with Mr. Nixon's knowledge or not, have covered up his crime, and I think that that points out precisely what we have in mind here.

Now, it would have also covered up both crimes (and I use those terms advisedly, because the overt acts that have been admitted by Mr. Mitchell at this stage do constitute prima facie evidence of crime, obstruction of justice, and failure to avoid criminal acts) and he as the chief law enforcement officer in the Nation was in a position to know of people on the Committee to Reelect the President who were going to commit or were contemplating crimes of a very serious nature, and he did nothing about it.

Senator Curtis made reference to this yesterday in a most forthright manner. He commented that John Mitchell had a responsibility not only not to have approved it, but to have specifically directed the

individuals who mentioned it, that he would take action against it if i took place and direct them not to do it.

With regard to executive privilege, there was also the matter o Ernest Fitzgerald, an Air Force cost analyst, who was fired after hav ing given testimony relative to the billion dollar overruns on the C–5A program. This committee is quite familiar with the details of that case

In that instance, the Air Force tried to use executive privilege tc avoid giving testimony before a Civil Service Commission hearing Fitzgerald had charged that they had covered up or were covering up perjury, falsification of records, and a smear job. Now, I had some familiarity with that from my term of duty in the White House. Th Air Force made an effort to impose an executive privilege on me, whicl I declined. I declined on the grounds that I had not believed in the executive privilege. When Mr. Nixon hired me, he was aware of this and, in fact, I believed that he was opposed to executive privilege a that particular stage.

I had read his statements in connection with the House hearings, in connection with the tax scandal hearings in the Senate, and I believec that he too saw the evil of secrecy, the fact that the President frequently is caught by being the last to know about crimes in his own household.

I think that what has transpired in the last few months has demonstrated very clearly that the President did not know what was going on in his own household.

At least we can hope that he has acted on those statements.

With regard to the freedom of information laws, I think these are good laws, and I do realize that there has been maladministration of these laws through the normal tendencies of bureaucrats to hide everything.

The press has not been aggressive enough in following through on this—and I might say that the committees of Congress have not been. In those instances where there has been a followthrough, it has been possible in most cases to break through and get the facts.

I have had a number of instances where agencies were using the exception on personnel records to bar the press—me specifically—from records, on standard background about people that might be published in "Who's Who" or any biographical sheet that was put out by the agency. Such things as where they went to school, when they were born, where they had worked. These were denied me by both the poverty program and by the AID agency, and I made a fuss about it.

Unfortunately in the first instance the Civil Service Commission backed the agency, which is typical of what the Civil Service Commission has done. There is no more outrageous agency in this city from the standpoint of coverup than the Civil Service Commission. I might say that this was dramatized in connection with the Fitzgerald hearings, where Chairman Hampton or the general counsel approved Herman Stalman's ruling that the hearings should be closed because it was somehow easier to get the truth when you did not have the press and the public around.

I thought that that particular type of thinking had gone out in the dark ages, but it was still around, and Bob Hampton was even arguing it with a straight face for a period of months. More recently, since he was slapped down by Judge William Bryant of the U.S. district

court and then by a unanimous district court or circuit court of appeals decision, he has been of a different view.

But this does not take away the fact that he was going to impose a closed hearing on Mr. Fitzgerald when what Mr. Fitzgerald wanted was an open hearing so he might expose the shenanigans that the Air Force had used in getting rid of him.

In that instance the grounds used for firing him was a RIF, an abolition of the job. That was the subterfuge for disposing of a man who had done something to displease his superiors. I became knowledgeable about some aspects of the kinds of smears that they were doing to Fitzgerald.

There were contentions that he was a security risk which they could not back. There were contentions that he had conflicts of interest, which they could not back, and these came to my attention at the White House. And when the chips were down, I finally went before the Civil Service Commission and willingly gave up my executive privilege and testified for them.

With regard to the freedom of information laws, I agree with Russ Wiggins that the oversight functions of the committee of Congress represent the greatest strength that there is, and I think that recent developments demonstrate that Congress is really our total hope in keeping a bigger and bigger executive branch under control. We cannot expect the people in the White House to want to disclose those things that are at odds with their programs, that which they want to sell the American people. We must depend upon the force of Congress, and that force can be aided by an aggressive press.

And on that point let me say that the Post has done an absolutely magnificent job on the Watergate. I think they have demonstrated very dramatically why we do not need any shield laws. As you know I am opposed to shield laws for the very same reason that I am opposed to executive privilege.

A shield law, when you get right down to it, would give every member of the press an executive privilege, the same thing we are fighting in the Watergate matter. If that is not a dramatic example that needs no embellishment, I cannot find one.

Mr. MOORHEAD. Mr. Mollenhoff, I felt that spear going through from the front to the back and then out the other way.

Mr. MOLLENHOFF. I am willing to say that your intentions are good.

Mr. MOORHEAD. That is the only person that is attempting to claim executive privilege, in the *Fitzgerald* case not even claiming it in the way the proponents of executive privilege claimed it. That is sheer affrontery.

The subcommittee would now like to hear from Herbert Brucker. He appeared before the subcommittee back in 1963. We look forward to hearing your thoughts in regard to the Freedom of Information issues today, Mr. Brucker.

STATEMENT OF HERBERT BRUCKER, WINDSOR, VT.

Mr. BRUCKER. Thank you, Mr. Chairman and members of the committee. I would like to address myself to the first of the questions that you have asked us to discuss: whether the need for public access to Government information is as pressing today as it was in 1955.

I do not think that any of us would have a question that the answer to that is "Yes." Toward that end I have prepared a brief written statement that I brought along. If I may, I would like to leave it as part of your record, but not take the time to read it.

Mr. MOORHEAD. Without objection, the full statement will be made part of the record.

[Mr. Brucker's prepared statement follows:]

PREPARED STATEMENT OF HERBERT BRUCKER, WINDSOR, VT.

The concern of your Committee with strengthening the Freedom of Information Act is in one sense a technical matter of insuring public access to information about government. But it seems to me chiefly significant as part of the endless political struggle of the governed with their governors. The issue is not just freedom of information, but this: Who shall hold ultimate power—the government, or the people?

We often quote, but in practice more often forget, the fundamental principles once put in few words by James Madison:

"Nothing could be more irrational than to give the people power, and to withhold from them information without which power is abused. A people who mean to be their own governors must arm themselves with power which knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to farce or a tragedy or perhaps both."

In recent years the increasing complexity of society has prompted Congress to insure popular information by legislation, especially through the Freedom of Information Act. Those of us who have spent our lives in this field are happy to see your committee now strengthening this Act, in light of experience under it.

Congress has not only taken positive steps to insure freedom of information, it has also consistently refused to take the opposite course of violating the First Amendment by making laws abridging freedom of the press. Today, however, you are asked to make such a law.

I refer to the proposed revision of the Federal criminal code, S. 1400. I am sure the committee is familiar with this bill, sections 1121–1125 of which are frightening in the breadth and sweep of information they would make secret, apparently beyond hope of redress. I trust Congress will again refuse to go along.

What is troublesome is the fact that since World War II both the executive and judicial departments have moved into the vacuum Congress has deliberately left, as required by the First Amendment. It seems to me that both the other departments are now making what are in effect laws abridging freedom of the press. And public acceptance of what they have done has given those actions the force of law.

As I understand it the classification of information—making it an official secret—is based on no law whatever. It is based instead on President Truman's Executive Order 10290 of 1951, and subsequent executive orders. But as the late Harold L. Cross, a recognized legal authority on freedom of information, wrote in his *The People's Right to Know* [Columbia University Press, 1953, p. 207]:

"The regulations prescribed by the Order do not directly affect relations between government and private citizens and are not binding upon the general public."

Nevertheless the public now accepts classification as law, so much so that it considers an Ellsberg to have broken the law by making classified information public.

The executive has not been alone in giving the force of law to abridgements of freedom of the press. The courts, historically the ultimate defenders of civil liberties, are now themselves making law abridging freedom of the press.

Thus it seems to me that, by agreeing to hear the Pentagon papers cases, the Supreme Court abridged freedom of the press. By not refusing to hear the cases the Court in fact for a time kept the New York Times, the Washington Post, and others from publishing what they believed they ought in the public interest to publish. If that was not the prior restraint supposedly unthinkable since Blackstone in the 18th century, what was it?

In the end of course the Court did permit publication, on the ground that in seeking to enjoin publication government had not met "the heavy burden" of justifying prior restraint. But was that not a way of saying that, in the

future, there might be times when the government might enforce prior restraint permanently?

Not only that but even some of the concurring opinions among the nine the justices wrote seemed to assume, as did the dissenting minority, that government information belongs not to "We, the people" but to government. At one point, for example, Chief Justice Burger wrote:

"To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery of possession of stolen property or secret government documents. That duty, I had thought—perhaps naively—was to report forthwith, to responsible public officers. This duty rests on taxi drivers, Justices and the New York Times."

To me this statement takes it for granted that there is no gray area here. If the government says information is secret then it must remain secret—even though without it the public is powerless. Under this assumption, leaking information that the government does not want leaked is simple theft. That means theft not only of the physical books, the Pentagon papers themselves, but also the information they contain.

To me it is not that simple. The question remains: who owns the news—especially the news of government? If the government owns it, then the American people will no longer have that "information without which power is abused."

Mr. BRUCKER. Well, I think one thing that makes this broader claim entirely pertinent is the specific information in the Freedom of Information Act itself is important and the fact that the public, on behalf of whom the newspapers fight for freedom of information, the general public seems to take it for granted that the burden is on the newspaper and the other media rather than on the Government. In other words, to think that, yes, it is right that the Government have secrets. This is something I think is very difficult to combat through legislation or any other way; but I think it is the most important thing.

On the question of whether there is easier access to Government information today, again I would have to plead ignorance there being no longer a newspaper editor. But I can simply express my delight in the first place that we have this Freedom of Information Act, which came up from nowhere and that now you are tightening it.

I would like to endorse the proposed amendments along the lines of changing phraseology and that certain records should be made available, published, immediately. I think that is very much the right idea.

And as to what Congress can do to increase the flow of information, I would simply say keep it up. I think it is wonderful that you are here. Thank you.

Mr. MOORHEAD. Thank you very much, Mr. Brucker. We appreciate not only your oral testimony, but also your excellent written statement as well.

The subcommittee would now like to hear from Mr. Creed Black, who is editor of the Philadelphia Inquirer. I think it is appropriate to describe your paper's successful case on the FHA appraisals, but carry on in your own way, and, if you want to touch on it, fine.

STATEMENT OF CREED BLACK, EDITOR OF THE PHILADELPHIA INQUIRER, PHILADELPHIA, PA.

Mr. BLACK. I would like to refer to that, Mr. Chairman, but I would first like to second the general sentiments expressed by Mr. Wiggins in his eloquent opening statement here, and then I would

I want to agree with him also on the fact that this committee is terribly important, too. We talk constantly in a particular editors' group with which I am active—the Associated Press of Managing Editors—about our freedom of information work; how we seem to do the same things, perhaps, year after year and yet the unquestionable need for us to do the same things year after year. I think that same standard applies to this committee. We certainly need this committee.

I want to agree with Mr. Mollenhoff on Watergate. I think—and this is not an original thought of mine—that it is certainly very, very clear that, while the deed itself was bad, the coverup that followed has overshadowed it as something that we regret very, very much happening.

And it is just too bad that, as he said, the obsession with secrecy has brought down so many possibly otherwise fine men.

I want to agree with Mr. Black on the need to open up the processes of Congress as well as the processes of the administrative branch of the Government. I want to agree with the general tenor of Mr. Brucker's statement, most of all, perhaps, with his brevity—and I will try to emulate that.

As far as the use of the existing bill is concerned, I have talked with a good many of my editors—they are out at the Shoreham this week. The theme that runs through their answers to the question of "Why have not we used it more?" is that it takes too much time. You get lost in the process. It is also too expensive; you need to hire legal counsel.

There is another theme, however; that despite these imperfections and despite our minimal use of it—the law—so far, the fact that the law is there is important. It has put out some fires before they have gotten too big. So, by all means, while we have found imperfections with the law, while we agree that we should use it more, we certainly think that the law—the action of 1965—was still very important.

We also think that, maybe, we as newspapermen should pay a little bit more attention to some of the others who have used the law—used it, perhaps, more effectively than we have—particularly the legal profession. We should look at the ways that they have used it.

In 1966 when I testified, there were two themes I tried to emphasize. One was that the Government was big and getting bigger and, therefore, the need for access to information was big and getting bigger also. I think this is still valid. The other primary point was that this law might be looked at by Government people as really of more assistance to them than it is to the press and the public, as it is a device by which more information about their processes will become better understood by the public and, therefore, more likely to be accepted.

I would like to go further back than 1966. I would like to go back to 1952 and the meeting of the American Society of Newspaper Editors here in Washington—then at the Statler-Hilton. I had an assignment this summer to reread the proceedings of this particular meeting as part of a history project for ASNE. I was really astounded at the eloquence on freedom of information that came out of that meeting. I was also rather mortified that so many of the things that I thought were being said for the first time in 1972 really had been said—and in many respects better—way back in 1952.

One point was made during those (1952) proceedings very effectively by a man named Harold Cross, who was a special counsel to ASNE which had hired him to help them with freedom of informa-

tion activities. He emphasized that while it is important that we record Congress' "ayes" and "nays," and that we record the decisions of the administrative branch, more important than this is that we record the Government in the process. We need to interpret better, report more extensively and make the public feel more a part of the processes of government. I think that that is still terribly important.

Now, really, when I think about the question of information, it just becomes so terribly simple to me. The more I am in this business, the more convinced I become—the more a sort of fervor I develop—for the simple fact that if people are given information they will react intelligently, much more intelligently than most of us give them credit for. When they are not given information we get the opposite reaction.

Relative to the Watergate, I would like to raise this question: If the President, perhaps, had held regular press conferences, as most of the Presidents prior to him have done; if there had been this additional exposure by him, this regular exposure? Granted all of the shortcomings, all of the imperfections and all of the circus atmosphere, we newspapermen, as well as, perhaps, you Congressmen, dislike about press conferences, they still are the way by which the President is exposed, not only in a situation where he gives information, but one where he gets information as well from the mere fact of this exposure.

I would just like to ask you all to consider whether if he had been more accessible to the press—regularly over a period of months, years—and particularly the last 9 or 10 months—might circumstances of Watergate be different?

I would like to go even a little further than that and suggest that while I do not want to get us into an argument about the Vietnam war, we probably all agree that it could have been a more positive experience for the country than it was.

So again, I would raise the question: If there had been, not just more information about that war in the process, but, perhaps, a better job by us as newspapermen in reporting that information, interpreting it, maybe the course of that war might have been a little more positive that it turned out to be.

Now, in rereading my own testimony (in 1966) I alternately gagged and applauded. One statement that I made in 1966 and which I stand by today, is this: "Trust the people with the truth, and they will seldom betray your trust. Mistrust them, deny them the truth, and you will reap what you sow."

But really, somebody in 1952 said it much better than that—and this again is from the proceedings of the American Society of Newspaper Editors. It was actually said by James Pope of Louisville, and he was quoting the then mayor of Milwaukee, a man of the name of Frank P. Zigen. I have no idea where he is now, but in one sentence he pretty much said it all: "The degree to which we have eliminated secrecy is the measure of our civilization." Thank you.

Mr. MOORHEAD. That's a very eloquent closing note, Mr. Smyser.

First, I want to commend the panel. The five of you here are all in the business of dealing in words, and you did it in less than 1 hour and 5 minutes. I hope that I and my colleagues will emulate your excellent example.

Mr. Smyser, some of your thoughts about information and intelligence of the people reminded me of something said by one of my political heroes, the late Speaker Sam Rayburn. He said, "Never underestimate the intelligence of the people, but never overestimate the amount of information they have." In other words, give them the information, and they'll make an intelligent decision; and I think this is what the thrust of your testimony has been.

All of you have given us so much food for thought that we almost suffer from indigestion; but I thought I'd just pick up some of the things that you said and emphasize them. I think that Mr. Wiggins remarked that this subcommittee is sort of an "ombudsman" for newspapermen and the public generally for getting information. I think that generally would stand repeating for the people generally, almost especially to the newspaper industry, because we'll never be able to write a law that's so clear that it won't need some active enforcement.

You also said that the press acts as an "inspector general" of the Government. I'd like to think that the Congress also does that job, or should do it to the maximum extent possible.

The recurring theme has come from the panel that the mere existence of the freedom of information law is a good thing. And I think it was also brought out that after a lawsuit had been brought, the reaction of the agency on the next request for information was much better.

Let me urge upon you that you continue to use the legal remedies of the act, even though it costs money, and even though the procedures are somewhat ponderous, as they will continue to be, no matter how we amend the law. If you win in court a few times, I think it would be very beneficial, even if it costs a little bit of money to do so.

While we have already held other hearings on "executive privilege" bills, we always like to hear Mr. Mollenhoff speak so eloquently on that subject, because under the doctrine advocated by someone who is no longer the Attorney General, Mr. Mollenhoff appeared before a subcommittee and gave his views on legislation dealing with the abuses of executive power. The exercise of the "Inspector General" function of the Congress, to use Mr. Wiggins' description, becomes more and more important as the Government, particularly the executive branch, gets bigger and bigger. I would have to say to you gentlemen that, in my opinion, there has been less than adequate control by the Congress over the activities of the executive during the past 10 or 15 years.

To get to the technical part here, I would like to ask Mr. Brucker about the concept of the burden of proof. The Congress intended to put the burden of proof on the Government agencies when they were going to withhold information, rather than the other way around. And yet, I take it from your testimony that you felt that at least the concept of the newspaper industry was that the burden of proof was not sufficiently on the Government. You felt that you had to persuade them.

Am I correct, Mr. Brucker?

Mr. BRUCKER. I don't quite recognize that as what I said.

Mr. MOORHEAD. Well, I would like some clarification.

Mr. BRUCKER. I don't think I—I may have misspoken and said that, but I don't think so. One thing along that line that I think I said was that the public tends to accept that Government secrecy is good; and

that was the problem, because the whole thing is supposedly in the interests of the public. And I certainly agree that if they have information, they will tend to do the right thing.

But certainly, I have seen through the years recently a feeling that the newspapers or television is too nosey, and you'd better let the Government alone. And that is a matter of some concern.

Mr. MOORHEAD. Thank you, Mr. Brucker.

Mr. Alexander?

Mr. ALEXANDER. Thank you, Mr. Chairman.

I'd like to thank these gentlemen this morning for their presentation. I have respected the press for many, many years; and I've gotten recently to appreciate it even more. I'd like to say to those of you who are here and for the record that, but for a persistent press, in my judgment, the Watergate scandal would still be covered by the cloak of executive privilege.

I appreciate what you have done to help this Government and help this country deal with the facts and truth about that matter and other matters that need to be brought to light, and to the public.

I recall that in a previous hearing with Mr. Mollenhoff, which was interrupted by one of the frequent fire drills that we have around here, beginning at around noon. During that hearing I asked, based upon your experience, what remedies you would recommend, as a practical matter, that Congress should think of or contemplate legislation about, that would assist the day-to-day gathering of information for Congress.

We have a problem here, as you know, getting the agencies to respond. It appears to be the general rule that we run into, especially with some of the agencies, you wait 2 days and then the Congressman will forget about it. And, of course, we have staff assistants, and we try to overcome this problem, but it is a problem.

Now, Mr. Black referred to the possibility of establishing an appeals procedure. I'd like to ask both of you, if I might, would you contemplate the possibility of an extension of maybe the Comptroller General's Office, or a branch of Congress possibly, even the jurisdiction of the Library of Congress, that could in some way facilitate the gathering of information from the standpoint of congressional inquiries?

Mr. BLACK. Well, I have not, as I said in my testimony, really thought this through. The idea was one that Mr. Hoyt advanced, and I am not sure about the procedure. I remember recently receiving in my office a thick file from the—I don't know whether it was the Comptroller General, or whether it was the General Accounting Office; I believe it was GAO—that said that it, too, has difficulty in getting information.

So I think that any appeals mechanism of this kind would almost have to be de novo and have something that could, obviously, work quickly, because the only purpose of this would be to save time. Otherwise, I think if you get it mixed up in any other large bureaucracy, you could end up consuming more time than you could ever hopefully save.

Mr. ALEXANDER. Well, I know in most cases, if I stop whatever else I'm doing and do nothing else but become an investigator, I can, under most circumstances, obtain the information that I want. But this is very time consuming.

This, of course, is a burden to our people we represent in our offices; and they need this assistance somewhat.

Mr. MOLLENHOFF. I was Presidential ombudsman, so to speak, and had this kind of a function within the White House. Before I left the White House, I made a speech down in Houston, Tex., where I laid out a Presidential ombudsman role that would fulfill this. It would be a statutory thing.

I realized after that stage, approximately 11 months in the job, that you had to have access to the President. You had to have that written into the law, and you had to have independence.

And I believe very sincerely that an ombudsman with about a dozen accountant investigators could keep this Government on the track for Congress, for the public, and for the press.

Mr. ALEXANDER. Mr. Mollenhoff, may I interrupt?

You are not recommending that we turn this function over to the executive branch?

Mr. MOLLENHOFF. No. I saw that my role in the White House was hampered because of the lack of access I had to the President, due to Haldeman's iron control. And he did not really appreciate the speech, because in several of the recommendations I made as to Cabinet rank, there would be no question about the ombudsman's authority to obtain records and reports. Looking for a man of great experience, stature, and impeccable integrity, I mentioned John Williams as the type of man who should have that job. He was then at the brink of going out of the Senate and retiring. Job tenure, to insure the ombudsman's total independence, a law was a requirement for the job tenure.

Other necessities included direct access to the President at all times, an initial staff of 12 to 20 lawyers and accountants with years of experience on investigations of Government operations, and public reports to the President, to the Senate, and the House (that would be made simultaneously so that there couldn't be any coverup of what the ombudsman wanted to report).

His job would be devoid of any partisan political authority or responsibility. The only power of the ombudsman would be the power of persuasion by the facts and the conclusions in his reports (that would be issued either every 3 months, every 6 months, or every year and with provision for special reports from time to time when there was a special need for a kick of some kind).

Mr. MOORHEAD. Could you provide us a copy of that speech for the record?

Mr. MOLLENHOFF. Yes.

Mr. MOORHEAD. Then it will be made part of the record.

[The information referred to follows:]

EXCERPTS FROM SPEECH BY CLARK R. MOLLENHOFF, SPECIAL COUNSEL TO THE PRESIDENT, BEFORE THE HOUSTON ROTARY CLUB MEETING, JUNE 11, 1970

* * * Arrogant bureaucracy is the greatest obstacle today to proper functioning of the government and has created a sense of frustration from the lowest student up to the presidency. The sense of frustration, dramatized by some of the student protests, is also present among businessmen, city, county, and state political leaders, Senators and Congressmen and federal government officials.

A properly organized and staffed ombudsman office can make the federal government more responsive to the thoughtful complaints of the public and more responsive to the will of the President.

My experience as your presidential ombudsman coupled with more than 25 years of experience investigating government mismanagement and corruption at all levels has convinced me that a properly structured and staffed ombudsman office can be the answer to many of our most serious problems. It would provide:

1. A place for citizens to lodge their complaints against arbitrary bureaucratic actions with the hope of having the grievances examined carefully.

2. It would provide the mechanism for thoughtful depth examination of complaints and would force the production of records dealing with government operations and decisions.

3. It would provide a means of separating legitimate complaints from frivolous complaints and would provide periodic publication of the findings of fact and conclusion. Reports published on a semi-annual or annual basis would force government agencies to give greater attention to the necessity of justifying decisions to an independent body and for correcting decisions that are erroneous.

The ombudsman office could be created by the President within the White House or it could be established by law independent of the White House. Essential to the proper functioning of this office are the following:

1. Cabinet rank so there can be no question about the ombudsman authority to obtain records and reports.

2. A man of great experience, stature, and impeccable integrity.

3. Job tenure so that there can be no doubt about the ombudsman's total independence (a law would be required for job tenure).

4. Direct access to the President at all times.

5. An initial staff of 12 to 20 lawyers and accountants with years of experience on investigations of government operations either with congressional committees or with government agencies, or both.

6. Public reports made to the President and the Senate and the House on an annual or semi-annual basis with provisions for special reports.

7. This job should be devoid of any partisan political authority or responsibility.

The key to the successful operation of the federal ombudsman office is the selection of an ombudsman to head this new structure. This must be a man of great experience in the investigation of government who is recognized by the public for his great stature and his impeccable integrity. Senator John J. Williams, Republican of Delaware, is the only man who comes to mind immediately as having the full credentials necessary to do this job. He will be retiring from the United States Senate at the end of 1970. His conduct as a member of the United States Senate over a period of twenty-four years is recognized by Democrats and Republicans, liberals and conservatives as having been in the highest tradition of public service.

I believe that the establishment of an ombudsman office, headed by Senator John Williams, would do more than any other single act to restore faith in the federal government.

Expensive reorganizations and realignments of government activities have been usually only a slight reshuffle of the same old bureaucratic cliques. John Williams and a small effective staff could break up the old bureaucratic patterns and restore integrity and fair play in many areas where it has been missing for years.

OMBUDSMAN

Many indictments and convictions followed the exposure of corruption in the Truman Administration. Revelations of conflict of interest in several high offices in the Eisenhower Administration resulted in a rash of resignations and a few indictments. There were indictments and conflicts arising out of scandals in the Kennedy Administration.

I have no doubt that the Nixon Administration will be plagued from time to time with similar problems. We had one major first test in connection with Major General Carl Turner. It was possible to demonstrate the advantage of swift nonpartisan action in connection with the Turner matter. We were able to learn of serious problems involving Major General Carl Turner, who had been appointed last March as the Chief United States Marshal. His resignation was obtained within a matter of a few hours after the Administration became aware that he was not worthy of his position. The hearings before the Senate Permanent Investigating Subcommittee demonstrated dramatically that it was important that we came to grips with that issue and removed the man who failed to meet the standards required by this Administration.

The public was understanding because the Administration took action against an appointee of the Administration at the first point at which it was clear that General Turner did not meet the Administration's standard. When Turner was appointed in March, there was no reason to believe he was other than an experienced career military investigator. There was no record of arrests or convictions to mar his record.

The mistake of appointing Carl Turner was the mistake any Administration could make and there was public understanding of this and no editorial criticism. I hope that the swift corrective action in the Turner case will set the tone for this Administration.

I hope that the Nixon Administration will always be able to find the true facts at an early stage and brush away the excuses and rationalizations that are so frequently brought forward to cloud the issue.

I was named presidential ombudsman because President Nixon wanted someone in the White House who would be mainly concerned with the problems of inefficiency, mismanagement, and corruption in the federal government. The jurisdiction was to be roughly that of a government operations committee of the Senate or House.

It is not a role that has carried any direct responsibilities in the political area or in the program policy areas. It stresses government operations.

It has been an effort to establish a mechanism outside the normal chain of command for the administration of government programs for independent fact finding on problem areas that will take advantage of the whole range of government sources, plus a wide range of sources outside of the federal government.

The President and others in his administration have been familiar with "Despoilers of Democracy" and "The Pentagon" which were nonideological and nonpartisan case studies on the problems of dealing with inefficiency, mismanagement and corruption in a wide range of government agencies. The President wanted that approach.

Many of our Presidents have been embarrassed by commenting upon government problems before they were apprised of the full facts on cases involving inefficiency, mismanagement, and corruption in their administrations. President Truman made errors in his comments and explanations on problems involving the Reconstruction Finance Corporation, the Internal Revenue Service, and some other agencies. This made it appear that he was condoning questionable activity.

President Eisenhower made similar mistakes in press conference comments on the Dixon Yates case, and in connection with the Adams-Goldfine matter.

President Kennedy made similar mistakes in commenting at press conferences on the Billie Sol Estes case, on the TFX case, and on other matters.

All suffered some major embarrassment because they relied upon the normal administrative chain of command. At a late date they found that men with a stake in the case, from a standpoint of official responsibility or as a result of involvement in questionable activity, had given them inaccurate information.

President Nixon, who had extended experience in dealing with congressional investigations, has realized the hazard of dealing with information that comes through the bureaucratic chain of command. He has wanted to keep the possibility of error down to a minimum.

Serious errors in dealing with the problems of mismanagement or corruption can do irreparable harm to an administration from a standpoint of its credibility on international or domestic matters, and in its dealings with members of the Senate and House.

The many grave problems—domestic and foreign, that must be dealt with today create conditions that make it particularly important that there be a mechanism to protect the President from the errors that can arise from overreliance upon the bureaucratic chain of command.

It is important to establish an effective government-wide follow-through on past problem areas, and to set the tone for what the President expects of his own administration.

The ombudsman program I suggest could bring some much needed idealism to the American Democracy. It could bring some of the idealism that I found in a few of my early teachers, an idealism that I tried to catch in poetry a few years ago.

I think it is equally applicable to men in government men in the communications business, and to others today as we contemplate the job of teaching and inspiring the young of this nation.

Mr. MOLLENHOFF. I have the speech here. I'm proud of every bit of that speech, as I am proud of my testimony here a number of years ago on executive privilege.

Mr. MOORHEAD. Mr. McCloskey.

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

Gentlemen, I'd like to speak to your comments and your thinking on the problem that has become of growing importance as these hearings have continued.

The Freedom of Information Act, in subsection 5, exempts interagency, or intra-agency, memoranda or letters which would not be available by law to a party other than in litigation with the agency.

We have had both Deputy Attorney General William Rehnquist and Deputy Atorney General Mary Lawton come before us and state the position that this interagency memoranda meant under this law that any communication within the Government from one person to another, one agency to another, was exempt not only from disclosure to the public, as the law provides, but exempt from disclosure to Congress, and the Supreme Court case so held.

And we seem to have assumed in the evolution of the relationship between the branches, over the last two decades at least, that the executive is entitled, for means of the efficiency of the conduct of its affairs, to keep in secret memoranda, opinions, and judgments rendered back and forth in the executive branch.

Mr. MOLLENHOFF. Mr. McCloskey, if you pardon that, I think that's where the Congress is wrong—their acceptance of the fact that there is any way the President can keep anything secret for any extended period of time, other than the decision period. Executive privilege has no law. There are no court decisions on that subject; and the vague, flimsy, constitutional argument is without base. Warren Burger has put together an extensive study on that subject matter.

Mr. MCCLOSKEY. I appreciate that, Mr. Mollenhoff. I heard the testimony you gave to the subcommittee earlier on that subject. But the basis even for this debate has been the acceptance that Government, like business, could not continue to operate efficiently unless the communications between its executives and its management were entitled to be in confidence.

I have been concerned with this question, as these hearings have progressed. Is it perhaps time that we now impose a different test on Government than we would on business? Perhaps we should require that the interagency memoranda be made available to the public and to the Congress, except in very narrowly defined situations.

We have a growing acceptance, both through Congress and through the public, that perhaps it is time that we state unequivocally in the law that there is no privilege on the part of the Executive to withhold any information of any kind from the duly instituted requests of Congress.

We have the power to hold such information received in Congress if the Executive demands it. I'm wondering if this is not perhaps the time and the place for this debate to be considered on the floor, to proceed on the basis that we now hold Government to a higher test than we have done until now.

Mr. MOLLENHOFF. You have this right under the Constitution, and you shouldn't have to reiterate it. It just takes some guts up here and some deep digging, so that people are absolutely clear on their rights.

You see that the problem——

Mr. MCCLOSKEY. Let me interrupt you. I think in view of the Supreme Court decision in the *Mink* case that there is no longer a right to claim this prerogative without enacting something in the law. As the *Mink* case pointed out, Congress does have the power to enact the law as explicit as it wishes; and I don't think we can just acquiesce and say that in view of the *Mink* case we can remain silent.

We would now have to enact into law some such unequivocal statement.

Mr. MOLLENHOFF. Well, this condition has arisen because committee people up here, chairman and members of committees, have not realized their full rights. John Moss and the members of this committee have been among those who have understood fully.

Mr. MCCLOSKEY. You asked for the report here.

Mr. MOLLENHOFF. Senator Ervin understands this thoroughly and has done a study in the law. There are too many chairmen up here who acquiesce, who are engaged in taking less than the truth for soft touches from the agencies. And it's going to take an abolition of those practices to get the kind of tough attitude from up here.

I tell you, if I was running a committee up here, there wouldn't be any question about making an issue of it.

Mr. MCCLOSKEY. I understand.

Mr. MOLLENHOFF. If I were on a committee up here——

Mr. MCCLOSKEY. I understand your position, but let us apply the point to an argument that was made to me by an Armed Forces officer yesterday. He testified as to their required loyalties to their commanding officer, in this case the Joint Chiefs of Staff, and that in the debates that preceded the taking of a position before the Congress by the Joint Chiefs, a lot of conflicting opinions had been rendered back and forth on both sides of the issue.

They felt that they could not run the executive branch if Congress had the authority over the Joint Chiefs, or say, on the members, regarding the bombing of Cambodia or the bombing of any part of Asia. Individual members of the Defense Department were then asked for their individual opinions that had been rendered in the decisionmaking process.

I'd like to hear the comments of other people on the panel about this subject. Do you see any difficulty if Congress made it a law that subordinate employees of the executive branch had to render specific statements of fact and opinion that preceded the ultimate decisionmaking process?

We have always restrained ourselves, or Congress, from demanding those facts and opinions if they differ from the final judgment of the executive branch; and that is what this part of the law is all about. It preserves the confidence of the interagency reports on the basis that the decisionmaker should be entitled to have been handed forthright advice from his subordinates and he could not get it if that subordinate was later going to have to tell the truth about his point of view.

Could I have some comments from the panel on that specific example?

Mr. MOORHEAD. I think Mr. Wiggins would like to address that.

Mr. WIGGINS. Mr. Chairman, an effort to define this line that separates the powers has gone on from the beginning of government. I think Senator McClay introduced it in the First Congress when he leveled upon Alexander Hamilton a request for an appearance.

I respect the ingenuity of this committee and Congress, and I am doubtful myself whether we can utterly remove the ambiguity of the constitutional provisions separating the powers of the relative branches of Government by statute.

I think that there is one wholesome lesson to be learned from reading all of the cases of contest between Congress and the President about executive privilege—and I've examined at length the solution of ombudsman that my colleague has ventured forth—but I think that if you go over all of them from the beginning, you will discover that Congress historically has not been able to compel an executive department to disclose when it has not wished to do so. But it has generally been able to make it wish it had. And this is the ultimate power of Congress, that whatever the separation of powers may be, at least there are these deferences that one power, department, owes another, and our constitutionalist views on excessive withholding of information. If the Congress persists in its purpose, it usually has been able to make the executive wish that it had divulged the information to Congress.

Mr. MCCLOSKEY. I wish I could share your confidence. I'm afraid it was the press and Judge Sirica, however, that changed the Executive's position on the executive privilege. I don't think it was the Congress.

Mr. MOLLENHOFF. Let me say that I think that there is an obligation on the part of Congress in these circumstances to stay away from far-out causes where they do not have the body of public opinion behind them. The weakness of the congressional branch in those circumstances becomes apparent, because you can't sell it to the public.

You should stay on firm, nonideological grounds. And I think that the Vietnam war, with all of the problems that it brought up, has weakened the Congress in this respect. Generally the President could rally the country behind him on some of his most controversial decisions there, because Mr. McCloskey, you would have been among those who took some rather far-out positions from time to time, and would have in that instance weakened the power of the Congress to appeal to the people. And that's all you can appeal to.

Mr. BLACK. Mr. McCloskey, I'd like to speak to your question on the basis of my experience here in the Department of Health, Education, and Welfare.

It was my observation then that without the kind of legal action you're talking about, the people who had serious reservations about policies being proposed by HEW didn't have great difficulty in communicating those to the Hill. I spent a lot of my time up here testifying because that was my job; and I would frequently encounter people in our department who were also up here, not testifying but making their feelings well known.

The second is that I think that anything of this kind invites a lot of self-serving. I participated in a number of meetings at HEW, which I then read about in the papers the next day; and they didn't sound like the meetings I had attended.

Those were not public meetings that I'm talking about. These were policy meetings. And there are people there who have axes to grind and hides to save; and I think the Congress should look with some caution on statements of this kind, that do take exception to a department's official policy. It's obvious that anything that comes up here from any executive department has been preceded by a lot of give-and-take and differences of opinion.

Mr. McCLOSKEY. That is my question. Do you think the Congress should be able to get these give-and-take comments by directing the executive branch to provide them, or do you think the executive branch should be able to withhold the frank, candid exchange of different opinions that you would see in ultimate policies?

Mr. BLACK. Well, I agree with Mr. Wiggins, both as an editor and as someone who has spent time in the executive branch, that it's a terribly fine line to draw; and I think the ambiguity is a problem that must be left, and it must be resolved like a lot of other problems of this kind on a case-by-case basis.

Mr. McCLOSKEY. You would say that the executive branch should be able to claim the privilege to refuse to divulge to the Congress on a case-by-case basis, information that is exchanged. Do I understand your testimony correctly?

Mr. BLACK. I think that executive privilege is something that should be used only in the most extreme circumstances. I think I would say at the same time that Congress should itself be very cautious in making the kind of demand that would provoke this sort of confrontation.

It just seems to me that it is an invitation to some sort of chaos if every time you take a department or an agency's testimony, you go behind that to find out how many people disagreed with it and to hear from those. As one of the members said—I guess Mr. Alexander—it takes you a long time to get responses from the Executive; and having been down in the bureaucracy, I can tell you why it does take a long time. It's a slow-moving operation because everybody has got to get into the act.

Mr. MOLLENHOFF. Let me say that you mentioned——

Mr. MOORHEAD. Mr. Mollenhoff, please be brief, because I want to yield to Ms. Abzug. The chair has been operating under a loose 5-minute rule, but if I don't tighten it up a little bit, we won't be able to finish before the first quorum call.

Ms. Abzug.

Ms. ABZUG. What we're considering here are amendments of the Freedom of Information Act. Isn't there a very sharp conflict in the issue we're now discussing here in that the very existence of the Freedom of Information Act has sort of set up a right of executive privilege? Also, do you think that the amendments that are being proposed remedy this problem sufficiently?

Mr. MOLLENHOFF. The Freedom of Information Act does not set up an executive privilege. The executive privilege—and that's the terminology, I think, that the Members of Congress should get well in their minds and clear on.

The Freedom of Information Act sets up certain exceptions under the law. Executive privilege is something that the Presidents have claimed in recent years as an arbitrary right that they have, regardless of the law. And that is the all-embracing thing. And Mr. McCloskey a few moments ago mentioned that they should be able to claim the privilege. You see, I don't accept that there is any privilege.

Mr. McCLOSKEY. What do you say about the Court decision, and I specifically refer to executive privilege? Do you disregard the Supreme Court's statement that there is an executive privilege?

Mr. MOLLENHOFF. I think that there is no executive privilege.

Mr. McCLOSKEY. What about the Supreme Court decision on it?

Mr. MOLLENHOFF. The Court decision on this can be cleared up by proper handling of the issue here in Congress.

Mr. McCLOSKEY. Well let's concede that, but the Supreme Court decisions are the supreme law of the land, are they not?

Mr. MOLLENHOFF. They are the supreme law of the land.

Mr. McCLOSKEY. Well, then, how do you come off——

Mr. MOLLENHOFF. Bad cases make bad laws.

Ms. ABZUG. I'm going to yield to the Representative from California.

Mr. MOLLENHOFF. We can have this out someplace else.

Mr. McCLOSKEY. I happen to agree with your conclusion as to the law, but I don't think we can ignore the Supreme Court.

Mr. MOORHEAD. Ms. Abzug, I think Mr. Wiggins would like to make a comment.

Ms. ABZUG. Please, if you would.

Mr. WIGGINS. I think you raise a very interesting part about any law, and in freedom of information or relating to this, raises the possibility by describing the access inversely, you limit the access.

I think this statute comes as near as surmounting that difficulty as a statute can by its declaratory sections, in which it tries to lay down the premise that the public is entitled to information per se; in the absence of the showing of the Government agency, that it isn't entitled to it. And so the presumption has frequently prevailed in Government that the applicant has to show cause as to why he should be given. However, I think that to a degree the act as it's devised has tried to escape the dilemma by its very terms of what is exempted, creating a new privilege of withholding. And it's not entirely escaped.

And any time you set up a definition of what the public is entitled to, you inferentially concede that it isn't entitled to everything. The law, as the chairman said, is a product of compromise. It's very difficult to draft that list of exemptions in such a way as to gain the consent of the committee or the consent of Congress. And the list of exemptions go a lot further than many members of the committee wish to go and any of the newspaper witnesses wish to go.

But I think it has to be considered in its day that it was a great improvement on the preexisting situation, and that the amendments that are now proposed further refine the exemptions. And that under an ideal circumstance, one would probably wish that the exemptions weren't as broad as they were.

Ms. ABZUG. Well, we are dealing here with another interesting problem. Many believe that there is no reason not to share with the legislative branch matters which pertain to national security, military

secrets, or foreign relations, when Congress or a committee deems this information necessary.

Members of Congress, who are officials elected by the people, have more justification for sharing so-called secrets than officials appointed by the President or his subordinates, especially if they are to legislate wisely.

We are dealing with the statute which, I believe, has a built-in privilege, and I'm not sure whether the amendments sufficiently overcome it. I wonder whether there's any justification for this statute, even as amended, and whether we don't in fact limit our rights by it.

Mr. MOLLENHOFF. Let me explain that I think that the Freedom of Information Act, the basic thing in it that is good under any circumstances, it provided a vehicle for getting into court for the first time, when you didn't have a financial interest in the information you were seeking. And that, in and of itself, was a good step forward.

There will always be discussions and disagreements over the precise terminology of the exceptions. I expect that. I expect also that there will always be disagreements over the manner in which these things are interpreted by the various agencies; because they will always be interpreted by agency lawyers who will look at the situation more on the agency side.

I agree with you completely, Ms. Abzug. The Congress should be theoretically entitled to everything that the executive branch has, because the Congress set up the executive branches in the first instance.

There are practical problems from the standpoint of national security to become involved. There should be in the Congress a vehicle for obtaining those, and I would not tell the Congress how to do that particular thing.

In speaking about far out causes, I did not wish to be critical and say that you were not entitled to the information. I was saying that you must accept the fact that if you do not have a broad base, your case is not as good. If you are on the wavelength of Jane Fonda and people of that stature, then you do not have a case that will appeal to middle America. Mr. Nixon will always be outdealing you in that instance; and that's a practical fact of life.

Ms. ABZUG. Well, he does have a very good case of that right now.

Mr. MOLLENHOFF. He doesn't have a very good case with regard to the present situation, with regard to Vietnam, or to the Watergate. But he had a good situation, according to the polls, over a period of 3 or 4 years; and he made the most of that.

Ms. ABZUG. It's a very interesting point you're raising, Mr. Mollenhoff, if you'll forgive me for interrupting. But we know from history that sometimes Congress and the people are not up to date as to what has arisen. The war in Vietnam is a sad example of this. And I think that it was our responsibility to get a lot more information than we did get about the war in Vietnam, so that we could have more aptly reflected, indeed, where the public was on this issue, and could have more effectively represented them.

Mr. MOLLENHOFF. Well, I think that when people are on committees like this, that you do have a manner of making your point public. I think that one of the greatest opponents of the administration was in probably the best strategic position—Senator Fulbright—on the other

side. I think that he failed totally because he did not have the courage nor the diligence to do the work to make the points. He has been, I would say, a lazy chairman of the Senate Foreign Relations Committee; and he has not followed through on cases involving just basic integrity in government.

Mr. MOORHEAD. Mr. Thone.

Mr. THONE. I have no questions.

Mr. MOORHEAD. Mr. Stanton.

Mr. STANTON. I appreciate your appearing here.

First of all, I'd like to know if you have any idea how many members of the electronic media have ever used the Freedom of Information Act. No idea?

Mr. MOLLENHOFF. No idea at all.

Mr. STANTON. The reason that I make that point is that I'm concerned about broader issues. The Gallup Poll shows that your industry is a dying one as far as providing information to the American public. The American public receives 70 percent of its information from the electronic media, and approximately 30 percent, according to the Gallup Poll from your——

Mr. MOLLENHOFF. They're the poorer for that.

Mr. STANTON. That may be, but that is a fact, or at least that is a statistical fact. And I think Mr. Smyser might want to raise a point here.

Mr. SMYSER. I simply would say that it is not a statistical fact; that is, statistics would show precisely the opposite. I can't quote them now, but I know that they exist. I just have to challenge that.

Mr. STANTON. I think another fact is the diminishing number of newspapers in American cities. For example, in my community there used to be five newspapers; today there are two. And frankly, those two have the same lawyers, and they operate out of the same ballpark and the same ballgame in such a fashion as you can hardly distinguish them.

So that as an objective individual I look at them and say how much information do we get from them?

Mr. MOLLENHOFF. Let me just offer the opinion that that's an irrelevant statistic, whether how much you get from television or newspapers, because in fact the television does very damn little enterprise reporting. And most of what they have comes initially from newspaper digging.

Mr. STANTON. That's just the point I was going to make. The Watergate story indicated there was a great deal of pressure put upon the Washington Post in terms of its licensing other interests in terms of a television station; and my question for the members of the panel is should the Government reexamine its role in terms of the electronic media and the control it holds over it in the light of the pressures and the fact that the public is getting more and more every day its information from the electronic media?

Mr. WIGGINS. Congressman, we don't feel we're dying. I think the printed media will long survive. But since you solicit a point of view on this, I would like to concur with some testimony that I think was given before. And I think the time has arrived when the electronic media should be subjected to no scrutiny by the Government, but to

see that they adhere to the wavelengths that have been assigned to them.

The limitations that have been originally imposed on the media arose at a time when there were a limited number of channels, and modern technology is now making available in any community in this country probably more channels than can be economically utilized by those who would like to use them.

And as soon as that situation came to prevail as a necessity for limiting them, and supervising them, and requiring that they be insuring a public service, it again disappeared. And as long as the media is subjected to an examination of its performance periodically by a commission that judges the character of its programing, and the nature of the people who appear on it, and whether or not it's serving the public interest, the electronic media is in a precarious position.

This is my own personal and private view. I speak for no one else. It offends my sense of freedom from the Government intervention.

Mr. MOLLENHOFF. I'd like to say that I associate myself with those remarks, because I feel that even with the superficiality and irresponsibility and biases that exist in television, that any Government control of any aspect of it would be worse.

Mr. SMYSER. I'd just like to elaborate a little bit on the question of whether or not we are a dying media. There are all kinds of other figures that we could cite here, such as total newspaper circulation figures. It's very, very true that newspapers have sort of redefined their role in about the last 15 or 20 years, and to a large extent because of the effects of the electronic media.

But there are just all kinds of positive signs in our business. There is the upsurge of the local newspaper and its importance, its understanding of its role better.

I just need to be on the record as saying that I take exception to your statement that we're a dying media.

Mr. STANTON. Well, I think in terms of what I understand about the newspaper media, it is my judgment—and of course, it's strictly a personal opinion—that the newspapers do a less effective job today than they did 15 years ago when I started in political life. And I say that because the advertising dollar is more and more going to the electronic media, and the resources available to newspapers to employ investigative reporters to do a job is less and less.

And because those resources are less, and because the electronic media do not employ investigative reporters in the same sense and the same purpose that newspapers do, I think we get less effective coverage of Government.

Mr. BLACK. Well, Mr. Stanton, may I suggest that we have the American Newspaper Publishers Association send you some material on the economic health of our industry. I think that you'll find that you really have some bad information on some of the statistics.

Mr. STANTON. Well, I would like some information that would show me that the newspaper industry is a viable, healthy industry; because I'm not so sure it is.

Mr. BLACK. We'll see that you get it.

Mr. MOLLENHOFF. Let me straighten one thing out on investigative reporters. Being in that field for the last 30 years, I happen to believe

that there is more active investigative reporting today than there was 20 and 30 years ago, and even than 10 years ago; and that it's being done in a more responsible, effective manner. And that could be attributed in many respects to places like the American Press Institute and the seminars that they conduct; Nieman fellowship programs, and a number of other programs of this type.

Mr. STANTON. Well, let me point out something to you. I do not want to make a case against the newspapers of the world or appear antinewspaper, because I am not. But the fact of the matter is that there are seven Congressmen from northeastern Ohio who are covered by two major dailies, the Plain Dealer and the Cleveland Press; and the fact of the matter is that three reporters cover that area for two major newspapers. And then if one sees one of those reporters, in terms of legislative branch of the Government, once a week, it's unusual.

What I am saying is that they do a less effective job in coverage in terms of input of the Congress itself than they do of the local city council meetings.

Mr. MOLLENHOFF. Well, from my own standpoint I think that I can say that there would be a certain responsibility on the part of the Congressmen to conduct themselves in an effective, newsmaking manner; and that they would be, under those circumstances, covered more thoroughly.

There are members of our delegation that have very little coverage; and they shouldn't have. There are others that have a great deal of coverage, and shouldn't have.

Mr. STANTON. Let me say this, that the ability to get coverage has never stopped me from getting it. I get very good coverage. I get coverage that I personally regulate in terms of my press releases. It's my coverage and my judgment of my image. That doesn't give any credit to the American newspapermen.

Mr. MOLLENHOFF. Are you doing anything wrong that they're not catching?

Mr. STANTON. They'll never know it.

Mr. MOLLENHOFF. Let me say——

Mr. STANTON. You'll never know it.

Mr. MOLLENHOFF. I have a staff of three men in our operation here. Our operation is not to influence the members on ideology or politics; it's to cover them straight. It's also to cover them tough if they do anything wrong.

I don't know of anything that any of them are doing wrong right now, but there have been some in the past—five, one Senator and four Congressmen—who were eliminated because they were covered too thoroughly.

Mr. STANTON. Well, I don't want to get into the personalities of it; and I could just rate you as an exception.

Mr. MOLLENHOFF. Nor do I want to.

Mr. STANTON. Well, I could just rate you as an exception to a rule; but I happen to believe that there is less investigative reporting and less good coverage of the Congress of the United States. And if there was more in the past, or if there was less in the past, then it was a truly difficult time in the fifties or around there.

Mr. SMYSER. Mr. Stanton, I think on the matter of investigative reporting we could answer you with one word, Watergate.

Mr. STANTON. Let me say this, that I would agree; and I would commend the Washington Post, and particularly Katherine Graham, because I understand fully the application of Executive power on that matter in terms of what happened. And I think it's good. I think it's salutory in terms of the American system. I think it is a credit that the American system can even survive this type of thing.

But the fact of the matter is that a Watergate has existed in many, many other areas of the Government for a long, long time; and I have not seen the——

Mr. MOLLENHOFF. Have you been reading my column?

Mr. STANTON. I do not read you.

Mr. MOLLENHOFF. I have one column a week, and I can hardly keep up with the scandals I can document.

Mr. BLACK. And Mr. Stanton, this is going on all over the country. We can document this for you. I've sat on the Pulitzer jury a couple of times judging the public service area where newspapers all over the country are conducting very extensive investigations and revealing all kinds of wrongdoing; and it's happening, I think, in every State.

Mr. STANTON. I think they are publishing the wrongdoing in many, many areas; and I think that it's salutory. All I am saying is that I believe that we have to have a fuller and broader approach in terms of your industry, but more importantly, we have to have an investigative approach from the electronic media which would strengthen the position of the American public.

Mr. MOLLENHOFF. We're involved now in an investigation with the Commodity Exchange Authority. This is a $200 billion Exchange Authority which controls the boards of trade across the country. It's an absolutely outrageous scandal situation involving these $200 billion, and we're having some difficulty getting the Congress interested.

If you want to come aboard, we'd be glad to have you; and we'll send a copy of our series up to you at any point.

Mr. STANTON. I'd appreciate that.

Thank you.

Mr. MOORHEAD. Next to the members of the panel, I see that Mr. McCloskey is fidgeting more than anybody except the panel; so to relieve his blood pressure, I'll let him speak.

Mr. MCCLOSKEY. This isn't really a blood pressure item. I'd just like to ask three peripheral questions that bear on this.

Now, the first, gentlemen, with respect to the health of the newspaper profession. Do you feel that Congress should subsidize the postal rates that are now being considered by the committees of the Congress in order to maintain smaller newspapers?

Do you feel this is important for Congress to assist in the health of the newspaper profession today?

Mr. BRUCKER. I didn't quite hear that. To subsidize?

Mr. MCCLOSKEY. The postal rate question. We have delegated to the U.S. Postal Service and to some public corporations the control of postal rates. We are now considering elsewhere the question of whether or not we should not grant some subsidy rates for smaller newspapers to permit them to survive. I think Mr. Stanton's supposition is correct. We are hearing from a lot of small print media that

they cannot survive with their postal rates, on the basis of the Postal Service.

Mr. MOORHEAD. Mr. Brucker first, and then Mr. Wiggins said he would like to answer.

Mr. BRUCKER. Well, isn't the remedy for that to go back to the original conception of the second-class rates? That because of their importance in public information, newspapers should be delivered as swiftly as first class, and should be subsidized.

It seems to me that what the Congress ought to do is simply go back to that. There is no reason why the Post Office Department has to make money any more than the Defense Department.

Mr. MCCLOSKEY. Well, that's the question. On freedom of information, which is in the jurisdiction of this committee, do you gentlemen feel that freedom of information in America today and the role of the newspaper requires the subsidy for a public service?

I think Mr. Stanton is absolutely correct that smaller newspapers, particularly in the rural areas where we find great middle America is yet not aware of some of the examples that appear in your column, Mr. Mollenhoff.

And I think all of you who have done interior work have found the print media away from New York and away from Washington much less comprehensive in their coverage of some of these items.

Mr. MOLLENHOFF. Well, if the Congress doesn't realize now what a mess it made out of things in accepting Red Blount's Postal Service Corporation, it should go out tomorrow and turn this whole thing around. It's been a disaster from the standpoint of financing, from the standpoint of delivery; and I think it should be investigated absolutely all the way through, and I say turned around even before the investigation, because the investigation will take too long. And that would mean coming back to the second-class rate, first-class service and delivery which Mr. Brucker——

Mr. MCCLOSKEY. Is there any disagreement with that on the panel?

Mr. MOORHEAD. Mr. Wiggins?

Mr. WIGGINS. Mr. Chairman, I would like to associate myself with the criticism of the U.S. Postal Service, which Mr. Mollenhoff has just uttered. I do think that it is a matter that is just not related to a utiliarian function. It is definitely related to freedom of information in terms of all the stuff that moves through the mail. And I think the quasi-public agency has been set up, has embarked upon its own revision of postal philosophy, at war with all of the good Postmaster Generals from John Wanamaker to James Farley, who operated on the premise that the nearer you could handle the mail to the point of origin and to the point of distribution the better it was.

And since the central sorting has been instituted, the bringing of all the mail into large cities where the problems originally arose, and then sending it back out again. And all this has been doing is incur costs which efficiencies of mechanization are going to be overwhelmed.

But back to the central problem of newspaper rates. I think that many small newspapers are affected by the ability to get into the hands of their readers their publications; and that if they had to rely on independent distribution it would put upon them a further burden which they couldn't bear.

And I think they're also getting into a very precarious situation, because the pileup of lower class matter is involving newspapers, which are really not being handled in a first class manner, but are being dealt with as though they were circulars. So that the delivery time of many local newspapers is incredibly delayed, sometimes up to 3 or 4 weeks after mailing.

And it's a very unfortunate effect upon the usefulness of the point to the public as a whole.

Mr. McCLOSKEY. I have another question which relates to something which Mr. Mollenhoff said, as it relates to Mr. Ziegler. It is a matter before the committee, and that is the question that has been raised.

We do have a statutory section that it is a crime to lie to a part of Government for the exchange of information; that it is a crime for the member of the press to lie to the congressional committee.

I wonder if we should consider making it a crime for a Government employee to lie or consciously withhold information, or give a deceptive answer in response to a newspaper report or a question.

Mr. MOLLENHOFF. I think that it would be helpful if somehow there would be a situation created where the Press Secretary at the White House would feel that he was under oath.

We've had a disastrous situation over there in recent months. We have had 10 months of falsehoods, with Mr. Ziegler contending that he could make it all go away by saying it was simply inoperative at this point.

I don't know how one goes about this from the standpoint of putting him under oath every time he comes in there. But I think that as a public official and as spokesman for the President of the United States, a rather important position, he has been our only avenue of information for a period of the last 4 years.

Mr. McCLOSKEY. Mr. Mollenhoff, I appreciate that situation. We have, those of us that don't seek misrepresentation from the point of business, laws of crime and perjury; and I'm wondering if the importance of freedom of information would justify this revision, and this is a question I don't know the answer to.

I would really welcome the considered judgment of any member of the panel on whether we have now reached the point where the public spokesman for Government should be penalized later for relaying false information which he knows was untruthful at the time.

According to the ordinary rules, the conscious deceit or the conscious giving of a half statement or a half truth, or making a statement which he knows is going to be accepted differently is not acceptable. Should we now impose a criminal penalty on members of government who consciously mislead?

Mr. MOLLENHOFF. I don't think you could work out the mechanics of this to cover most situations, because you have the question of proof. And who can prove that, and who do you believe when a reporter says that a public official told him something, and he says it's otherwise?

Now, in the Presidential press briefings, though, there could be a requirement that those be taken, made a public document, and that the material in them be treated in the same manner as testimony before a congressional committee would be.

And I think that that would have a helpful effect.

Mr. MOORHEAD. Sir, do you swear that you will tell the operative truth and not the inoperative truth?

Mr. MOLLENHOFF. That's right.

Mr. MOORHEAD. Are there other questions?

Mr. Thone?

Mr. THONE. Only a quick observation. I have followed and admired Mr. Mollenhoff for a long time; he comes from my part of the country. But, Clark, I don't believe you really want to swear or anything of the sort, a Press Secretary. This is your job as a good investigatory reporter. You're going to smoke him out as you did here.

Mr. MOLLENHOFF. I want to feel that he feels it. I've not felt in the past that there was a necessity to do this, but over the period of the last 10 months, what Mr. Ziegler has been telling over there, has been the front for all of the falsehoods on Watergate. He has been the only source, because the President wasn't having press conferences. And Erlichman and Haldeman were not showing their faces; they were telling him what to say. And this condition is one where he should feel some responsibility and some accountability.

The President is trying to shield him in this particular case by saying, well, he was misled like I was. While there is some period of time where that could apply if you study the record carefully, I don't see how any thinking person could have been misled at various stages in some very serious matters.

Mr. THONE. So you're answering my thought, Clark, that you don't want a Press Secretary, or someone like that, under formal oath?

Mr. MOLLENHOFF. Not under normal circumstances, but I would like to think of Ron Ziegler as having some greater responsibility than he has been exhibiting in the last 10 months.

Mr. THONE. Well, the hour is late. I would like to visit with you, it's an intriguing subject, and I think Pete here came up with a viable suggestion I had not thought of before, and it might have some possibilities. But I don't go along with what you are now suggesting, Clark.

Thank you, Mr. Chairman.

Mr. MOLLENHOFF. I don't seriously say it. I just wanted to give a gig to Ron.

Mr. MOORHEAD. Any other comments?

Yes, Mr. Brucker.

Mr. BRUCKER. I'd like to add one thing, going back to Mr. Stanton's question about the differences between electronic and print. I would certainly like to associate myself with the idea that the electronic can be just as free as print, particularly because the fact is that it is something that cannot be done by any of us or by any of you. It is entirely possible that within the next quarter century there will be no print media, except that that is printed through the electronic media, which makes it all the more important that they both be equally free.

Mr. STANTON. I concur on that, because I have seen studies that show that we will get our daily newspaper through CATV, and then the printing of the daily newspaper will be there. And that's the reason that I wanted to indicate that your industry wasn't as healthy.

Perhaps I made an exaggeration, but the fact of the matter is I think that your industry, as an industry, is going to go out of business.

Mr. BRUCKER. Well, that business will still go on. You've got to read. It's just a question of how you print it.

Mr. STANTON. It will take a different form, but the fact of the matter is that unless we do something now in terms of the electronic media, there has never been a major story in the United States that has been conducted by NBC, or CBS, or ABC in terms of investigation that I know of where they have done anything like the Watergate, or any investigation of Government one can justify as a basis for enlightening the public. That's the reason I made that report.

Mr. MOORHEAD. The Chair recognizes that Mr. Smyser and Mr. Wiggins had some comments to make.

Mr. SMYSER. Just briefly I want to agree with what both Mr. Wiggins and Mr. Brucker said about the electronic media being free of all restrictions. I'm all for that.

As far as Mr. Stanton's concern about current investigative reporting techniques, I think they are essentially good.

I've tried hard to adopt a philosophy relative to criticism of our business which is: Listen, but shut up and do your job. I think we are doing our job. I think we're going to convince you in time.

I think one thing we have to remember is we're not so much in the print media business as we are in the information business. As long as we concentrate on that, whatever form we take, we'll still be a healthy industry.

Mr. WIGGINS. Well, Mr. Congressman, I have that same point to make. That newspaper enterprise is a business, and you were talking about some of its current production levels and some of its current business practice. But the essential element in newspaper industry enterprise is the news gathering, the editorial department. And no matter what the vehicle, the apparatus, the paraphernalia by which the gathered information is disseminated to the public, it will still be essentially the same enterprise.

But I agree with you on the point that more and more we may be relying upon electronic media of one kind and another, and to a degree or another of the existing statutes are subject to governmental intervention; and it's none too early to eliminate that degree of governmental supervision which is, in my opinion, consistent with the first amendment.

Mr. STANTON. I think that the newspaper media recognizes the transition that I'm talking about; otherwise, Scripps-Howard would not own about six television stations; The Washington Post would not own the electronic properties that it does; and the other major networks that do house people and others that own the properties that they own.

The point I'm making again—I don't want to continue on this—that we'd better look further than this limitation that we're talking about in terms of the Freedom of Information Act.

Mr. MOORHEAD. Gentlemen, I think we've had a very good session this morning with maybe a few loose ends that we missed. So Mr. Phillips, do you have a question?

Mr. PHILLIPS. Just one brief matter, Mr. Chairman. In preparations for these hearings, the staff has reviewed previous testimony of these five distinguished panelists in 1955, in 1963, and in 1965.

Many of the statements that were made in those previous appearances are so relevant to the current hearing, I wonder if it would be permissible for us to compile a selection of quotations from the pre-

vious hearings for these printed records and to include them at this point in the record?

Mr. MOORHEAD. That's an excellent idea.

Without objection, so ordered.

[The information referred to follows:]

EXCERPTS FROM TESTIMONY OF WITNESSES AT EARLIER SUBCOMMITTEE HEARINGS ON FREEDOM OF INFORMATION

* * * It is a misguided philosophy to assume that either distorting or withholding information will do your client good. Inevitably such practices backfire. Just tell the people, fully, factually, promptly. Tell them when it is good. Tell them when it is bad, or at least open the channels of information so that they may find out for themselves.

Trust the people with the truth and they will seldom betray your trust. Mistrust them, deny them the truth, and you will reap what you sow.

Tell the truth yourself before someone else has a chance to step in and mislead and gain credence for their misleading in that you have been negligent, less than frank. * * *

Richard Smyser, Managing Editor, the *Oak Ridger*, Oak Ridge, Tennessee; Chairman, Freedom of Information Committee, Associated Press Managing Editors Assn.—March 30, 1965.

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* * * Our own position is that the Administrative Procedure Act and the other laws which are on the books have been inadequate in one important respect, and that is recognizing—writing into law—the public's right to know. The fact is that in the present situation, as we see it, the burden of responsibility for public knowledge of government affairs is fundamentally misplaced. It shouldn't be up to the American public, and the press is simply their representatives, to fight daily battles just to find out how the ordinary business of their government is being conducted. Rather, it should be the responsibility of their employees, who conduct this business, to tell them. * * *

Creed Black, Managing Editor, Chicago *Daily News;* Chairman, Freedom of Information Committee, American Society of Newspaper Editors.—March 30, 1965.

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* * * It took the Government of England 200 years to tear down the structure of secrecy erected in the generations after the invention of printing. It may take us a long time to break down these barriers to information . . .

The general views of this society on the right of the people to the facts about Government was stated quite adequately by Lord Acton when he said:

"Everything secret degenerates, even the administration of justice; nothing is safe that does not show how it can bear discussion."

For generations, no public figure in America would have dared dissent from this point of view openly. Now, a great many persons in Government do not seem to agree with it.

What has brought about this change?

We think it is due to the size of Government; to the emigration of governmental power from publicly operated legislative and judicial agencies to secretly operated administrative agencies; to the declining faith in the wisdom of the people which is an aspect of this generation's counterrevolution against free institutions; to the requirements of national military security which have increased steadily since World War I. * * *

J. R. Wiggins, Executive Editor, Washington *Post & Times Herald;* testifying for the American Society of Newspaper Editors.—November 7, 1955

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* * * There will always be a few political figures who wish to stretch or distort the law to hide their crimes of mismanagement. There will always be some bureaucrats who will take the view that the Government agency that pays their salaries has become their personal property, and is not subject to examination and criticism by the public, Congress or the press.

* * * The (proposed) fifth exemption would exempt "intra- or inter-agency memorandums or letters dealing solely with matters of law or policy." Even if this is closely restricted in its application, it can be used to hide a great deal of information dealing with legal opinions and policy. It is often the erratic policy papers or the cleverly worded legal opinions that this is the key document in such controversies as the tax scandals, the Dixon-Yates scandal, the stockpiling scandals, or the Billie Sol Estes scandals. The danger of the broadest secrecy flowing from this exception should be apparent to anyone who has examined the details of these scandals. The argument that all agency business cannot be carried on "in a goldfish bowl" may have some merit from a standpoint of efficiency. However, it is a short step to the philosophy that secrecy promotes efficiency, and that therefore secret Government is something that should be promoted. It is precisely that philosophy that we are trying to end by supporting the pending legislation. * * *

Clark Mollenhoff, Washington correspondent, Cowles Publications; Vice Chairman, Committee for Advancement of Freedom of Information, Sigma Delta Chi.—March 30, 1965

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* * * The right of access to the truth about what is being done in the people's name and with the people's money is not a right of the press but a right of the citizen. The first amendment's guaranty of freedom of the press was originally a civil liberty of the individual. And it still is, even if today it takes large news gathering and publishing or broadcasting organizations to bring the facts to the citizen.

Moreover, nothing that has happened through the coming of instantaneous worldwide communications, nuclear weapons, the exploration of space, or anything else has changed this fundamental relationship between citizens, Government, and the news.

This country will continue to remain strongest if its people have constant access to a maximum of the facts. Incomplete information or deliberately distorted information may be useful in a totalitarian state. The less we have of it the better our system will work, and the more surely the national interest will be served.

* * * Democracy is slow, cumbersome, and often disorderly. But it is more enduring and more just than any other form of government precisely because it speaks not with one voice but with many. There is only one necessity. Those many voices must be the voices of men who can have access to knowledge of what is going on. Otherwise they will be but the voices of ignorance.

Herbert Brucker, Editor, Hartford *Courant;* Vice President, American Society of Newspaper Editors—March 19, 1963.

Mr. BLACK. Mr. Chairman, I hope you'll select only the ones that are pertinent.

Mr. PHILLIPS. Yes. The staff will be selective.

Mr. MOORHEAD. I think if the witnesses would like to take a look at the excerpts before they're made part of the record, it certainly would be agreeable.

Mr. BLACK. No. I was only joking, but our readers are not always that kind.

Mr. MOORHEAD. Mr. Alexander?

Mr. ALEXANDER. A point of inquiry. Do the records to which Mr. Phillips refers contain a compilation of penal laws, criminal laws that were in effect at that time, that would be the subject of criminal law? I was wondering how many of them would be in effect. I'm just trying to discover if we had your reference label, if it would be easier to get information now.

Mr. PHILLIPS. Yes, we have a compilation of statutes showing access and nonaccess provisions.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Yes, Mr. Chairman. I find myself in an enviable position today, because I'm a former correspondent for United

Press International and even a former employee of the postal system, as well as being a congressional staffer.

I wonder if you gentlemen would agree with me that most of the national news which is communicated to the American people today actually comes through the wires of United Press International and the Associated Press?

Mr. BLACK. I think that that is less and less true, because I think we have an increasing number of independent wire services, or supplementary wire services—the Los Angeles Times, the Washington Post, the New York Times, the Chicago Daily News, and a new one operated by my own company, Knight Newspapers, Inc.

Mr. CORNISH. Well, these, of course, are the major metropolitan dailies, but of course it wouldn't apply to many of the smaller daily newspapers—there probably are thousands of them throughout the United States—who depend primarily, I think, on the large news services for their bulk of national and international news.

Mr. BRUCKER. It's perfectly true that that is going on, but I think that what Mr. Black was saying is that there is a change coming over it. There is now in process something called a survey of New England daily newspapers. I've been a part of that, and I have investigated the nine dailies that are published in the State of Vermont. And I've been very much impressed with how much the New York Times supplementary news service flushes out and makes much richer the bread and butter diet that you get in the AP newspapers.

Mr. CORNISH. I would agree with that point. The thing that really troubles me, however—and all of you have made the point, I think, that you would like to see government open up more to increase the flow of information to the people, and you have mentioned that the Congress might do better in this regard. And I would certainly agree with all those points.

But the thing that really troubles me is that I am not sure that the news media are really prepared to handle that job, especially when, for example, the House staff or the Associated Press have reporters who are assigned to cover five and six congressional hearings simultaneously.

Now, as you know, that's an impossibility. And I'm just wondering how much information the American people should have at their disposal that they are not getting because of the inability of the press to adequately cover it.

Mr. SMYSER. You are properly concerned about the diet of news that small papers like my own get—papers which depend almost exclusively on the Associated Press. But there is something else happening and that is an increasing amount of self criticism from within the press itself—if I may put in a plug for my organization, the Associated Press Managing Editors Association. The AP is by no means monolithic. It gets an increasing amount of contribution and criticism from its member editors, both individually and through the organization (APME) of which I speak.

And I think the concerns you mentioned are very valid ones, but I think that they are also concerns with which most of us, particularly on all small newspapers, are quite conscious of.

Mr. BLACK. I'd like to make a couple of observations on that again, again going back to my own time here in Washington and looking at

it from the other side of the fence. I would certainly agree that newspapers are not doing the kind of thorough job that they should; and I think any editor in America would say he was never satisfied with the job they were doing.

HEW, for instance is a giant of a department, with 110,000 people, 250 programs, and an $80 billion budget. The AP had one man there, and the UP had a man to cover that and two other departments. And I don't think any other paper had anybody there on a regular basis. Yet, if they had some big development come along, we would have 100 reporters over there; and then the next day those 100 were somewhere else.

We are, as editors, critical of pack journalism; and I think that's a problem here in Washington. Too many cats are watching one rat hole while others are going completely unwatched.

But I think it is also true that when you get out from Washington you find that the people out in the rest of the country are not quite as interested in all of the details of things that are going on here in Washington as you gentlemen are as I was when I lived here, because it's your way of life, and there are a lot of things outside of Washington which people living outside of Washington are not just as interested in.

And I did find in my time here that I thought the press, despite these shortcomings that I mentioned, was doing a good job of sifting out the important from the unimportant and conveying the really important news to the American public.

And on top of that, Mr. Stanton, the press, while certainly not investigating everything it ought to be, is keeping a lot of people on investigative work.

Mr. CORNISH. Well, actually I was picking up on one of the points that Mr. Stanton was making. I happen to be a former reporter for the Cleveland Plain Dealer. I don't know whether you know that or not.

Mr. STANTON. Everyone I know was a former reporter for the Cleveland Plain Dealer.

Mr. CORNISH. Well, the point that Mr. Stanton was making was that there are many subjects and items of news that are of intense interest to the people who live in Cleveland that are taking place here in Washington, because this has become the capital of the world, so to speak, in many, many respects. And certainly in respect to the interests of northeastern Ohio.

And I gather from the gist or the thrust of his question that he felt that this wasn't being adequately dealt with, and I'm sure that it probably would apply to virtually every other area of the country, too.

Mr. STANTON. I would like to know, for example, the Philadelphia Inquirer, how many reporters does it have assigned to the Pentagon?

Mr. BLACK. Well, I don't think one man is covering the Pentagon for bureau.

Mr. STANTON. How many does Knight assign to the Pentagon?

Mr. BLACK. We have one man who specializes in defense and foreign affairs, James McCartney.

Mr. STANTON. Well, how could one man cover the Pentagon for your paper?

Mr. BLACK. Well, I don't think one man is covering the Pentagon for our paper, because we have, in addition to Mr. McCartney, we have

the wire services, we have the Washington Post, the Los Angeles Times, the Chicago Daily News. And our own wire service, in turn, is going to be serving other clients.

But I don't think that we have to depend on our man alone. How many men did we have covering the Watergate in those early days? Well, we had everybody who was working on the story for the Washington Post working for us because we have their wire service. But even people who do not have the Post wire service papers are getting the benefit of that coverage.

Mr. STANTON. Well, I think that—what I want to point out is that—I could go on forever, and I do not want to.

Mr. Chairman, I yield back. We'll continue this some other time, Mr. Black.

Mr. BLACK. Well, just let me emphasize again, Mr. Stanton, that we as editors are never satisfied. Neither are our correspondents. The editors of the Knight Newspapers spent all of yesterday afternoon with the members of our Washington bureau talking about the Washington coverage and what we can do to improve it.

And as Russ Wiggins, Herb Brucker, and Dick Smyser will testify, our industry is probably the greatest in the country for self-flagellation. Every time we come to a convention like this one we are having here in Washington right now, if we do not keep criticizing ourselves for 3 days, we invite others in to do it.

So we are certainly——

Mr. STANTON. That is an item in the proper position of your convention.

Mr. MOORHEAD. Mr. Smyser?

Mr. SMYSER. I just want to point out that APME has regularly upwards of 300 editors involved in what we call our continuing studies committee. They have two purposes: No. 1, to improve the Associated Press service; and No. 2, to improve our own industry—our newspapers—both through improving the AP and just general improvement of our newspaper. These are actively working committees.

Mr. MOORHEAD. Thank you, gentlemen, very much. I think this has been a healthy interchange. As I said to my colleague from Ohio, I also wish we had more people looking over the Pentagon.

Thank you, gentlemen. You have been most helpful to the committee, and we appreciate it very much.

The committee now stands at recess, subject to the call of the Chair.

[Whereupon, at 12:22 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

THE FREEDOM OF INFORMATION ACT

MONDAY, MAY 7, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:05 a.m., in room 2203, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bella S. Abzug, and Frank Horton.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; Harold F. Whittington, professional staff member; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning we begin the second day of our hearings on legislation to strengthen and improve the Freedom of Information Act. At our opening day of hearings last week, we received testimony on the current status of the public's access to information and the right to know. Witnesses were a distinguished group of media experts, all of whom had testified at subcommittee hearings in 1955, 1963, and 1965 on this same subject. Their support and effort during that period was most helpful in the eventual enactment of the Freedom of Information Act in 1966.

It was likewise stimulating and helpful to have their comments on the current government information situation. We were pleased to have their enthusiastic support for pending legislation to further expand the people's right to know by plugging loopholes and making other needed improvements in the recent law.

Well over 60 of our colleagues in the House and another 20 in the Senate have cosponsored the two bills before this subcommittee, H.R. 5425—which is also S. 1142—and H.R. 4960.

This morning we are pleased to have a number of these Members with us to testify. Other cosponsors have indicated that they will file statements in support of the legislation.

Our first witness this morning will be our able colleague on the committee, the gentleman from New York, Mr. Horton, who has served with us for many years on this subcommittee, and who is now ranking minority member of the full committee. Mr. Horton is the principal sponsor of H.R. 4960.

You may proceed, Mr. Horton. We are pleased to have you with us.

STATEMENT OF HON. FRANK HORTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. HORTON. Mr. Chairman, thank you. I am pleased to be before this very important Subcommittee of Government Operations.

Mr. Chairman, I welcome your scheduling of hearings on H.R. 4960 and H.R. 5425 to amend the Freedom of Information Act. Both H.R. 4960, which I cosponsored with you and several other Members, and H.R. 5425, which you have authored, are designed to strengthen the public's right to be informed of their government's activities. Nothing can be more essential to the safeguarding of our democratic society—now in the midst of a severe shock.

George Washington stated that secrecy was a form of deceit. How true those words ring today when executive privilege, security classification, executive secrecy, and harassment of newsmen have been orchestrated to a degree unknown before in our society in an effort to conceal wrongdoing from Congress and the public.

Our form of government—in fact the foundations of our society—rest upon an informed citizenry and their representatives in Congress. To participate effectively in the decisionmaking process and to maintain a watchful eye over those who administer the laws, Congress and the public require access to information which they believe necessary and pertinent. This is even more true today than it was 100 or 200 years ago because the management of our society has come to be centered to an increasing degree in the Federal executive branch. What is worse, perhaps, is that until recently, at least, there has developed an acceptance in the public and in many Members of Congress that secrecy in government—not to mention central direction of government—are good and essential activities.

I hope that this state of mind will now change in light of current events and that Congress and the public will now exert their rights fully—as conferred upon them under the Constitution—to obtain all the information they require.

To this end this subcommittee has held a series of hearings recently on legislation coauthored by Congressman Erlenborn and myself which sets necessary and narrow limits on the use of executive privilege. Soon this subcommittee plans to issue a report recommending changes in the security classification system. And, here today, in these hearings, we are exploring the means in these hearings to strengthen the hand of the people to find out what their government is doing.

Some 7 years ago our Government Operations Committee initiated the Freedom of Information Act. This law provides that all information in the possession of Federal agencies shall be made available to the public except information falling within nine specific categories—for example, classified data, internal communications, investigatory files, trade secrets. This constituted an important breakthrough—one not yet attempted by any other country, if I am not mistaken. In hearings held last Congress which explored the administration of this act, we were informed that the act has served the public well on many occasions. Without question, vastly greater amounts of information are now being made available to the public than occurred prior to the law's passage. But, the hearings also brought to light many problems

and failures in the administration of the act. Among these failings were:

Serious bureaucratic delays in responding to requests for information;

Need of individuals to pursue cumbersome and costly legal remedies;

Inadequate recordkeeping by agencies;

Undue specificity required in identifying records;

Narrow interpretation of the act, thereby excluding greater amounts of information from disclosure;

Imprecise wording of statutory language, leading to inconsistency in interpretation and a restrictive interpretation of the act's provisions;

Promulgation of legally questionable regulations; and

Overclassification of millions upon millions of Government documents.

Following closely on the heels of these findings was the Supreme Court decision in *EPA* v. *Mink*. This decision, in my opinion, sadly misinterpreted the Freedom of Information Act and the intent of Congress in enacting it. Two exemptions incorporated into the act provide that a Federal agency has the discretion to withhold information if it is classified for national security purposes under statute or Executive order or if it constitutes an internal agency communication which would not have to be disclosed in a court of law. Overturning a lower Federal court order upholding a request by 33 Members of Congress for information in the Government's possession concerning the Amchitka nuclear test explosion, the Supreme Court held (1) that the lower court's finding that the exemption could not be used as a shield for withholding was erroneous and that the Government agencies involved could withhold such information on the basis of the above two claimed exemptions and (2) that the lower court could not challenge an agency's classification of documents and was not required to challenge an allegation that documents were properly withheld on the basis of the internal communication exemption.

This decision of the court cannot be allowed to stand, nor can we continue to permit the Freedom of Information Act to be administered in its present form.

To meet these objections, I have introduced H.R. 4960.

Title I of this bill overturns the *Mink* decision and directs a Federal court to look behind an agency's claim of security classification or internal communication and decide for itself whether a requested document meets the narrow requirements of the law regarding exemption from public disclosure. Moreover, the title seeks to put a stop to the practice of some agencies which have commingled exempt material with nonexempt information in order to screen the entire lot from public view. The courts are authorized to make those portions of a document public which are not covered by an exemption unless to do so would seriously distort the meaning or seriously jeopardize the integrity of the exempt provisions.

Title I also amends three existing exemptions under the Freedom of Information Act to further narrow their application and to further clarify their meaning.

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One such amendment would restrict trade secrets and other commercial or financial information to those instances in which some other law specifically confers an express grant of confidentiality and in which the agency in receipt of the information specifically confers an express written pledge of confidentiality. This amendment is designed to overcome the practice under the existing exemption to, first, confer confidentiality on the basis of the Freedom of Information Act itself; second, to exercise the exemption in cases of other types of confidential or privileged information; and, third, to extend confidentiality solely on the basis of a claim for protection made by the supplier of information rather than under an express grant of confidentiality. At this point, Mr. Chairman, I urge your subcommittee to seek the views of other witnesses on the ramifications of my proposed amendment on the protection of trade secrets.

A second amendment narrows the internal communication exemption which has been widely used to date to withhold information from the public. The amendment would limit the exemption to internal memos or letters which contain recommendations, opinions, and advice supportive of policymaking processes. This is the primary area, I believe, which such an exemption is designed to protect.

The third amendment seeks to alter the exemption on investigatory records compiled for law enforcement purposes. This exemption has also been widely used to conceal information by extending its coverage to include inactive or closed investigative material, as well as that which, if revealed, would not hinder effective law enforcement. The amendment narrows coverage under the exemption of investigatory records to the extent that their production would constitute a genuine risk to enforcement proceedings, or a clearly unwarranted invasion of personal privacy, or a threat to life.

Improving the contents of a law without enhancing enforcement procedures will be of little or no benefit, however. To accomplish the latter, therefore, title II of H.R. 4960 creates a seven-member Commission—four members to be appointed by Congress and three by the President for a term of 5 years—to assist the Federal courts in determining whether requested information is being properly withheld by an agency under the Freedom of Information Act. As has been requested by courts and other authorities, such assistance is essential because the courts at present lack sufficient time or expertise in many instances to enforce the act effectively. In addition to the courts, the bill also authorizes Congress, committees of Congress, the Comptroller General of the United States, and Federal agencies to petition the Commission for a review of an agency's denial of information. An individual citizen may also obtain a review by the Commission if three members of the Commission agree to such a review. Authority to enforce the Freedom of Information Act would remain with the courts and the findings of the Commission would only be advisory.

However, a Commission finding that an agency has improperly withheld information from the public shall constitute prima facie evidence before the court that information has been improperly withheld. This shall have the effect of placing the burden of proof upon the agency in the court proceeding to show that its action in refusing to make information available is consistent with the law.

Finally, H.R. 4960 provides in title III for certain additional amendments to the Freedom of Information Act which, as a result of subcommittee hearings last Congress, were found to be necessary if the public is to have access to all the information it is entitled to. These amendments first, lay down reasonable time limits for an agency to respond to a request for information; second, authorize a court to award reasonable attorney's fees and court costs to private parties who have been found to have been improperly denied information by a Federal agency; third, direct a court to enjoin an agency's improper withholding of information; and, fourth, require agencies to file annual reports with the appropriate committees of Congress detailing their administration of the Freedom of Information Act.

Mr. Chairman, almost 7 years ago Congress took a giant step toward throwing the doors of informational freedom open to the public. Disclosure of information was to be the rule, not the exception; the burden of disclosure was to take precedence over the burden of concealment. Regretfully, these requirements have all too often been ignored or interpreted too narrowly. The state of our society today and the need to maintain effective restraints upon a giant Federal bureaucracy require that more stringent steps be taken. I believe enactment of H.R. 4960, amending the Freedom of Information Act, together with that on executive privilege, will go far to correct existing imbalances.

Mr. Chairman, a number of excellent proposals are pending before this subcommittee. I am confident that with the leadership of this committee, my colleagues Mr. Moss and Mr. Erlenborn, and indeed all the members of this subcommittee, a tremendously important piece of legislation will emerge from these hearings.

Thank you.

Mr. MOORHEAD. I would like to ask, Mr. Horton, whether you think, in view of recent events whether the climate is right for passage of legislation of this type in the Congress?

Mr. HORTON. I personally would think so. I think that as a result of what we have seen, that Members of the Congress would be anxious to be more specific, and I think we can demonstrate as a result of the very comprehensive hearings which you held last year, and which I attended very faithfully, as you know, that there is need for clarification of both of these areas. Speaking specifically about the Freedom of Information Act, I think it was a landmark step forward when we passed that legislation.

But, I think our hearings demonstrated that there has been great abuse and that there has been an inability of the people to get information. And, in fact, the Freedom of Information Act has been used as an impediment in several instances. I think as a result of our hearings last year, and what is being done now that the agencies are moving forward. I got something the other day from one of the Federal agencies indicating that they were moving forward to make available more information under the Freedom of Information Act.

But, I think that there are ambiguities under the act at the present time, which the provisions that I have suggested for amendment can help overcome. I think that we can make the act more effective in order to make more information available to the public.

So, I would say "Yes, I would think that the climate and the atmosphere would be conducive to action upon a bill such as this."

Now, I realize also that there are different views on this, and so it is important that we move in areas where we can get good support, because if everybody has a different view, and nobody can come forward with something that can be accepted by all of us, then we will just fall because we do not have sufficient support for the bill. I think that the legislation we have introduced is an important step forward. I do not feel that I am bound by any special items, however. For example, in the makeup of the Commission, I have suggested certain numbers, but that is not important. It could be more, it could be less. But I do think something like the Commission is important to interpret some of this information, and to act as an aid to the courts.

Mr. MOORHEAD. I am interested in your FOI Commission idea, and particularly that the majority of the Commission would be appointed by Congress.

Mr. HORTON. Right.

Mr. MOORHEAD. Is there any precedent that you relied on for establishing a commission in that form?

Mr. HORTON. I do not know of any special precedent that we had for that, although we did have the Procurement Commission, which I served on, which was handled in a similar way

Mr. MOORHEAD. But you were appointed by the President, were you not?

Mr. HORTON. No. No. We had the same setup with the Procurement Commission. We had 12 members. The Comptroller General was a member by the statute. Then, there were three members appointed by the Speaker of the House, three by the Vice President, and the remaining five by the President. The Commission worked very effectively I thought. We are now finished.

Mr. MOORHEAD. So on the Procurement Commission, a majority was then congressionally appointed? Of the 12, only 5 were Presidentially appointed? I am counting the Comptroller General as a congressional appointment.

Mr. HORTON. Right. Only 5 of the 12 were appointed by the President.

Mr. MOORHEAD. But in the FOI Commission provided for in H.R. 4960—and I think this is part of the righting of the balance between the executive and the legislative branches—the majority would be appointed by Congress?

Mr. HORTON. Yes. I think you need some type of commission or some type of organization like this. They would be full-time Commissioners that would work in this field so that they would be expert in this area. At the present time, there is no source except perhaps in the Congress, and even as such we do not act as judges on interpreting whether or not it should or should not be made available. I think we do need some technique to get questions resolved, and I think that is part of the problem we have had now with the administration of the Freedom of Information Act, as I have detected it through the hearings we have had.

Mr. MOORHEAD. As I understand under your bill, persons seeking information from an agency would have a choice of either going directly to the court if denied, or first going to the Commission; is that right, sir?

Mr. HORTON. Right.

Mr. MOORHEAD. We do not take away his rights to go directly to the court?

Mr. HORTON. No. There is no removal of that right. But, the majority of the people when their requests for information are denied do not go to court because it costs a lot of money, time, and effort. If we have a commission, I do not think there would be that impediment. And, I think we would have more effective administration of the act.

Mr. MOORHEAD. And presumably Members of Congress could also go to the Commission?

Mr. HORTON. Right.

Mr. MOORHEAD. When there was withholding of information from Members of Congress by an executive agency?

Mr. HORTON. That would be available, too.

Mr. MOORHEAD. Well, Mr. Horton, I think you have made a tremendous contribution, not only with your legislation, but also by your strong and forthright statement today. If you would be willing, could you join us up here as an ex officio member?

Mr. HORTON. Thank you.

Mr. MOORHEAD. We have a most extraordinary and beautiful witness following you.

Mrs. Mink, would you come forward? We certainly commend your efforts and those of your colleagues in the case of *EPA* v. *Mink*. I agree with Mr. Horton's characterization of that decision because it certainly showed that no matter how frivolous a classification marking applied by the executive branch might be, the court would not look behind it. Obviously, I think the Congress should correct this situation with proposed language in Mr. Horton's legislation or mine.

Do you want to comment, Mr. Horton?

Mr. HORTON. No. I am just glad to welcome you to the subcommittee.

STATEMENT OF HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mrs. MINK. Thank you very much, Mr. Chairman. I too, regret that the Supreme Court rendered the decision that they did in the *Mink* case, necessitating this legislation. But, I guess in retrospect I can say that the decision has forced us in a way to review the application of the Freedom of Information Act, and to narrow it so that it can have some force and effect in making available information to the public. So, in that respect I think that the final decision of the Supreme Court hopefully will generate enough concern in the Congress to prompt legislation in this area.

I am delighted to have this opportunity to testify regarding the various bills that are before this subcommittee. I have cosponsored legislation which the chairman of this subcommittee has offered, and I believe its adoption, or certainly legislation similar to it, is essential to the preservation of freedom of information in America.

Unfortunately, the Freedom of Information Act has been placed under concerted attack by the executive branch of our Government. The executive has received considerable support from the judicial branch in this regard. Therefore, if we are to restore the purposes of the act, it will be necessary for Congress to enact sound and strong

legislation requiring full disclosure of Government information to the people of the United States.

When I testified before the subcommittee last year, I favored a judicial watchdog system for freedom of information. When the executive refused to disclose information, the matter could be appealed to a court, I thought. The court would examine the documents in camera to see whether full or partial disclosure should be required. In this, I placed my trust in the independence and integrity of the judicial system.

Subsequent events, however, have brought me to the reluctant conclusion that this protection would be inadequate. I believe that Congress itself must grasp the power to require disclosure of Governmental information when the executive and judicial branches will not.

When Congress enacted and the President signed the Freedom of Information Act in 1967, its purpose was to require the disclosure of all Government information to any member of the public. The only exceptions to the law's disclosure requirement were materials included in nine exemptions listed in the act.

Of these nine exemptions, the first has proved most vexatious. This applies to matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The national security exemption, originally intended by Congress to be narrowly construed and implemented, has instead been enlarged and expanded by the executive branch to encompass virtually any information the Executive desires to withhold.

Under the slipshod and illicit procedures devised by the Executive to withhold information under the national defense exemption, an army of bureaucrats has been allowed to classify and withhold information at will. According to newspaper reports of the Ellsberg trial, the man who originally classified them "Top Secret" acted on his own authority and judgment. The only training or instruction he ever had in security matters was watching a movie which had the theme, "Beware of blondes who are excessively friendly—they may be Russian spies."

In 1971, 32 other Members of Congress and I filed the first Freedom of Information Act suit ever to reach the U.S. Supreme Court. As members of the public, and as lawmakers who had to vote on funds for a dangerous nuclear test, we sought information on that test prepared by the Government's environmental agencies which are responsible by law for informing the public on environmental hazards. The executive branch opposed us every inch of the way. When the U.S. court of appeals was audacious enough to insist that the documents be examined in camera by a lower court to see which ones should be released, the executive branch sought Supreme Court review of even this threat of intrusion on its right to withhold.

On March 6, 1972, the Supreme Court agreed to review the appeals court decision. Two days later the executive branch issued an order revising its security classification system. Henceforth, documents were to be separately classified on a paragraph-by-paragraph basis to facilitate declassification in the event it was needed. This ratified one of the contentions of my suit, that the documents I sought could not be classified in their entirety merely by being stapled to a secret document.

On January 22, 1973, the Supreme Court issued its decree in the *Mink* case, which proved to be a disaster for Freedom of Information. In essence, it upheld everything the Executive had done to withhold this information from the Congress and the public. The most damaging part of the decision was the nullification of the doctrine of judicial review. The Court held there was no requirement for an in camera inspection of documents to see whether they could be withheld. It said that the simple statement of the Executive that they were classified would suffice. Thus there would be no check or guard against arbitrary Executive efforts to hold back embarrassing or sensitive materials.

The Court's preoccupation with national security secrecy was further illustrated on February 5, 1973, when the Chief Justice sent to the Congress 77 proposed new rules for evidence for use in the Federal courts. One of those rules, No. 509, sought to apply the grossly expanded national defense loophole to bar any such evidence in Federal courts. Under this proposed rule, any attorney representing the Government could object to the production of a record on the grounds that disclosure would be contrary to the public interest. In effect, this would bar disclosure of all Government documents unless the private citizen or other plaintiff was able to prove that disclosure was in the public interest. Fortunately, Congress has deferred the otherwise automatic implementation of this and other controversial rules sought by the Court.

I might mention another example of executive efforts to build upon the new-found secrecy power it has gained through palpably erroneous interpretations of the national defense loophole in the act. Last October, Congress approved legislation declaring that meetings of the hundreds of Government advisory committees "shall be open to the public." We provided, however, that this requirement would not apply to meetings where discussions are held of matters exempted under the Freedom of Information Act from public disclosure. Predictably, the Government has seized upon this tiny loophole to close these open meetings. Apparently, before the administrators will obey our 1972 law we will have to tighten up the Freedom of Information Act.

H.R. 5425 would make these necessary revisions. One change would amend section 3 to enlarge the right of the public to Federal information. Section 3 would also be amended to require all agencies to furnish any information or records to Congress, or any committee or subcommittee thereof, upon request. This is along the lines of an existing 1928 statute which requires the production of information upon the request of any seven members of the Committee on Government Operations.

This change is a logical and essential step. But I would go further. I would urge that if Congress is to become a truly coequal branch of Government, that we must have equal access to Government information. This means the establishment of a principle that Congress has the right to all information and its declassification or release.

As elected officials each of whom has a constituency of at least half a million people, we have as much right to decide which information shall be released to the public as faceless appointed officials whose only qualification is that they watched spy movies. Members of Congress

should be entitled to any executive branch information upon request by any 10 Members, classified or not. I would only require that Members be responsible for the safe custody of this classified information. If Members should want to obtain its declassification so as to enable its release to the public, I propose a new mechanism for congressional determination of declassification. I propose the appointment of a special joint committee of the House and Senate. This committee would have the lawful power to declassify security information. If a Member obtained information and wished to have it declassified, he could refer it to the committee for a required swift decision. Closed hearings or consultations with the executive branch could be held by the committee prior to its decision. The key factor would be that Congress, the elected representatives of the people, should have this power to declassify.

I feel that the appointment of an outside commission or body for this purpose would be an inadequate remedy. Neither should it be required that a congressional resolution be passed by the entire membership of the House or Senate for release of information. Free access to information gathered by our tax dollars is a public right and elected representatives should have the power to decide this issue.

A further point I would like to make on the pending bills is the provision relating to agency memorandums. The provision, in lines 6 through 8 on page 3 of H.R. 4960, changes the exemption to include materials containing recommendations, opinions, and advice supportive of policymaking processes. I am not sure that this would be an improvement over the current standard of whether the material would be available by law to a nonagency litigant. Perhaps the bill's provision should be refined to refer only to "those portions" of memorandums or letters instead of the entire documents, and the policymaking process should be only at the agency head level.

H.R. 4960 contains another provision which is well-deserving of consideration for inclusion in legislation you may approve in this field. H.R. 4960 imposes a mandate that a court "shall enjoin" refusal to release Government information not exempted from disclosure under the act. This is an improvement over the act's current permissive authority to enjoin.

Both bills provide for the payment of attorney's fees and court costs to be a successful litigant under the act. I feel this should be extended to costs and fees at any level in which the litigant is upheld by the court and not only in cases where the final decision is in favor of the litigant. I believe that certainly in the *Mink* case our costs should have been reimbursed by the Government. Where the Supreme Court remanded the case, I believe that all costs and fees ought to be covered by the Government. This is a small price to pay for freedom of information.

In addition, both bills fail to change the existing definition of national security information exempted from mandatory disclosure. We should require that any such information be separately classified by its own Executive order, rather than apply one general order as authority to classify all documents. Further, the test of whether the material is secret "in the interest of the national defense or foreign policy" allows too much leeway for the Executive. We should specify in the exemp-

tion that only materials whose disclosure would damage current foreign policy activities, or reduce the Nation's ability to defend itself against military attack, would be exempt.

It seems to me that strong limitations against secrecy must be invoked by Congress. We have to guard against our inadvertently contributing to the suppression of information from the American people and from Congress. I urge this subcommittee to work toward the highest standards for openness in all aspects of our Government operations. Secrecy must only be tolerated in cases where release of the information will seriously jeopardize our national security or endanger the stability of our foreign relations. Embarrassment of the executive such as providing internal arguments made against a policy should never be a reason to keep a report secret. The public should be advised of all sides of an issue. The Executive must not be characterized as a propaganda agent of its decisions. Executive policies should be able to stand the light of full public review. All the facts should be made available to the public. We cannot rest until our laws are perfected to safeguard this fundamental principle of a free society.

Thank you.

Mr. MOORHEAD. Thank you, Mrs. Mink. That was an excellent statement.

You draw a line which is difficult, not only conceptually but politically, between what I will call the Congress' right to know, or the Congress' need to know to carry out our constitutional functions, and the public's right to know. Is the distinction because there are certain cases where we are assigned a duty to legislate, let us say, on whether to provide funds for an underground nuclear blast or not, we need to know detailed information in order to vote intelligently. Perhaps the public would not need to know such details, and then might not have exactly the same rights in such cases—is that correct?

Mrs. MINK. Yes. I believe if you intertwine and interrelate the public's right to know with Members of Congress need to know, you will prejudice the ability of Members of Congress to acquire the information which is necessary, and with the speed with which matters come before us really frustrate our ability to legislate based upon facts. So, I think that because we are dealing with classified material which obviously will take some time before it can be declassified and released to the public, and our ability to acquire this information should be, I think, dealt with separately so that we can legislate intelligently. And we may, as I suggested, determine that the material should not have been classified in the first instance, that there is nothing in it that affects or prejudices in any way our national security or our foreign policy, and then petition a special committee for its ultimate release.

But, as you and I know, matters come up before the Congress with such haste, and sometimes we simply do not have the opportunity to go through a prolonged hearing. In most of these bills you are requesting that a decision be made within 30 to 50 days. It still is far too long to safeguard and protect our right to legislate based upon facts. So, I think that regrettably these two areas are separate and should be treated separately in any legislation which you will be recommending to the House.

Mr. MOORHEAD. Well, I can certainly see in the situation in your case that the environmental report might have been so intertwined with nuclear secrets that the information should be made available only to the Congress, because we had to vote yes or no on necessary funds but that it should not be declassified and released to the public. I gather that in the actual case that if you had a staple remover, the pages you were interested in could have been made available not only to the Congress, but also to the public generally?

Mrs. MINK. Right, right.

Mr. MOORHEAD. It was really a distortion, if ever there was, of any commonsense rationality.

Ms. Abzug.

Ms. ABZUG. Thank you for your most important testimony. The sections of the bills that we have before us which would seek to address the problems raised in the *Mink* case provide for certain provisions of review of the documents in question to determine whether they are being improperly withheld. Do you feel that they are insufficient for meeting the particular problem?

Mrs. MINK. Yes.

Ms. ABZUG. Do you think that our trying to cope with these problems by amendments to the Freedom of Information Act will really get to the root of the problem or do you think that what we really require is an unraveling of the whole issue including Executive classification, violations of the intent of the act, and even executive privilege, all of which are intertwined with the problems inherent in the exemptions we have?

Mrs. MINK. Well, I think the major problem is that the Congress has simply abdicated its responsibility to protect the right of the free flow of information to both ourselves and the public. I am of the opinion that legislation can correct this, can reassert the checks and balance concept which I think is implicit in this whole matter of freedom of information. And this is why I feel that it is not only important to protect committees and subcommittees, and the House and Senate as a body, as receivers of this information, but that every Member of the House in a sense should be accorded this privilege of acquiring the necessary information in order to legislate. If the Executive, if some lowly agent, a clerk in the executive branch is given the authority and discretion to classify information, and this judgment is to remain unchallengeable by the legislative branch, I think we have given up our most fundamental responsibility, and that is to acquire information so that we can legislate intelligently. And that is really the pursuit that I feel is so important. Of course, once we do that, we free this whole business of secrecy in government and so, ultimately, by reasserting our rights to information we will also be protecting and enlarging the public's right to know because in being given this information, which we have been denied in the past, we will be able independently to determine whether it should continue to be classified or not, and take the necessary steps to insist upon its declassification and release to the public at large.

Ms. ABZUG. Are you proposing a Joint Committee of the House and Senate which would have sole authority to declassify?

Mrs. MINK. Not the sole. Legislative authority to declassify. The Executive, of course, would still retain its right to examine its own classification system. I make no suggestions relative to changes in that. As a matter of fact, I noted right after our case was filed that the Executive did undertake some major changes in the whole classification process.

Ms. ABZUG. In other words, this joint committee would act on the classification as it is presented to it?

Mrs. MINK. Yes. I see no reason why the Executive can classify and declassify, that our legislation should give the courts the right to make an in camera examination for the purpose of declassifying and we are the only ones left out. What makes us different so that we are incapable of protecting the interests of the United States with respect to the various nine exceptions that are listed in the Freedom of Information Act? I think we are equally capable of making these determinations if not better qualified than any other branch. Certainly it would not be a self-serving decision as it would be in the instance of the executive branch. In my litigation the only reason that they refused to release the information at the time we needed it was because they did not want to enlarge the controversy and to give people who were opposing the test valuable factual information upon which we could make a much stronger case. All of these materials were later released with the exception of the AEC report. So, that tells us how much national security was involved in the basic information. And it was the only reason we did not proceed with the balance of the matters under litigation as the Supreme Court suggested; because it was moot, the material was already out.

Ms. ABZUG. Do you think that there is validity to reviewing the kind of information that we are theoretically entitled to by statute on request of, I think it is now, five members of the Committee on Government Operations? The original statute in 1928 that you referred to, I believe, said seven.

Mrs. MINK. It is seven.

Mr. MOORHEAD. Seven members.

Ms. ABZUG. I see, so it is still seven.

Mrs. MINK. Well, with all due respect to this committee, I do not feel that there is any reason to limit that right. Why should it be just this committee? And this is the suggestion that I make, any 10 members of the Congress. If you are reluctant to give one member the right to secure this information, why not make it possible for a group of members interested in a specific issue to make the same request that seven members of this committee would have the right to do?

Ms. ABZUG. You have commented favorably on a number of the amendments. There are some who have raised the issue with me that no matter how much we keep amending and reamending the Freedom of Information Act, we are still continuing a vast array of exemptions which create the bureaucratic capacity to withhold information. Some people who have discussed it with me, in any case, have indicated that we have to start fresh. What do you feel about that?

Mrs. MINK. No, I do not think so. I really do not believe that this law has been utilized. In 7 years our case was the first that got to the

Supreme Court, so those who take the cynical view that the law is inadequate, I really have no comment to say except that the law has not been used to the extent that it might have been. And perhaps if it had been we would not have encountered this disastrous decision 7 years after its enactment.

Ms. ABZUG. The reason that that view is taken is that though the intention of the original act was to provide access to information, the exemptions actually created a tightening of restrictions. Some very fundamental exemptions have been unconscionably misused by the executive branch of Government to withhold information. Therefore, it is very difficult to overcome the built-in concepts that are actually legislated or created statutorily, and which without the statute would have operated entirely differently.

Mrs. MINK. I really cannot comment on that, Ms. Abzug.

Ms. ABZUG. Thank you.

Mr. MOORHEAD. Mr. Horton?

Mr. HORTON. Mr. Chairman, I too want to congratulate you, Patsy. It is an excellent statement on a very important subject.

I do not disagree with your thought with regard to the establishment of a joint committee, but you do not make any statement either for or against the concept that is in my bill, H.R. 4960, which creates a seven-member commission. Do you have any thoughts about that? And before you comment, just let me say this, that I do not think it is inconsistent to have both.

Mrs. MINK. No.

Mr. HORTON. Because the commission concept I think is very important to resolve many of these problems, and especially the problem that you ran across in the *EPA* v. *Mink* case. There has got to be some convenient way for the courts to review this information. Now, they do not have the expertise, and it takes a lot of time to get the expertise necessary to go into these matters. And I think that if you have something like the commission that acts as an aid to the court it would help. These people would be full time, as I indicated in my testimony; they would be there to kind of arbitrate, if you will, questions with regard to whether or not information should be withheld or should not be withheld. They would act as a vehicle for giving information to the courts upon which the court could rely. Perhaps you have not had a chance to look at it, but maybe you might take a look at that as an important ingredient from the executive branch standpoint as well as from Congress. It seems to me from the hearings that we have held in the past that we need something like this to pull together this whole question of interpretation of the Freedom of Information Act. And I think it can be very helpful for court interpretations, too.

Mrs. MINK. My reservation, Mr. Horton, comes from the feeling that the establishment of the commission might be setting up another third barrier for the free flow of information. If the main thrust of the legislation is to give the courts the responsibility of determining whether the classification did, in fact, meet the criteria set forth in the Freedom of Information Act, then I believe that the courts ought to assume this responsibility. The past track record under the Freedom of Information Act does not indicate that they are so overburdened

by this kind of litigation as to make it impossible for them to make this decision. And since the commission which your bill creates is only advisory in nature, in sending its report to the Court, you must have a lawsuit in order for its findings to be useful in the first place although you do make it prima facie evidence. Without litigation, Members of the Congress, committees, the Comptroller General, the public at large would have no opportunity to take advantage of the expertise that might be set up in this commission. And certainly if the commission made a finding against the public, and against a Member of Congress seeking information, it would be an intolerable obstacle to overcome. You have to argue then against the executive branch as well as the commission in court. So, again, I think that the three branches of Government ought to have devices within themselves to make these judgments, each of which is challengeable by the other.

The defect of remedy in our *Mink-EPA* case was that had the court rendered a favorable decision requiring in camera examination, we would have been denied access to the hearings, and that this would have been a rather cozy arrangement between the court and the Executive, or the Executive's agent in deciding exactly what should be released and what should not. So, even that is not an ideal situation. It is a very difficult problem, but it seems to me that the setting up of a commission would further exacerbate the purpose or the goal of our legislation, which is to make information more readily accessible to the public and to the Congress.

Mr. HORTON. Thank you. No further questions.

Mr. MOORHEAD. Ms. Abzug?

Ms. ABZUG. No further questions.

Mr. MOORHEAD. Mrs. Mink, one quick question. On page 4 you say that any information would require its own Executive order. Do you mean an Executive order signed by the President for every piece of paper?

Mrs. MINK. For the matters which are requested by Congress for release I think there should be an independent decision made by the Executive, denying it. In our case all we got was a letter from John Dean saying that the earlier classification had been placed upon the entire file, and no further review made as to the validity of the Executive order being placed in the first instance. And in the trial in the district court no witness was produced by the executive branch who actually made the classification.

Mr. MOORHEAD. This subcommittee has also received a number of negative letters from John W. Dean.

Mrs. MINK. So, we were stuck there really arguing against a completely faceless bureaucrat who made this decision which we were contending was misplaced zealousness.

Mr. MOORHEAD. Thank you very much, Mrs. Mink.

Mrs. MINK. Thank you very much.

Mr. MOORHEAD. Your experience has been of great value to the subcommittee.

The subcommittee would now like to hear from our distinguished colleague, the Honorable Robert P. Hanrahan.

Mr. Hanrahan, would you come forward and proceed as you see fit?

STATEMENT OF HON. ROBERT P. HANRAHAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. HANRAHAN. Thank you very much, Mr. Chairman.

Ladies and gentlemen, I would like to read this prepared statement this morning in regard to the Freedom of Information Act, passed in 1967, which gives the public the right to know what its government does.

Mr. MOORHEAD. Would you like to come forward, Mrs. Mink? We would be delighted to have you join us.

Mrs. MINK. No. I have to go.

Mr. HANRAHAN. The statement stipulates that every Government agency, with certain specific exceptions, make records promptly available to any person on request.

As this committee learned last year during the hearings conducted on the subject, hundreds of requests for information by public interest groups and individuals have been refused.

The act guarantees the right of every citizen to know what its government is doing while it protects that information which is necessary to run the Government. The legislative intent of the Freedom of Information Act is to make disclosure of information as a general rule, not the exception, and to place on the Government the burden of justifying the withholding of a document or information.

It is time that we take a searching look at what is being classified and why. We need to restrict what is being classified to a sensible minimum. H.R. 4960, Mr. Horton's and Mr. Erlenborn's bill, would accomplish just that by establishing a Freedom of Information Commission to assist the Federal courts in determining whether requested information is being properly withheld by an agency.

I might say, parenthetically, in Congresswoman Mink's testimony, she said this would set up another bureaucratic agency and further along in my testimony I will point out that this commission can make information more accessible to the general public. That is my main concern here this morning, to make sure that the public has access to information from Federal agencies.

As I said here, H.R. 4960 would accomplish just that by establishing a Freedom of Information Commission to assist the Federal courts in determining whether requested information is being properly withheld by an agency. This is a sorely needed revision. It has been difficult for the courts to enforce the act because of the time and expertise involved in determining what should and should not be made available to the public.

Presently, the exempt and nonexempt information under the act is being inadevertently or purposefully commingled, blocking the release of information sought. That practice has to cease.

The act also needs to be more clear about classification systems. The three categories suggested in H.R. 4960 greatly narrow the scope of which materials are to be withheld.

Mr. Horton's and Mr. Erlenborn's legislation would strengthen the Freedom of Information Act to further guarantee the public's right to know.

There is another area of weakness in the current Freedom of Information Act. Regulations fixing fees for the production and copying of records vary widely from agency to agency, reflecting the wide discretion each one has in setting user charges.

In a study published by the Administrative Law Review, it was found that charges made for copying Government documents differ widely and that the variation "cannot possibly be explained on the grounds of differing labor or other costs." Copying charges range from 10 cents or less in agencies such as the Office of Economic Opportunity and the Securities and Exchange Commission to 40 cents a page in the State Department and 50 cents in the Department of Transportation. The Equal Employment Opportunity Commission, the Atomic Energy Commission, and several other agencies charge a special fee of up to $1 for the first page copied.

Although the Freedom of Information Act allows agencies to charge a "reasonable fee" for record searches, the search fees, like copy costs, vary from $2.50 an hour, Veterans' Administration, to $8 an hour at the Post Office.

Agencies have argued that the charges tend to discourage "frivolous requests" but the spirit and language of the act do not support this policy of discouragement nor the delays often encountered.

It is for these reasons that I should like to offer an amendment to H.R. 4960 which would authorize the commission to review fees charged by the Federal agencies, as well as require—and I repeat require—the agencies to submit their fee schedules for approval on an annual basis.

In establishing this fee schedule, the commission shall, to the maximum extent possible, standardize fees charged by such agencies.

The amendment would also provide the opportunity for any agency to petition the commission at any time for a review of all or part of its fee schedule. An individual is also guaranteed the opportunity to petition the commission for a review of an agency's charges for information.

I strongly support H.R. 4960 and I urge this committee to give careful consideration to it. Freedom of Information is an issue which is, now more than ever before, a concern of the American people—one which requires our immediate attention and action.

I respectfully request that you consider my amendment and support H.R. 4960.

Thank you very much.

[The attachments to Mr. Hanrahan's statement follow:]

TABLE OF AGENCY FEES FOR THE PRODUCTION OF DOCUMENTS [1]

Agency	CFR citation	Minimum charge	Cost per page photocopy	Clerical search
AEC	10 CFR, pt. 9	$1; $2.50 (search)	$0.25	$5 per hr.
CAB	14 CFR, pt. 389	$1	$0.05	
Department of Agriculture	7 CFR, pt. 1	$1; $1 (search)	$0.25	$4 per hr.
Department of Commerce	15 CFR, pt. 4	$2 (nonrefundable); $2.50 search.	$0.25	$5 per hr.
Department of Defense	32 CFR, pt. 286a	$1.50; $2.50 (search).	$0.25	$5 per hr.
Department of Health, Education, and Welfare.	45 CFR, pt. 5	[2]	[2]	[2].
Department of Housing and Urban Development.	24 CFR, pt. 15	$1, none if less	$0.25	$5 per hr (1st hour, no charge).
Department of the Interior	43 CFR, pt. 2		[3]	[3].
Department of Justice	28 CFR, pt. 16	$3 (nonrefundable).	$0.50 1st page ($.25 additional)	$1 per ¼ hr; 1st ¼ hr no charge.
Department of Labor	29 CFR, pt. 70	None	$0.30	$1 per ¼ hr; 1st ¼ hr no charge.
Department of State	22 CFR, pt. 6	$3.50 nonrefundable.	$0.40	$3.50 per hr.
Department of Transportation	49 CFR, pt. 7	$3	$0.50	$3 per hr (or actual cost if more).
Treasury	31 CFR, pt. 1	$2 (search)	$0.10	$3.50 per hr.
EEDC	29 CFR, s. 1610	None	$0.25	$3.60 per hr, $0.90 per ¼ hr.
Farm Credit Administration	12 CFR, s. 604	[3]	[3]	[3].
FCC	47 CFR, pt. 0, s. 441.	[4]	[4]	[4].
Federal Maritime Commission	46 CFR, pt. 503	None	$0.30	$4.50 per hr, ½ hr no charge.
FPC	18 CFR, pt. 1	[5]	[5]	[5].
FRB	12 CFR, pt. 261	None	$0.10	$5 per hr.
FTC	12 CFR, pt. 4	None	$0.30	Reasonable fee where applicable.
GAO	4 CFR, pt. 81	$3	$0.25	Not stated.
GSA	41 CFR, pt. 105-60	[3]	[3]	[3].
ICC	49 CFR, pt. 1002	$1	$0.25	$3 per hr.
NASA	14 CFR, pt. 1206	None	$0.07	$1 ¼ hr (1st ¼ hr no charge).
NLRB	29 CFR, pt. 102	[3]	[3]	[3].
OEO	45 CFR, pt. 1005	None	$0.10 maximum	
Railroad Retirement Board	20 CFR, pts. 200, 262.	[3]	[3]	[3].
Renegotiation Board	32 CFR, pt. 1430	$2	$0.25	$4 per hr, (1st ¼ hr no charge).
SEC	17 CFR, pt. 200	[3]	[3]	[3].
SSS	32 CFR, sec 1606.57.		$1 [6]	[6].
SBA	13 CFR, pt. 102		$0.25	$2 minimum.
U.S. Commission on Civil Rights	45 CFR, pt. 704	$1	$0.10	$5.32 per hr.
USIA	22 CFR, pt. 503	None	$0.40	$5 per hr.
VA	38 CFR, sec. 1.527	None	$0.25	$3 per hr (1st ½ hr no charge).

[1] This table was prepared as a working paper in connection with administrative conference efforts to implement recommendations. It is not a complete list of agencies having rules on the subject, the extracted material is highly abbreviated and it does not take into account actual agency practices to waive charges in many circumstances.
[2] Published separately by operating agencies.
[3] Rules not specific.
[4] New rules under consideration.
[5] Available at Office of Public Information.
[6] Includes search.

AMENDMENT TO H.R. 4960 OFFERED BY MR. HANRAHAN

On page 11, redesignate sections 223, 224, and 225 as sections 224, 225, and 226, respectively, and immediately after line 4, insert the following new section:

Sec. 223. (a) Not withstanding title 5 of the Act of August 31, 1951 (Public Law 82-136; 31 USC 483a), or any other provision of law, on or after the two-hundred and fortieth day after the Commission commences operations, no Federal agency may charge any fee to any person with respect to the making available of records to such person pursuant to sections 552 of title 5, United States Code, unless such fee is approved by the Commission under subsection (b).

(b)(1) Prior to the two-hundred and fortieth day after it commences operations, the Commission shall establish a fee schedule for each Federal agency

with respect to fees which such agency may charge to persons requesting records from such agency pursuant to section 552 of title 5, United States Code. In establishing such fee schedules for Federal agencies, the Commission shall, to the maximum extent possible, standardize fees charged by such agencies.

(2) The Commission shall review each fee schedule it establishes under paragraph (1) on an annual basis.

(c) (1) Within ninety days after the Commission commences its operations, each Federal agency shall transmit to the Commission a copy of its current fee schedule with respect to fees it charges persons requesting records pursuant to section 552 of title 5, United States Code.

(2) Any Federal agency may petition the Commission at any time for a review of all or any part of its fee schedule established by the Commission under subsection (b).

(d) Any individual may petition the Commission at any time for a review of all or any part of the fee schedule established for any Federal Agency by the Commission under subsection (b).

Mr. MOORHEAD. Thank you very much, Mr. Hanrahan.

Without objection, the balance of your statement will be made a part of the record—the fee schedules that you have provided and the language of the amendment that you have offered.

Your statement will be of great help to the subcommittee. I think for one thing that perhaps you have helped to solve one of our most difficult problems—which is difficult to legislate—a fair and reasonable fee schedule. There may be some justification for different search fees in one department where the records are more difficult to find than in another one. One may be completely manual, while another may be automated, where you just push a button and the information requested could be provided quite inexpensively.

Mr. HANRAHAN. Mr. Chairman, my concern was that the public is being turned off by these Federal agencies when they call up, or when they go in person to ask for something. The public is treated by Federal agencies like the scum of the earth—do not bother me attitude. Now, we have 2.8 million civil servants, and they are acting more like masters than civil servants or servants of the people. And I think this really hits at the heart of that basic issue, because I had experience working with a Federal agency and I know how they operate. And I am sure that there are a few agencies that are very efficient, but I think on the whole most of these agencies are not responsive to public requests. It is only at the insistence of some Congressman or a Senator before they do get this information for a particular constituent. And we live in a very complex society today of growing Government, and I think that this particular amendment would, and the commission itself would not be a detriment, as Congresswoman Mink has pointed out. I think this commission is sorely needed especially to give it some real teeth so that we could make these Federal agencies a little more respectful of Congress and more respectful in particular of the public.

Mr. MOORHEAD. Do you see that these fees, whether it is the copying or the search fee, should they be at cost, or close to the cost to the Government of doing it, or should it be below that cost because it is really rendering a public service? What is the overall philosophy that we should be directing the commission to follow in setting fees if we adopt your amendment?

Mr. HANRAHAN. I think it should be one of public service, because these people do serve as civil servants, and they are helping the public. And I would hope that it is their philosophy for being a civil serv-

90-576 O - 73 - 7

ant, that they are there to help people. I think that this is the whole philosophy of whether you are a Congressman, elected official or appointed official. If you are not there to help people you do not belong in that position. So, even if it would cost a little more money for the Government, I think it is profitable for proper communication. But it is necessary and vital in our society today that we are more concerned about human beings than building buildings. I would much rather spend this on people and the public in general, even if it does cost us a little more money, staying within the budget ceiling, of course, of $268 billion.

Mr. MOORHEAD. We are all agreed on that.

Would you go so far as to say that there should be no fee at all, that it should be a part of the public service of whatever department or agency is involved to furnish information to the public?

Mr. HANRAHAN. Well, I think that this Commission could properly do a very thorough job of determining that because this would be within their purview, I think, to make this determination whether the fee is reasonable or not, or whether there should be no fee whatsoever. I think that the Commission itself should make this determination. And naturally, you are going to get input from public officials also on whether there should be a fee involved.

Now, with some of these scientific documents, I can see where this might cost a great deal of money, but when you see this tremendous variance here in the index of my testimony on this table of agency fees for production of documents. At Villanova a law professor who did a study of these search and copying fees pointed out this tremendous variance from one agency to another. And I think that if we have to go to the extreme of charging no fee whatsover, I do not think everyone and his brother is going to come off the street and ask for a particular bit of information. I think this is what they were originally saying, that they were going to get every Tom, Dick, and Harry coming off the street and asking for information on a particular subject.

This is why we are here, to help people, and I do not think we are going to be faced with that situation. After all, when the applicants for civil service jobs filled out that application, the 171 form, they applied for work, and this is what they should be doing.

Mr. MOORHEAD. My own feeling is that we have got to give the Commission some sort of guidance. My own choice would be for the lowest possible fee, even below cost. That would be sufficient to eliminate frivolous requests.

Mr. Horton?

Mr. HORTON. Mr. Chairman, thank you. I would like to congratulate Mr. Hanrahan for his very constructive suggestion. I think it is a very important matter, and it would indicate from his statement and the material that he has furnished us here that he and his staff have done a lot of research work on this important problem. And I think it is a very important contribution to the work of the subcommittee.

I do not have any specific questions but do believe that this is something that the subcommittee should take under consideration. I would hope that something like this recommendation could be included in the bill. I think you have indicated, Bob, in your conversations with me,

and also your testimony here today that there is a great deal of variance in fees and it ought to, as you have indicated, and as the chairman has indicated, it ought to be made easier for people to get this type of information. I would tend to agree with the chairman that there ought to be some type of a fee so that you could discourage persons from making frivolous requests. But I do not think the requester ought to pay the full shot under all circumstances because some of this information can get to be quite expensive, but taxpayers should not have to pay for frivolous requests.

Mr. HANRAHAN. No, I would agree on a basic, minimum on the fee charge.

Mr. HORTON. I would think that it should be a rather reasonable fee, and not one to necessarily compensate the Government for every penny that is involved in the production of and furnishing of this type of information. I think it is a very valuable contribution that you have made to the subcommittee here, and I know you have done a lot of work on it personally, and indicated your concern about this at a very early stage. As a matter of fact, at the time I was introducing the bill.

Mr. MOORHEAD. Would the gentleman yield for just a moment?

Mr. HORTON. Yes.

Mr. MOORHEAD. We might provide that the Commission could waive fees in individual cases where there is merit, but where no funds are available.

Ms. Abzug?

Ms. ABZUG. No questions.

Mr. MOORHEAD. Well, thank you very much, Mr. Hanrahan. This, I think, has been a most productive discussion that we have had here. You have stimulated a lot of thinking on the part of the subcommittee members for which we are deeply grateful.

Mr. HANRAHAN. Thank you. And I welcome the opportunity to appear here, and hopefully when we convene as a full committee we may incorporate this amendment as a part of the new revision of the Freedom of Information Act, because I think that as I have mentioned in my testimony, as a new media man just mentioned to me, is this going to make information more accessible to the public, and stop these bureaucrats from preventing information from being accessible, I should say, to a legitimate citizen that is making a legitimate request. And I deeply appreciate your hearing me out this morning.

Thank you.

Mr. MOORHEAD. Thank you.

Mr. PHILLIPS. I would like to make one observation for the record, Mr. Chairman, if I might, on the question of fees. Of course, this matter came up in our hearings last year on a number of occasions.

The Administrative Conference of the United States has also looked at fee schedules of various agencies—the table that you have put in the record, Mr. Hanrahan. Subsequently last year, the Office of Management and Budget was asked both by the subcommittee and the Administrative Conference to review the fee schedules that were being chargd by various agencies and departments under the Freedom of Information Act, both for copying and searching of records. OMB later issued a statement to various departments and agencies suggesting that they

charge the minimum fees necessary to cover costs. That has resulted in a few cases of some reduction in both copying and search fees.

However, OMB stopped short of doing what the subcommittee had hoped that they would do; that is, to set some minimum uniformity of costs among the various departments and agencies for both copying and searching. The situation is a little bit better now, I think, than it was 2 years ago, but not very much better. Perhaps the only way that this can be accomplished is through some mechanism such as you suggest, or a change of policy on the part of OMB to enforce more their very lukewarm policy statement that there should be a lower minimum in each case. Certainly this is, as we have found in our hearings, a very essential part of the problem.

Mr. HANRAHAN. I know, I would certainly agree with that, Mr. Phillips, that we definitely establish some type of uniformity or standardization of these fees. I think that is the guts of this whole issue.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you again, Mr. Hanrahan.

Mr. HANRAHAN. Thank you.

Mr. MOORHEAD. The subcommittee will meet again on the freedom of information legislation tomorrow morning at 10 a.m., in room 2154. We will have witnesses from the Department of Justice and the Department of Defense and one outside witness.

The subcommittee will now adjourn until 10 o'clock tomorrow.

[Whereupon, at 11:20 a.m., the subcommittee adjourned, to reconvene at 10 a.m., Tuesday, May 8, 1973.]

THE FREEDOM OF INFORMATION ACT

TUESDAY, MAY 8, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Bill Alexander, Bella S. Abzug, James V. Stanton, Paul N. McCloskey, and Gilbert Gude.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

For nearly 20 years this subcommittee has concentrated on one of the basic problems of our democratic society—the problem of public access to Government information. Any society is truly democratic to the extent that all members of the society participate in its Government, and this subcommittee's long-term goal has been to convince the huge and growing executive branch of the Federal Government that it is proper—in fact, absolutely necessary—to pull aside the paper curtain of secrecy between the public and their government.

The 1966 freedom of information law was a giant step in that direction, but months of hearings with scores of witnesses last year proved that the executive branch often ignored both the spirit and the letter of that law. As one result of the House Government Operations Committee's unanimous report on this subcommittee's hearings, most Federal agencies agreed to make major changes in their administration of the freedom of information law.

Another result was a clear recognition that substantial legislation changes must be made before the law can become the freedom of information weapon that the public, the press, and the Congress need in their continuing battle against unnecessary executive secrecy.

I hope that the executive branch will approach this legislative problem in the same spirit of cooperation in which they are considering the committee's recommendations to solve administrative problems under the freedom of information law. I might interject that I think the Justice Department has done an excellent job in devising regulations in this area. That hope impelled me to ask President Richard M.

Nixon to designate the executive branch witness who would present the Nixon administration position on the legislation before us.

In response to my request, Assistant Attorney General Robert Dixon was selected to present the administration's position. As head of the Office of Legal Counsel in the Department of Justice, Mr. Dixon is in an excellent position to help us work out effective legislation, for his office has been responsible for the guidance of all other agencies in their handling of the legal problems which have come up during the nearly 6 years the freedom of information law has been operating.

President Nixon has personally considered the need for improvements in the freedom of information law and commented on the "many constructive recommendations" in the committee report on the law. Just before last year's election, the President said in a letter to Robert Fichenberg of the American Society of Newspaper Editors:

> I fully support all efforts designed to improve the administration and execution of the terms, policies, and objectives of this important statute. If, after careful consideration, the Department of Justice determines that changes in the language of the act would be advisable, I would support such legislative revisions.

I will insert all this correspondence in the hearing record at the conclusion of these opening remarks.

The subcommittee opens its hearings today with testimony from Assistant Attorney General Dixon, the administration representative, who will explain what careful consideration has been given to legislation to improve the terms, policies, and objectives of the freedom of information law.

Later this morning we will hear from Prof. Thomas M. Franck, director of the Center for International Studies at New York University, who will comment on the flow of information in the field of national defense and foreign policy. This afternoon, we will hear from the Department of Defense, represented by General Counsel J. Fred Buzhardt and Assistant Secretary of Defense Jerry Friedheim.

[The communications between President Nixon and Mr. Robert Fichenberg follow:]

AMERICAN SOCIETY OF NEWSPAPER EDITORS,
FREEDOM OF INFORMATION COMMITTEE,
Albany, N.Y., September 14, 1972.

President RICHARD M. NIXON,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: As a candidate for the most important governmental job in our democratic society, I know you are committed to the ideal of a fully-informed public and Congress and I know you have given thought to action which can make this ideal a reality.

The American Society of Newspaper Editors is deeply concerned about the information problems which face our society and solicits your comments on some of those problems. Will you please provide answers to the following questions?

1. Would you support legislation which would permit newsmen to protect the identity of their sources unless the defendant in a libel suit bases his defense upon the source of allegedly defamatory information or unless a federal district court finds clear and convincing evidence that the newsman has information relevant to a specific law violation, that there is no other means of obtaining the necessary information and that there is a compelling and overriding national interest in divulging the information?

2. Would you restrict the use of executive power to withhold information from the Congress to a presidential prerogative, exercised by the president, personally, in each specific case?

3. Would you support legislation granting statutory authority for the system of classifying information to protect national defense and foreign policy and providing specific penalties for misuse of the system by either under-protecting or over-protecting such information?

4. Would you support legislative or administrative improvements in the Freedom of Information Act (5 U.S.C. 552) designed to prevent delays in handling requests for access to public records, to tighten the language on access to public records reflecting court decisions and to provide for government payment of court costs and reasonable attorney's fees in cases under the Freedom of Information Act which the government loses?

I would appreciate your early reply.

Sincerely,

ROBERT G. FICHENBERG,
Chairman.

THE WHITE HOUSE,
Washington, November 4, 1972.

MR. ROBERT FICHENBERG,
Chairman, Freedom of Information Committee, American Society of Newspaper Editors, Knickerbocker News, Albany, N.Y.

DEAR MR. FICHENBERG: I wish to thank you for this opportunity to express my views on questions which the American Society of Newspaper Editors has submitted in regard to governmental information policies.

Your first question asks about my position on the legislation sponsored by the Joint Media Committee, which is designed to create a qualified testimonial privilege for newsmen in the Federal courts. I am aware that many in the news media are concerned about the Supreme Court's recent holding that newsmen are not constitutionally protected from being required to appear and testify before the State and Federal grand juries. In a broader sense, however, I am also impressed that for almost 200 years the press and the government have managed to maintain a proper balance between the encouragement of a free and vigorous press and the fair administration of justice, all without the need to resort to Federal legislation.

In 1970, in response to a growing concern of the news media, the Attorney General issued "Guidelines for Subpoenas to the News Media". These guidelines require careful consideration of the individual situation by the Federal prosecutor, extensive negotiation with the newsman and his organization and, if these fail, a request for issuance of a subpoena only after express authorization by the Attorney General. The policy expressly established by the guidelines is that the Department of Justice does not consider the press "an investigative arm of the government." During the two years in which the guidelines have been in operation, they have apparently been successful, since requests for subpoenas have been authorized on only 13 occasions and 11 of these involved newsmen who, though willing to testify or produce documents, preferred to follow the formal procedure of the issuance of a subpoena. The Attorney General has authorized subpoenas in only two instances in which negotiations with newsmen proved unsuccessful.

Before moving forward with legislation in this field, I would hope the Congress would face up to the legal difficulties in defining a qualified privilege and the problems inherent in the administration and exercise of such a privilege. I would also suggest that the merits of enacting such laws must be carefully weighed against the dangers inherent in establishing a precedent for Federal legislation in this sensitive area. For these reasons, while I would not oppose the legislation sponsored by the Joint Media Committee, I think that the system established by the Attorney General's guidelines is preferable to Federal legislation at this time.

If a State does not have similar successful guidelines, I believe it is advantageous to all concerned that a "shield" law be enacted to fill this void. My support for such a law in the absence of effective guidelines is based upon the acknowledged need for reporters to shield their sources in most cases. Let me also reemphasize in this respect my firm commitment to the preservation of the principle of a free and vigorous press.

Should it ever become apparent that the Federal guidelines fail to maintain a proper balance between the newsman's privileges and his responsibilities of citizenship, then I would certainly be willing to reconsider my position on the need for Federal legislation.

In response to your second question, as to whether I would restrict the use of executive power to withhold information from the Congress to a prerogative which must be exercised personally by the President, I call your attention to my memorandum of March 24, 1969, to the heads of executive departments and agencies, which imposes this very restriction on the use of this authority. The memorandum explains that "the policy of this Administration is to comply to the fullest extent possible with Congressional requests for information." In furtherance of our policy, this memorandum directs that Executive Privilege will be invoked only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise, and that there will be no exercise of the privilege without the President's specific personal approval.

Your third question asks if I would support legislation granting statutory authority for the system of classifying information to protect national defense and foreign policy and providing specific penalties for misuse of the system. On March 8, 1972, as you know, I issued Executive Order 11652, which deals with classification, downgrading, declassification and safeguarding of national security information. This Executive order is the culmination of more than a year of intensive staff review and represents the first major overhaul in the classification system in almost 20 years.

The new order has three purposes: (1) to reduce the amount of information which is classified and to provide better protection for such information; (2) to accelerate the schedules for automatic downgrading and declassification of classified documents; and (3) to establish an Interagency Classification Review Committee to monitor the implementation of the new Executive order. Under this new system, the number of persons in the government who may classify documents has been substantially reduced, including a reduction of 77 percent in those that may designate documents as top secret. A National Security Council Directive implementing the order further provides that administrative sanctions shall be applied for abuse of the classification system. In view of the progressive and comprehensive procedures established by the order and directive, I see no need for legislation on this subject at present.

You last question requests my opinion on the advisability of legislative or administrative improvements in the Freedom of Information Act which would be designed to (1) prevent delays in handling requests for access to public records; (2) tighten the language on access to public records reflecting court decisions and (3) provide for governmental payment of court costs and reasonable attorneys' fees in cases under the Freedom of Information Act in which the government does not prevail.

During the five years of its existence, the Freedom of Information Act has resulted in considerable progress toward the goal of permitting the maximum public availability of governmental information consistent with the needs of national security, individual privacy, law enforcement, and the other factors which the act itself recognizes. I have been a strong supporter of the Freedom of Information Act and have directed all members of this administration to observe and implement the spirit as well as letter of the act. However, because of the great variety and complexity of governmental records, the act has not always proved easy to administer.

From the experience of these past five years, it is evident that there are some problems inherent in the act and in the procedures used for its administration. Last year, the Administrative Conference of the United States, after a comprehensive study of the implementation of the act, presented recommendations for the correction of certain of these procedural problems, including improvements designed to prevent delays in handling requests for documents. These proposals have been under study by the departments and agencies and some have already been adopted. Additionally, in September the Committee on Government Operations of the House of Representatives issued a report on the administration of the Act that also contained many constructive recommendations. The Department of Justice is now studying these suggestions as well as considering the best methods of implementing administrative improvements.

I fully support all efforts designed to improve the administration and execution of the terms, policies, and objectives of this important statute. If, after care-

ful consideration, the Department of Justice determines that changes in the language of the act would be advisable, I would support such legislative revisions. However, until all efforts to improve the implementation of the act have been tried, I would be opposed to the award of attorneys' fees at the taxpayers' expense, since this might encourage the filing of lawsuits in disputes that could be otherwise resolved without burdening the courts.

Finally, I wish to take this opportunity to reiterate my firm commitment to the principle of a fully informed public in our open and democratic society. During the past four years, this Administration has given positive emphasis and taken new initiatives to provide the American people with information concerning their government. We feel that the establishment of the Office of the Director of Communications for the Executive Branch has significantly enhanced this effort. In addition, the major reforms in classification procedures and the emphasis on successful implementation of the Freedom of Information Act are contributing to achieving our goal of permitting the greatest possible public disclosure. You may be sure that if re-elected, I will continue to commit the full force of my office to meeting this goal.

Sincerely,

RICHARD NIXON.

Mr. MOORHEAD. Mr. Dixon, you may proceed.

I might say that I have read your testimony, and I am reminded of the story that when a diplomat says "yes," he means "maybe," and when he says "maybe" he means "no," and when he says "no," he is no diplomat. You vary somewhere between "yes" and "maybe" in your testimony. You qualify as a diplomat but just barely, sir.

STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE; ACCOMPANIED BY ROBERT SALOSCHIN, OFFICE OF LEGAL COUNSEL

Mr. DIXON. Thank you, Mr. Chairman. I am pleased to be here this morning. I have with me, on my left, Mr. Robert Saloschin from the Office of Legal Counsel who is our staff member primarily in charge of administering the Freedom of Information Act for the Department and for giving advice throughout the Government. I might say that I have no more dedicated, more competent person on my staff in regards to the very important mission of this act.

Mr. Chairman, I appreciate your opening remarks, and I realize that our posture here is a little bit like the posture of a husband who might say to his wife: "Dear, we have been together for a good many years and we will stay together for a good many years, but, today, sweetie, I do not like your hairstyle or your general demeanor." But if that is the case, so be it, and we will do the best we can. We must stay together and work together in this field.

I will present my statement in a somewhat condensed fashion in deference to the committee's time. I would appreciate it being printed in full, although I will condense it as I go through.

Mr. MOORHEAD. Without objection, the full statement will be made a part of the record.

[Mr. Dixon's prepared statement follows:]

PREPARED STATEMENT OF ROBERT G. DIXON, JR., ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Dear Mr. Chairman:

We appreciate the opportunity to appear before your Committee and discuss H.R. 5425 and H.R. 4960, bills containing several proposed amendments to the Freedom of Information Act. I will discuss H.R. 5425 both generally and specifically, then add some comments on H.R. 4960, and finally offer a few ideas on how we might work together to advance the general objectives of the Freedom of Information Act.

Before discussing the bills, let me emphasize our basic approach to this subject. The Freedom of Information Act [applicable to the executive branch but not to the other two branches] is a basic commitment to the maximum feasible access by private persons to the internal details of administration, with no need to disclose the private interest prompting the request. It is a major effort to open many aspects of government. It is a real challenge to administer the Act well, and to accommodate the competing interests involved. Regarding most requests by scholars we have little problem. Regarding requests for information given to the Government in confidence, or which involve law enforcement-

type files, we have more problems.

As to our part in making the Act work, let me reiterate a statement by my predecessor, Ralph Erickson, when he appeared before you last year on March 10th to discuss the work of the Justice Department and of our Freedom of Information Committee. He said, "We are continually striving to improve our efforts in this important field of law and government, but we also feel that on the whole we are doing a reasonable job . . . considering the magnitude and complexity of the challenges which face us."

Since then, we have taken several further steps to improve performance in this field.

These steps were over and above our regular freedom of information workload of processing requests, handling litigation, and counselling other agencies.

(1) We have prepared a 19-page analysis and program outline for improved administration in this field.

This is set forth in a letter with attachments sent to you on December 27, 1972. This was in response to your ten recommendations for improved administration of the Act, contained in your landmark report of last September 20th.

(2) We have issued and published in the Federal Register of February 14, 1973 a sweeping revision of our own

regulations under the Act, to improve and expedite the processing of requests for Justice Department records. After an adequate test period to see how these new procedures are working, we plan to encourage other agencies to consider adopting generally similar changes.

(3) We prepared and conducted a concentrated and comprehensive seminar on the proper handling of Freedom of Information requests for over 50 officials from all parts of the Justice Department.

> This was held on March 1, 1973, the day our revised regulations went into effect, and was keynoted by a message from the Attorney General. As we informed you in our letter of March 19th, this training program was well received, and we hope to build on this experience in helping other agencies to provide better freedom of information training for their personnel to the extent our own resources permit.

I.

Let me turn to some general comments on H.R. 5425. We are of course sympathetic to what we take to be the two main purposes of the bill, namely, to make the Act as clear as possible, and to make government records even more quickly and fully available than at present. We recognize the Act is not perfect. We fear, however, that these

amendments would introduce new uncertainties, bearing in mind the incredibly vast and varied aggregations of records covered by the Act, and the inevitable need for some flexibility and judgment.

We share the concerns of those who feel that the administration of the Act is not perfect either. Our own considerable experience in screening contemplated denials of access by other agencies, plus our work in handling appeals from denials within our own Department, support our belief that access should sometimes be more speedy and extensive than some officials are inclined to grant. At the same time, I should note that the overall government practice is not nearly as restrictive as it may appear to some critics, that there are reasonable explanations for much of the restrictiveness that does exist, that no agency can operate in a goldfish bowl very effectively, and that steady progress is being made toward better access, due in part to the efforts of your Committee and, we like to believe, of our Department as well. Our goal is continued progress in improving the administration of the Act and responding as speedily as possible to the increasingly broad and searching requests for all of the records of the executive branch.

Despite the laudable general purposes of H.R. 5425, we are compelled to oppose its provisions strongly. Before discussing them in detail, let me summarize the overall reasons for our opposition. In our view, with some possible exceptions, the proposed amendments contained in the bill (a) would lead to increased costs and administrative burdens for government agencies without corresponding public benefits, (b) would create new uncertainties to confuse requesters, agency officials and the courts, (c) would actually tend to reduce the flow of information to the public--unnecessarily, and (d) would undermine personal privacy and the effective implementation of numerous laws and programs which Congress over the years has enacted, and which must be faithfully executed by the executive branch if our system of government is to serve the nation and its people well.

I will now discuss the specific amendments to the Act which H.R. 5425 proposes, taking up first Section 1 of the bill.

II.

1. Section 1(a) of H.R. 5425 would amend the indexing provision in subsection (a)(2) of the Freedom of Information

Act. This provision currently requires that there be indexes to the several types of material covered in subsection (a)(2), which are basically materials that may be used as precedents for agency action. Under the present Act these indexes must be available for public inspection and copying, but the proposed amendment would go further and compel all agencies to publish and distribute such indexes.

There may be nothing wrong with this amendment in theory--some agencies already publish certain indexes--but in practice and as a government-wide requirement it would be confusing, costly, and essentially unnecessary.

There is considerable reason for uncertainty about the actual scope or coverage of the present

indexing requirement, and this uncertainty would become a real problem under the amendment. There is seldom a practical problem today unless an agency or a citizen needs an index which may be within the meaning of subsection (a)(2) and the index is not available. But the proposal to compel publication of all indexes which exist or should exist under subsection (a)(2) would require the immediate resolution of these uncertainties and would often require it in a vacuum, i.e., when few if any persons are interested in using a particular index.

Published indexes would rarely be best sellers. The Immigration Service maintains an index in its various public reading rooms, and personnel in charge of those rooms report that members of the public virtually never use the available indexes. The considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be largely wasted. Even where indexes meet a need, like the card catalogue in our law library, it is not clear that the expense of publishing would be warranted. And indexes that have been developed by specialists for their own use may be largely incomprehensible if published. It would sometimes be more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and interest, rather than to tell him to go buy an index that may not help. To make published indexes helpful, they may sometimes have to be completely reorganized, or agencies will have to write explanatory literature which hopefully will make the index useful to an unknown spectrum of readers.

Indexes, after all, are principally devices for locating other materials. The present Act,

besides making the indexes available to requesters, imposes an obligation on agencies to search their records upon request. A major obstacle to locating requested records is the availability of sufficient time of qualified agency staff. Publishing indexes would rarely help overcome this obstacle, and the obstacle might be aggravated if staff needed for searches must be assigned to preparing, revising and updating indexes for publication.

We conclude that this amendment should not be adopted on a government-wide basis until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, and until consideration has been given to possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date, and less costly.

2. Section 1(b) of H.R. 5425 would amend Subsection (a)(3) of the Act so that requests for records would no longer have to be "for identifiable records", requiring instead that a request for records "reasonably describes such records". This well-intentioned amendment is unnecessary, and it might lead to confusion as well as to unwarranted withholding of requested records.

The proposed language would enable unsympathetic officials to reject requests which would have to be

processed today, on the new ground that the requests are not reasonably descriptive. This amendment could also subject agencies to severe harassment, as where a requester gave a description of Patent Office records he wanted that was adequate to find them, but his request was for about 5 million records scattered through over 3 million files. The court, apparently unable to accept something so unreasonable, held the request was not for "identifiable records".

The problems of identifying and describing records will never be completely eliminated, but they have been carefully studied by the Administrative Conference of the United States, the Justice Department, and the courts. Under the influence of these various bodies, agency practices are improving greatly in this area, and further legislation is not needed at this time.

3. Section 1(c) of H.R. 5425 would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request, and 20 working days to decide an appeal from any denial. We strongly oppose this amendment.

The Act now requires that agencies make records "promptly" available. While promptness is a relative term, there is no doubt that most courts will treat an unreasonable delay by an agency in processing a request as a basis for mandamus

requiring the agency to reach a decision. All our experience leads us to believe that, while fixed time periods may be useful in achieving greater speed when used as norms or goals, what constitutes unreasonable delay varies with the circumstances of each case and can only be determined on a case-by-case basis.

We recognize that there is considerable room for improvement in many agencies including our own in the speed with which requests under the Act are processed. This may be partly due to the fact that no money has ever been appropriated to any agency to administer the extra work which the Act involves. Yet we have affirmatively tried to move in the direction of quicker processing, without sacrificing quality, and without undermining the ultimate legislative objective of greater disclosure. For example, we supported the Administrative Conference guidelines, from which the 10 and 20-day time limits in the bill originated, although only as a desirable goal for agency administration of the Act. We would like to see requests acted upon even more quickly than

these 10 and 20-day limits whenever this can be done consistently with agency resources, other responsibilities, and processing quality. In our own department we have encouraged the press to contact our Office of Public Information for expedited and informal service, recognizing the need of the press for specially prompt service. And, as you know, we have recently issued an experimental revision of our own departmental regulations to include 10 and 20-day time limits.

It therefore may seem ironic on first blush that we so vigorously oppose the 10 and 20-day limit provisions set forth in section 1(c) of the bill and any similar legislative amendments. But we believe this amendment is far too rigid for permanent and government-wide application, just as would be, for example, a requirement that Congress come to a record vote within a specified number of days on all reported bills or Administration bills. The section is quite unrealistic from the standpoints of the complexity of the problems which requests may present and the complexity of the governmental organizations which are concerned with such problems, and it is likely to be counter-productive of the general purpose of maximizing disclosure, by discouraging the careful and sympathetic processing of requests. The amendment probably would encourage hasty initial decisions

to deny, would mean an increase in unnecessary administrative appeals, would also mean that appeals would be denied more frequently, would lead to more unnecessary litigation, and would in general reverse the substantial progress now underway.

Such an amendment would also make it difficult to encourage a more positive and understanding attitude in administering the Act by those whose primary responsibilities are to agency programs and missions. The amendment would tend to divert the attention of both requesters and agency personnel from the main issue of whether the requested records are to be made available to the collateral question of time, e.g., how we can get a request disposed of quickly if not correctly. It would tend to erode the credibility of federal legislation in the eyes of the public, because in many instances agency personnel might disregard the legislative time limits on the not unreasonable assumption that the requester is less interested in a negative answer within the specified period than in getting the information he seeks, even if it takes a little longer. It would be very difficult to enforce.

The time limits in our new Justice Department regulations will hopefully serve as a model for other agencies to adopt more or less similar time limits in their own regulations, but as I shall demonstrate, these time limits do not serve as a justification for a legislative proposal like Section 1(c) of the bill. First, our time limits apply only to Justice Department records, not to the records of all other agencies. There are great differences among the agencies in subject matter, responsibilities, documentation, organizational structures, and relationships with other organizations both at home and abroad. Also, some of these agencies do not have a great deal of in-house, in-depth experience or expertise in applying freedom of information principles to requests for their own records, yet they encounter problems that are difficult even for those with extensive experience. Second, our regulations do not apply to all parts of even our own department. In adopting them we recognized the valid objections of the Immigration Service, which properly pointed out that the time limits would be unworkable for them.

> They said: ". . . We are a field organization. Authority to grant routine requests is delegated ...to...57 ... offices, but, with a view to a uniform liberal policy of disclosure, authority to deny any request is reserved to the Commissioner himself. The Service handles an immense volume of requests. In Fiscal Year 1972 receipt of formal requests for records averaged 7500 monthly. Most requests concern records contained in A files, each of which relates to one person. There are 6,297,000 active A files, each of which is theoretically in the custody of the field office which has jurisdiction over the alien's place of residence, but which in actuality may be somewhere else for any of several reasons. There are also 5,938,000 inactive A files, distributed among 10 Federal Records Centers. The logistics and practicalities of handling those applications and requests frequently entail unavoidable delays. The subjects of the files often move from one immigration district to another and their files follow them. Because of this circumstance, and inaccuracies in the basic information furnished by the requester, it may take some time to locate and obtain the file. In consideration of these facts, the Justice Department at the same time that it was adopting a 10 day rule for requests addressed to the Department generally, authorized the Service exceptionally to adopt a 30 day time limit rule. All things considered, the Service record for promptness in responding to requests is good; enactment of section 1(c), far from improving that record, would be injurious to the efficient and prudent operation of the program."

We have little reason to believe that the Service is unique among government organizations in this respect. Similar

examples can probably be found within the Defense establishment, the Postal Service, the Departments of Transportation and of Health, Education, and Welfare, the Veterans Administration, or any other agency with a large field establishment, a complex structure, or responsibilities that require careful coordination outside of an immediate office or headquarters.

Thirdly, even if one could identify and exclude from the proposed amendment the parts of the government like the Immigration Service that cannot reasonably meet such time limits, it would still be necessary to provide, as both the Administrative Conference guidelines and the Justice Department regulations do, for circumstances in which it is not practicable to process the request within the specified period. Our revised regulations follow the Administrative Conference in specifying six reasons for extensions of time. ¶ Even these reasons are not always sufficient because they take no account of the unavailability of personnel through illness, death, or resignation, or delays caused by sudden

or sizeable increases in priority workload within the primary agency mission, in circumstances which cannot be predicted or controlled. In many agencies, especially in our own Office, there are certain times when personnel must either work on a particular freedom of information request or on other matters of high priority, including requests that come from Congress or the White House.

> Letme put this point in a different way, because in our view it is vital to the quality of government. In the overall context of agency operations, to impose a strict time limit on a particular function elevates that function to a higher priority than others, no matter how vital they may be. For example, do we really want FBI personnel to process every request within prescribed time limits when their attention is needed for such things as a rash of airline hi-jackings, bombings of public buildings, or other emergencies? Should personnel of the Atomic Energy Commission be required to sidetrack or speed through work designed to perfect nuclear power plants to meet the energy crisis in ways that are environmentally and economically acceptable? Must FAA personnel process such requests within prescribed time limits when they have work requiring attention that may help prevent the crash of airliners? Should Postal Service personnel process these requests within prescribed time limits while deferring pressing problems affecting efficient and economical mail service? Are personnel of our Department and the Customs Service who are trying to stem the importation and distribution of heroin to be required to suspend this work when the calendar says they must process a request for access to records within the prescribed time limit? These are not rhetorical

questions. The requests which come in under the Act sometimes encompass thousands of records, and even those which seek a few records may require serious and time-consuming attention.

There is a fourth reason why this amendment is not justified by the time limits in our new Justice Department regulations. Although we are proud of these regulations and will strive to live up to them as nearly as we can, consistently with our resources and other responsibilities, I must tell you that after two months of experience under these regulations we are finding that we were over-eager and under-sophisticated. The regulations may be misleading, by holding out an expectation of more speed than we can, or should, consistently achieve.

On appeals that seemed to present simple questions, we have had to consult other organizations and even foreign governments and extend the time. We do not propose, just to adhere to our 10 or 20-day periods, to deny requests that might with more study and effort be granted in whole or part. We take the Freedom of Information Act too seriously to engage in such a numbers game. Therefore, after a few months experience under our new regulations, we expect to make some adjustments in the time limit provisions, although

we do not contemplate the elimination of goals stated in terms of time periods. But if these limits were embodied in a statute, we would lose our ability to adjust and perfect them in the light of experience and our overall responsibilities and resources.

In making these observations we are aware that the 10-day limit proposed in Section 1(c) merely requires that a decision be made within 10 days, not that the records be actually delivered to the requester within that period. But this feature is of little help, because it is usually impossible or unwise to process a request until the requested records have been retrieved and examined. Any one with much experience in administering this Act will soon discover that the mere characterization of records in a letter of request, or for that matter in an index, a title, or other characterization, is sometimes not a reliable guide to the actual contents, legal status, or policy aspects of the records. Anyone deciding on a request under the Act must understand the Act, understand the agency activities for which the records are maintained, and know what is in the records, and if in doubt he must take the time to find out.

4. Section 1(d) of H.R. 5425 would impose an automatic requirement in any suit under the Act for an in camera inspection by the court, and if the records were withheld under the 1st exemption the court would further be directed to decide whether disclosure would injure foreign relations or national defense. Under the Act today, as construed by the Supreme Court in the Mink case, 1/ courts in appropriate circumstances may conduct an in camera inspection, except in a very small percentage of suits under the Act where the records have been classified under Executive Order to protect national security.

In camera inspection is not a normal type of judicial procedure, and we vigorously oppose an automatic, across-the-board requirement for it. First, we see no reason why Congress should overrule the Supreme Court's recent decision in this area. No argument has been advanced that the approach of that decision is unfair. Furthermore, there are numerous cases under the Act which courts have decided in favor of plaintiffs, in favor of the government, or partly in favor

1/ E.P.A. v. Mink, ___ U.S. ___, Jan 22, 1973.

of both sides, without any need to resort to in camera inspection. The normal, proper and economical way to decide such suits is upon sworn affidavits and, if necessary, supplemental affidavits, which of course are filed under penalties of perjury. If more is required, the court can take oral testimony and other evidence. But in camera inspection is a procedure in which the court and one adversary see material that the other side does not. To encourage frequent use of this extraordinary practice will tend to undermine the fairness of the judicial process.

Furthermore, in camera inspection may be completely irrelevant to the issues in a particular case, for example when the question whether or not the records sought are exempt turns on a dispute not on their contents but on the circumstances or purposes of their creation and subsequent handling.

In addition, if the court must determine by inspection whether the records "or any part thereof" shall be withheld, as the subsection states, a conscientious judge may feel compelled to spend at least a few moments on each page. Based upon experience with large requests, this may take

many months of a judge's time. Some documents should not be subject to in camera inspection. Consider, for example, a memorandum from one of our litigating divisions to the Solicitor General, withheld under the 5th exemption, which criticizes a district court decision, discusses the strengths and weaknesses of the government's position, and frankly assesses the probable attitudes of various courts of appeal toward the type of case involved. The Government should not have to subject such a document to the court for its inspection.

There is a further provision in Section 1(d), concerning classified documents. This provision would routinely force the judge to subordinate an Executive Branch determination that a classified document was properly classified for defense or foreign policy reasons to the judge's personal opinion on such a question. This provision raises serious constitutional questions, since the actual conduct of defense and foreign affairs under the Constitution is entrusted to the President, and these responsibilities have always included the identifi-

cation and protection of information that constitutes "state secrets". Even if this were not so, the courts have generally and properly regarded themselves as poorly qualified to make such judgments. 2/

> As is well known, even agency personnel who are intimately familar with various specialized and rapidly changing aspects of defense and foreign affairs are sometimes uncertain whether particular information should be classified, and are sometimes wrong whichever way they may decide. The government has recently set up improved declassification procedures to deal with this situation. But it would be both unwise and unfair to our overburdened courts to transfer to them decisions involving matters of defense or foreign policy for which they have neither background nor responsibility, and which both the Constitution and common sense entrust to the Executive Branch.

5. Section 1(e) of H.R. 5425 would reduce the present 60-day period which the Government normally has to answer complaints against it in federal courts to 20 days for all suits under the Act. It would also provide for an award of attorneys fees to the plaintiff in any such suit in which the government "has not prevailed", leaving it unclear what might happen in cases where the government prevails on part of the records in issue and does not prevail on the rest.

2/ United States v. Curtiss-Wright, 299 U.S. 304, 319-320 (1936).

We oppose both features of this proposal. When a suit is filed under the Act, the local U. S. Attorney, who is often not as familiar with this field of law as if he were defending a tort or contract suit, must consult the Department of Justice, usually the Civil Division, already overburdened by the rise of litigation. The Department in turn must consult the agency whose records are involved, and frequently that agency must coordinate internally among its headquarters components or its field offices, and sometimes also externally with other departments. The federal government is larger and more complex, and bears more crucial public interest responsibilities, than any other litigant. It needs more time to develop and check its positions, especially if they may affect agencies other than the one sued. And yet unlike a large corporation it cannot readily hire more lawyers to meet a sudden influx of litigation. A 20-day rule would increase the incidence of positions that would later be reformulated, causing unnecessary work for both sides and for the court, and providing ample illustrations of the adage that "haste makes waste".

The award of attorneys fees is particularly inappropriate in a type of litigation which can be started by

anyone without the customary legal requirements of standing or interest or injury. Some lawyers might take turns in filing these suits for each other. In any event, the proposal would encourage increased litigation, rather than encouraging efforts by requesters and agencies to adjust their differences whenever possible. We see no reason why there should be a departure in this area of law from the traditional rule, applied in every other field of Government litigation, that attorneys fees may not be recovered against the Government.

Plaintiffs often have less financial need for these proposed awards than in other types of litigation, because under the Act the burden of proof is shifted to the defendant, and because the expense of an evidentiary trial with oral testimony is rarely encountered. Finally, the successful plaintiff under the Act may not fit the familiar image of a noble and deserving champion of the public interest who comes into court under the Freedom of Information Act to vindicate the public's right to know and vanquish bureaucratic secrecy. Instead, the plaintiff may well be a businessman using the

96-576 O - 73 -- 9

Act to get information about his competitors' plans, practices, processes, capabilities and design concepts. Or he may be someone seeking government-furnished raw material for commercial exploitation in a sensational book or in a mailing-list venture. Or he may be a defense contractor seeking to obstruct the renegotiation of his excess profits. Or he may be an investigatory law firm engaged in policy-making through new forms of class-suit litigation--a permissible practice but hardly one meriting a public subsidy. And in all such cases, the award of attorneys fees would compel the hapless taxpayer to pay for litigating both sides of the dispute.

II

I turn now to the several proposed amendments in Section 2 of the bill, which would rewrite exemptions 2, 4, 6, and 7 of the Act.

1. Section 2(a) of H.R. 5425 would amend the 2d exemption to restrict it to personnel matters and exclude any other internal operating matters. While some courts have so interpreted this exemption, your House Report which preceded enactment of the Act expressly construed this exemption to cover certain internal operating instructions, the disclosure of which might cripple agency effectiveness in law enforce-

ment and other arms-length situations. 3/

We agree with the view you expressed at that time. In our opinion it is absolutely vital, if laws are to be enforced, that agencies be able to give instructions and guidance to their own staffs without exposing these instructions, routinely and under compulsion of law, to the very persons whom the agencies may have to investigate, or regulate, or audit, or inspect, or negotiate with. While we do not contend that all internal instruction and guidance material should be withheld, some must be if important laws and programs enacted by Congress are to be effectively executed. Within our own Department, this amendment would undermine the functioning of, for example, the Bureau of Narcotics and Dangerous Drugs, the FBI, and the Immigration Service.

In any organization that must operate in an arms-length environment, wholesale exposure of internal management

3/ H. Rept. 1497, 89th Cong., 2d Session, p. 10. The Senate Report, No. 813, 89th Cong., 1st Sess., p. 8, is not inconsistent with the House Report, and another Senate Report, No. 1219, on an earlier version of the bill in the 88th Congress, confirms the House Report (p. 13, referring to pages 12 and 11).

directives is a poor gamble, if not a good guarantee that its mission will largely fail. By tipping them off as to the Government's investigative techniques and enforcement practices, this amendment would benefit the tax dodger, the chiseling contractor, the industrial or transportation enterprise that may be tempted to skimp on safety, the food processor who gets careless on sanitation, the manufacturer who may discharge dangerous pollutants into the environment, and in a broad sense all litigators against the government.

2. Section 2(b) of the bill would amend the 4th exemption. This exemption is primarily designed to enable the government to offer private persons, usually businessmen, protection for their trade secrets or other confidential information when contained in government files. The proposed amendment would limit the protection which can be offered strictly to business-type confidential information, and has serious right of privacy implications.

We are strongly opposed to an amendment which would place confidential information of the types likely to be furnished by businessmen in a favored class, compared to information furnished by other citizens which also merits protection, on an ethical basis if not on a legal basis. Agency files may contain an endless variety of letters of complaint from citizens on all kinds of subjects, some of which warrant confidential treatment in the interest both of the citizen and of the agency's mission, but which may not fit under any other exemption in the Act. Again, inquiries by various agencies into casualties such as fires, plane crashes and explosions are often undertaken not for law enforcement purposes but purely for fact-finding, to devise measures to save life, limb and property in the future. The full and candid statements of witnesses in these inquiries are often vital in determining the probable cause of the disaster, and such statements are more likely to be obtained with a promise of confidentiality which can be honored. Similar considerations apply to statements from agency employees given in internal audits that are necessary to maintain the quality of agency performance.

Moreover, there are other agency records which sometime warrant protection, involving perfectly legitimate communications from state or local or foreign governments, or from Congressmen and Senators, which would never have been written if the writer thought the agency would be compelled to make his letter generally available. From time to time agencies consult us informally on whether they can legally deny requests for access to communications from Congressmen and Senators. These communications may contain confidential information from constituents or third persons, but under this amendment they would not be protected unless the information is "commercial or financial".

Even information subject to the attorney-client privilege or other traditional common law privileges, which both House and Senate Reports leading to the Act expressly indicated were covered by the 4th exemption, would no longer be protected unless "commercial or financial". In the dark days at the beginning of World War II, the government asked all citizens to volunteer inventions or other suggestions or ideas which might help in the defense effort and promised confidentiality, but under the proposed amendment a public appeal in such terms could not honestly be made again.

We conclude that whenever functions entrusted to government reasonably require information from sources which legitimately expect confidential treatment for such information, the government must be able to promise such treatment and honor its promise. And there is really no more danger of abuses under the 4th exemption where non-commercial information is concerned than if business information were involved, because use of the exemption in such cases will be subject to very critical review by the courts, by our department, by Congress and the press, and by requesters.

3. Section 2(c) would amend the 6th or privacy exemption by exempting medical, personnel and other privacy-type "records", rather than exempting such types of "files". This proposal may seem reasonable on first blush, but it seems to be based on the questionable assumption that medical "files", personnel "files" and the like are being used to hide "records" which should not be in those files and which the public should have a right to know about. This possibility seems to us rather remote, particularly in view of the attitude of the courts. The risk should be weighed

against the need to protect the ordinary individual's privacy against big organizations that may use information from the government to affect his life, including his educational and job opportunities, although the information may be inaccurate, incomplete, irrelevant or obsolete.

In this connection it is vital to remember that exemptions are only options to withhold. If the option is made burdensome for agencies to exercise where personal information is involved, there will be more invasions of privacy. It is relatively easy today to deny public access to an individual's medical "file", but if an agency like the Veterans Administration must take the time to decide whether each and every "record" in a person's medical file involves a sufficient invasion of privacy to warrant its withholding, the option to withhold may become too costly and unattractive. Actually, personal privacy today may need more rather than less protection.

4. Section 2(d) of the bill would amend in several respects the 7th exemption, which covers "investigatory files compiled for law enforcement purposes". The word "files" would be

changed to "records", the phrase "law enforcement purposes" would be changed to "any specific law enforcement purpose the disclosure of which is not in the public interest", and the coverage of the exemption would be cut back to exclude (i) records of scientific tests, (ii) inspection records relating to health, safety or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking.

These changes would seriously impair and in some situations render almost helpless those parts of the government upon which the nation must depend to enforce the laws. To take a simple case, a sustainable conviction of a murderer would become very doubtful if the government is compelled to publicly disclose before trial incriminating ballistic reports, a type of scientific test data. Scientific tests of various kinds may be used in many other law enforcement investigations, for example against violations by motor carriers, or against frauds. To take another situation, the Bureau of Narcotics and Dangerous Drugs has inspection reports "relating to health" which may be used for criminal or administrative enforcement against anyone among nearly 500,000 registered handlers of controlled substances--

doctors, druggists, manufacturers and distributors. These reports would no longer be exempt, threatening severe damage to compliance investigations as well as irreparable damage to the reputations of registrants.

The proposed amendment would have a particularly adverse effect on law enforcement in fields such as organized crime, antitrust, and indeed any field of serious illegal activity which is characterized by conspiratorial conduct of long duration. Society cannot fight effectively such activities by confining the investigative process to those inquiries triggered by "specific" illegal episodes. Without broad intelligence-type investigation, effective law enforcement in areas like antitrust, organized crime and other major conspiracies would become extremely difficult, uncertain and often impossible. America must not become a haven for group crime.

Another effect of the amendment would be to subject the FBI and its voluminous investigatory files to a record-by-record screening at anyone's request, involving an unpredictable but potentially unlimited drain on FBI money and manpower that

would inevitably interfere with the FBI's main work. If requests are made for the FBI's files on organized criminal activities for given geographic or economic areas, the law should not make it routinely necessary that each piece of paper in such files be examined and separately ruled upon at every level that may pass upon such requests.

According to the legislative history of the Act, it was not supposed to have affected the FBI's investigative files at all. If Section 2(d) were enacted, there would be over a period of time more and more citizens who would become afraid to tell the FBI what they know or suspect about crime. Even if the FBI could always meet to a judge's satisfaction the amendment's vague burden of proving that "disclosure . . . is not in the public interest," there would be enough other disclosures under the remainder of the amendment to erode and destroy the vital public image of the FBI as a trustworthy repository of confidences. This danger applies as well to other law enforcement agencies. If the Act is to be amended, perhaps the time has come to put in an exemption expressly covering the files of the FBI and other federal investigators working with the FBI.

One further feature of this subsection should also be noted, the proposed exclusion from the 7th exemption of investigatory files if they also serve as a basis for public policy statements or regulations. The fear of exposing such files might not only inhibit rulemaking in important regulatory areas, but would also cut back on the flow of information to the public. For example, Justice Department officials would hesitate publicly to describe current policies as to narcotics, antitrust, or other areas of law enforcement in speeches to professional organizations or even at Congressional hearings. The reason is, such a statement or speech might terminate the exemption for the investigatory information which was compiled for law enforcement but also was used as a basis for developing the policy described in the speech.

To be sure, all final policy decisions should themselves be subjected to a process of scrutiny and justification--whether emanating from Executive action, from an executive session of a Congressional committee, or the office of a Committee chairman. But it would stultify creative action and the decision-making process if all interim hypotheses and false starts were subject to revelation.

III.

Section 3 of the bill involves a direct attack on the doctrine of executive privilege and is, in our opinion, unconstitutional. It attempts to require every agency in the Executive Branch to disclose to Congress any information or records in its possession regardless of the contents or consequences.

> Documents entrusted to an officer of the Executive Branch by a foreign government under a promise of confidentiality would nevertheless be required to be disclosed in violation of that commitment. Information that the Congress itself has required by law to be kept confidential would have to be made available, and without any commitment that the Congress would respect and protect that confidentiality. This goes much further than other bills introduced on the subject of executive privilege and clearly violates the separation of powers established by our Constitution. If the President cannot require that promises of confidentiality to foreign governments be kept, cannot obtain the candid advice of his subordinates, or cannot protect information given in confidence for use in faithfully executing the law, the viability of the Executive Branch is destroyed. Our Constitution forbids this.

IV.

Section 4 of the bill would require each agency to make an annual report to Congress with various kinds of statistics on its administration of the Act. We fully

appreciate and respect the desire of Congress to be informed on how the Act is being carried out. But in view of the uncompensated expense to the agencies of these reports, we wonder why permanent legislation of a government-wide nature, and of the scope proposed, is needed to keep you informed. We recall that in 1971 your Committee without such legislation obtained similar statistics from the agencies by a questionnaire, plus a great deal more information during your 1972 hearings. We feel sure the agencies will be glad to cooperate when asked, without a series of permanent, across-the-board fixed reporting requirements.

> Collecting and assembling the reports called for by the bill would be costly and burdensome for some agencies, tending to divert the energies of staff that might otherwise be used to process requests under the Act. This is particularly true of the requirement to report reasons and days to process on each individual request. For example, the Immigration Service would have to set up a system for recording and collecting the number of days to process each of 90,000 requests a year, although there is no showing the Service is not generally prompt. Some agencies would have to set up special record-keeping systems in field offices to prepare such a report, particularly to collect data not now collected on requests that are routinely granted. Perhaps such reports should be called for every few years or when

needed or desired, but not routinely every year for the indefinite future. You might also prefer to change the questions in a given year and to concentrate on certain agencies but not all, which you can do more readily by questionnaires.

We also doubt the meaningfulness of some of the statistics called for. Thus, in counting the number of requests for records received, should a letter containing three requests be counted once or three times? Suppose the letter contains only one request, but it is a categorical one, seeking hundreds or thousands of records and requiring a major effort to process, should that enter the statistics as just one request? Suppose a request from a newspaperman comes in by telephone and it is granted without regular processing, should it be counted? If so, are all employees who may handle such phone calls to be required to remember to record them for the report? And what about requests which are made and processed without reference to the Act because they always have been and neither the requester nor the agency personnel thought about invoking the Act? Efforts to resolve such problems with faithful respect for the reporting requirements may encounter an indifferent response in the ranks, due to difficulty in getting the employees, especially the younger and brighter ones, to follow through consistently on matters which may strike them as tedious and of little use, or to remain in jobs involving such activities.

The other statistics called for, such as those on delay, appeals and litigation, also have doubtful significance and much capacity to mislead. A short delay may be too long on requests that are easy to grant or deny, but a much greater period of time may not be excessive when the records sought are voluminous, there are difficult legal and policy

questions, the staff is being pressed on other priority assignments, and coordination with several organizations is called for. Therefore, the statistical volume of grants, denials, and resulting litigation for an agency may mean little, apart from knowledge of the particular requests, types of records involved, and the circumstances affecting requesters and the agency.

V.

Now I would like to comment on H.R. 4960, and particularly on certain of its provisions which are different from H.R. 5425.

Section 102 would impose a requirement to do an editorial job of excerpting and deleting on an unknown but extremely large number of government records that may contain both exempt and non-exempt matter, in all cases where prescribed standards are met. These standards are the preservability of meaning and the dissectability of contents. The application of these standards calls for a full understanding of each record, good editorial judgment, and sometimes an attempt actually to edit, with an appraisal of the results of that effort. The standards would often be hard to satisfy and uncertain in practice and would require highly qualified staffs. Even so, the standards are inadequate, because they do not take account of how the records relate to agency activities. We think experience shows that the courts and the agencies are best able to decide on a case-by-case basis the nature and extent of the deleting and excerpting that should be done on particular records, and that it is unnecessary and somewhat impractical to attempt to frame legislative requirements in terms of stated levels of comprehensibility, faithfulness to an original, and editorial judgment.

Section 103 of H.R. 4960 would curtail the 4th, 5th, and 7th exemptions in various respects. There is no real showing that these changes are needed. Despite some past abuses in some agencies, this Department and the courts are both active in curbing unwarranted withholding. The proposed changes would impair the government's ability to obtain commercial and financial information needed for the intelligent performance of various functions, to formulate sound policy and actions with deliberations based on adequate and efficiently marshalled information, to conduct informed and effective enforcement of a great variety of laws, and to grant and honor promises of confidentiality where such protection is legitimately desired by a citizen and serves a valid public purpose.

Title II of H.R. 4960 would establish a 7-member Freedom of Information Commission to investigate instances of alleged improper withholding by federal agencies. We recognize that in a field as complex and controversial as this, there are continuing needs for oversight, review, coordination, and guidance to improve the administration of the Act. But we also want speed and economy, and it is not clear that adequate oversight and review cannot be supplied by the combined efforts of Congressional committees, the courts, the Justice Department, professional groups, the press, scholars, and interested members of the public. If all these resources cannot meet the needs, even after improvements, some

96-576 O - 73 - 10

new entity should perhaps be created. However, the proposed Commission would seem to involve another step and further delay in a long process which already includes initial determinations, administrative appeals, suit in the United States District Court, appeal to the Circuit Court, and perhaps final review by the Supreme Court. The costs for such a Commission, its seven members, Executive Director, appointed staff personnel, and employed experts and consultants, with travel time and per diem, may be an unnecessary or excessive expense for an already overburdened Government. We believe that, with a spirit of cooperation, measures can be devised that are simpler, quicker, less expensive and perhaps even more effective. At least it would be worth exploring.

Title III of H.R. 4960 contains various procedural changes and reporting requirements. With your permission, I will not discuss the provisions of Title III at this time, because most of them are similar to provisions in H.R. 5425 which I discussed earlier.

VI.

I conclude with a few suggestions for the overall advancement of freedom of information. We in the Justice Department are in a strategic position to see how the Act operates from the inside. We believe the basic obstacle to improved public access is not the present language of the Act, as these bills seem to assume. The courts have resolved almost all legal doubts in favor of disclosure, despite considerable risks to private rights and public programs. Similar pressures come from Congress, the press, and others. Where access is still inadequate, therefore, the real need is not to change the law but to improve compliance.

We should realistically face the facts of agency life. An agency employee who is indifferent toward his job would probably not care who browses through agency files. Most employees, however, take their jobs seriously and tend to identify with their assignments, their agency, and "their" files. In these circumstances, some doubts about granting access may be resolved against release, especially in view of the natural fear of creating a bad precedent. Similar

attitudes can also be found in non-governmental organizations.

The most practical way to meet this situation, at least at this stage in the development of this field, is to provide help and training for agencies and their staffs in freedom of information matters, while respecting the importance, the complexity and the dedication of their regular work. You can help bring about better administration of this Act and its objectives if you continue your valuable oversight in this field with realistic regard for the problems that confront people in the agencies, as well as those that confront requesters. The prodding is helpful.

It would be most helpful also to make available some financial support for providing enough properly trained and qualified personnel to upgrade the administration of the Act. With such support, we could provide more leadership in such matters as training, research, guidance, and review, and could process requests more quickly to a conclusion. Perhaps this can be done through improvements through means

previously mentioned, or through a new interagency freedom of information council. In all candor, however, we are rapidly reaching the limit of effective administration of this Act on the basis of squeezing it into the regular workload. We are confident, however, that with your understanding and support we can continue to improve the administration of the Act, handle expeditiously the expanding demands from all manner of persons and groups for disclosure of all kinds of internal documentation, and at the same time protect the legitimate countervailing interests specified in the Act. We continue to dedicate ourselves to that end.

Mr. DIXON. Thank you very much.

Mr. Chairman, we appreciate the opportunity to appear before your committee and discuss H.R. 5425 and H.R. 4960, bills containing several proposed amendments to the Freedom of Information Act.

Before discussing the bills, let me emphasize our basic approach to this subject. The Freedom of Information Act—applicable to the executive branch but not to the other two branches—is a basic commitment to the maximum feasible access by private persons to the internal details of administration, with no need to disclose the private interest prompting the request. It is a major effort to open up many aspects of Government. It is a real challenge to administer the act well, and to accommodate the competing interests involved. Regarding most requests by scholars we have little problem, and I might interject that as a former scholar, I, myself, had little problem in getting access to most information I desired. Regarding requests for information given to the Government in confidence, or which involve law enforcement-type files, we have more problems.

We have taken several further steps to improve performance in this field. These steps were over and above our regular freedom of information workload of processing requests, handling litigation, and counselling other agencies.

(1) We have prepared a 19-page analysis and program outline in this field. The committee has a copy of this material which is, indeed, in response to the committee's own research, and very important research, on the administration of the act.

(2) We have issued and published in the Federal Register of February 14, 1973, a sweeping revision of our own regulations under the act, to improve and expedite the processing of requests for Justice Department records.

(3) We prepared and conducted a concentrated and comprehensive seminar on the proper handling of freedom of information requests for over 50 officials from all parts of the Justice Department.

As an aside, that, indeed, was my first task on my first day in my new position—to serve as a moderator at this important seminar.

Let me turn to some general comments on H.R. 5425.

We are of course sympathetic to what we take to be the two main purposes of the bill; namely, to make the act as clear as possible, and to make Government records even more quickly and fully available than at present. We recognize the act is not perfect. We fear, however that these amendments may introduce new uncertainties, bearing in mind the incredibly vast and varied aggregations of records covered by the act, and the inevitable need for some flexibility and judgment.

We share the concerns of those who feel that the administration of the act is not perfect either. Our own considerable experience in screening contemplated denials of access by other agencies, plus our work in handling appeals from denials within our own Department, support our belief that access should sometimes be more speedy and extensive than some officials are inclined to grant. At the same time, I should note that the overall Government practice is not nearly as restrictive as it may appear to some critics, that there are reasonable explanations for much of the restrictiveness that does exist, that no agency can operate in a wide-open goldfish bowl very effectively, and that steady progress is being made toward better access, due in p

to the efforts of your committee and, we like to believe, of our Department as well. Our goal is continued progress in improving the administration of the act and responding as speedily as possible to the increasingly broad and searching requests for all of the records of the executive branch.

I might mention that I am told by Mr. Saloschin that we have had about a 2,000-plus percent increase in appeals within our own Department in recent periods.

Despite the laudable general purposes of H.R. 5425, we are compelled to oppose its provisions strongly. Before discussing them in detail, let me summarize the overall reasons for our present opposition. In our view, with some possible exceptions, the proposed amendments contained in the bill, first, would lead to increased costs and administrative burdens for Government agencies without, we feel, corresponding public benefits, second, would create new uncertainties to confuse requesters, agency officials and the courts, third, would actually tend to reduce the flow of information to the public—unnecessarily, which I will discuss in a minute—and, fourth, would undermine personal privacy and the effective implementation of numerous laws and programs which Congress over the years has enacted, and which must be faithfully executed by the executive branch if our system of government is to serve the Nation and its people well.

I will now discuss the specific amendments to the act which H.R. 5425 proposes, taking up first section 1 of the bill.

(1) Section 1(a) of H.R. 5425 would amend the indexing provision in subsection (a)(2) of the Freedom of Information Act. This provision currently requires that there be indexes to the several types of material covered in subsection (a)(2), which are basically materials that may be used as precedents for agency action. Under the present act these indexes must be available for public inspection and copying, but the proposed amendment would go further and compel all agencies to publish and distribute such indexes.

Certainly, there may be nothing wrong with this amendment in theory—some agencies already publish certain indexes—but in practice and as a Government-wide requirement it would be confusing, costly, and essentially unnecessary—at least, at the present time.

Indexes, after all, are principally devices for locating other materials. The present act, besides making the indexes available to requesters, imposes an obligation on agencies to search their records upon request. A major obstacle to locating requested records is the availability of sufficient time of qualified agency staff. Publishing indexes would rarely help overcome this obstacle, and the obstacle might be aggravated if staff needed for searches must be assigned to preparing, revising and updating indexes for publication.

(2) Section 1(b) of H.R. 5425 would amend subsection (a)(3) of the act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." This certainly well-intentioned amendment is, we feel, unnecessary. It might lead to confusion as well as to unwarranted withholding of requested records.

For example, the proposed language would enable unsympathetic officials to reject requests which would have to be processed today, on a new ground that the requests are not reasonably descriptive. This

amendment could also subject agencies to severe harassment, as where a requester gave a description of Patent Office records he wanted that was adequate to find them, but his request was for about 5 million records scattered through over 3 million files. The court, apparently unable to accept something so unreasonable, held the request was not for "identifiable records."

(3) Section 1(c) of H.R. 5425 would amend the act by imposing time limits of 10 working days for an agency to determine whether to comply with any request, and 20 working days to decide an appeal from any denial. We strongly oppose this amendment. And, indeed, about one-quarter of this entire statement is devoted to this point.

Let me give the essence of our objection.

The act now requires that agencies make records "promptly" available. While promptness is a relative term, there is no doubt that most courts will treat an unreasonable delay by an agency in processing a request as a basis for mandamus requiring the agency to reach a decision.

We recognize that there is considerable room for improvement in many agencies, including our own, in the speed with which requests under the act are processed. This may be partly due to the fact that no money has ever been appropriated to any agency to administer the extra work which the act involves. As an aside, I now find that in my very own small office we are keeping up on this with one-quarter of our staff time devoted to our role under this act. Yet, we have affirmatively tried to move in the direction of quicker processing, without sacrificing quality, and without undermining the ultimate legislative objective of greater disclosure. We supported the Administrative Conference guidelines, from which the 10- and 20-day time limits in the bill originated. We would like to see requests acted upon even more quickly if possible.

Now, let me comment on the general purposes of maximizing disclosures, because these time restrictions might operate to discourage the careful and sympathetic processing of requests. The amendment could encourage hasty initial decisions to deny, which would mean an increase in unnecessary administrative appeals and eventual litigation.

The time limits to our new Justice Department regulations will hopefully serve as a model for other agencies to adopt more or less similar time limits in their own regulations, but, as I shall demonstrate, these time limits do not serve as a justification for a legislative proposal like section 1(c) of the bill. First, our time limits apply only to Justice Department records, not to the records of all other agencies. There are great differences among the agencies in subject matter, responsibilities,, documentation, organizational structures, and relationships with other organizations both at home and abroad. Second, our regulations do not apply to all parts of even our own Department. In adopting them, we recognized the valid objections of the Immigration and Naturalization Service, which properly pointed out that the time limits would be unworkable for them. For example, in fiscal year 1972, receipt of formal requests for records of INS averaged 7,500 monthly. Similar examples can be found within the Defense Establishment, the Postal Service, the Departments of Transportation and Health, Education, and Welfare, and the Veterans' Administration.

Third, even if one could identify and exclude from the proposed amendment the parts of the Government, like the Immigration and Naturalization Service, that cannot reasonably meet such time limits, it would still be necessary to provide for circumstances in which it is not practicable to process the request within the specified period. Our reviewed regulations in the Justice Department follow the Administrative Conference in specifying six reasons for extensions of time.

Even these reasons are not always sufficient. In many agencies, especially in our own office, there are certain times when personnel must either work on a particular freedom of information request or on other matters of high priority, including requests that come from Congress or the White House.

There is a fourth reason why this amendment is not justified by the time limits in our new Justice Department regulations. This reason may be a clincher. Although we are proud of these regulations and will strive to live up to them as nearly as we can, consistently with our resources and other responsibilities, I must tell you that after 2 months of experience under these regulations we are finding that we were overeager and a little bit undersophisticated. The regulations may be misleading by holding out an expectation of more speed than we can, or should, consistently achieve, if the speed is at the cost of quality consideration of a request.

On appeals that seemed to present simple questions, we have had to consult other organizations and even foreign governments and extend the time. We do not propose to adhere to our 10- or 20-day periods if the effect is to deny requests that might with more study and effort be granted in whole or in part, and thereby abort an appeal and eventual litigation. We do take the Freedom of Information Act, its purpose and policy, too seriously to engage in such a numbers game. Therefore, after a few months experience under our new regulations, we expect to make some adjustments in the time limit provisions.

Now, turning to section 1(d). Section 1(d) of H.R. 5425 would impose an automatic requirement in any suit under the act for an in-camera inspection by the court, and if the records were withheld under the first exemption the court would further be directed to decide whether disclosure would injure foreign relations or national defense. Under the act today, as construed by the Supreme Court in the *Mink* case, courts in appropriate circumstances may conduct an in-camera inspection, except in a very small percentage of suits under the act where the records have been classified under Executive order to protect national security.

In camera inspection is not a normal type of judicial procedure, and we vigorously oppose an automatic, across-the-board requirement for it. First, we see no reason why Congress should overrule the Supreme Court's recent decision in this area. No argument has been advanced that the approach of that decision is unfair. Furthermore, there are numerous cases under the act which courts have decided in favor of plaintiffs, in favor of the Government, or partly in favor of both sides, without any need to resort to in camera inspection. The normal, proper, and economical way to decide such suits is upon sworn affidavits followed, if necessary, by oral testimony and the taking of other vidence. But, by contrast, in camera inspection is a procedure in

which the court and one adversary see material that the other side does not. To encourage frequent use of this extraordinary practice will tend to undermine the fairness of the judicial process.

We also oppose the provision in section 1(d) concerning classified documents. This provision would routinely force the judge to subordinate an executive branch determination that a classified document was properly classified for defense or foreign policy reasons, to the judge's personal opinion on such a question. This provision raises serious constitutional questions, since the actual conduct of defense and foreign affairs under the Constitution is entrusted to the President, and these responsibilities have always included the identification and protection of information that constitutes, to use the old-fashioned term, "state secrets." Even if this were not so, the courts have generally and properly regarded themselves as poorly qualified to make such judgments, as is indicated in the Supreme Court opinion in the case *United States* v. *Curtiss-Wright*, 299 U.S. 304, 319–320.

Turning now to section 1(e) of H.R. 5425, this section would reduce the present 60-day period which the Government normally has to answer complaints against it in Federal courts to 20 days for all suits under the act. It would also provide for an award of attorney fees to the plaintiff in any such suit in which the Government "has not prevailed," leaving it unclear what might happen in cases where the Government prevails on part of the records in issue and does not prevail on the rest.

Now, we do oppose both features of this proposal. The Federal Government is larger and more complex and bears more crucial public interest responsibilities than any other litigant. It needs more time to develop and check its positions, especially if they may affect agencies other than the one sued. And yet, unlike a large corporation, it cannot readily hire more lawyers to meet a sudden influx of litigation.

The award of attorneys' fees is particularly inappropriate, we feel, in a type of litigation such as the nature of the litigation which can be started by anyone under this act without the customary legal requirements of standing or interest or injury.

Under the act, the burden of proof is shifted to the defendant, and because the expense of an evidentiary trial with oral testimony is rarely encountered, plaintiffs often have less financial needs for these proposed awards than in other types of litigation. Finally, the successful plaintiff under the act may not fit the familiar image of a noble and deserving champion of the public interest who comes into court under the Freedom of Information Act to vindicate the public's right to know and vanquish bureaucratic secrecy. Instead, the plaintiff may well be a businessman using the act to get information about his competitors' plans, practices, processes, capabilities, and design concepts. Or he may be someone seeking Government-furnished raw material for commercial exploitation in a sensational book or in a mailing-list venture. Or he may be a defense contractor seeking to obstruct the renegotiation of his excess profits. Or he may be an investigatory law firm engaged in policymaking through new forms of class-suit litigation—a permissible practice but hardly one meriting a public subsidy. And in all such cases, the award of attorneys' fee

would compel the hapless taxpayer to pay for litigating both sides of the dispute.

I turn now to the several proposed amendments in section 2 of the bill which would rewrite exemptions 2, 4, 6, and 7 of the act.

Section 2(a) of H.R. 5425 would amend the second exemption to restrict it to personnel matters and exclude any other internal operating matters. While some courts have so interpreted this exemption, your House report which preceded enactment of the act expressly construed this exemption to cover certain internal operating instructions, the disclosure of which might cripple agency effectiveness in law enforcement and other arm's-length situations. We agree with the view you expressed at that time.

In any organization that must operate in an arm's-length environment, wholesale exposure of internal management directives is a poor gamble, if not a good guarantee that its mission will largely fail.

Section 2(b) of the bill would amend the fourth exemption. This exemption is primarily designed to enable the Government to offer private persons, usually businessmen, protection for their trade secrets or other confidential information when contained in Government files. The proposed amendment would limit the protection which can be offered strictly to business-type confidential information and has serious right-of-privacy implications.

We are strongly opposed to an amendment which would place confidential information of the types likely to be furnished by businessmen in a favored class, compared to information furnished by other citizens which also merits protection, on an ethical basis if not on a legal basis.

Moreover, there are other agency records which sometime warrant protection, involving perfectly legitimate communications from State or local or foreign governments, or from Congressmen and Senators, which would never have been written if the writer thought the agency would be compelled to make his letter generally available. From time to time agencies consult us informally on whether they can legally deny requests for access to communications from Congressmen and Senators. These communications may contain confidential information from constituents or third persons; but under this amendment, as we understand it, they would not be protected unless the information is "commercial or financial."

Section 2(c) would amend the sixth or privacy exemption by exempting medical, personnel, and other privacy-type "records," rather than exempting such types of "files." This proposal may seem reasonable at first blush, but it seems to be based on the questionable assumption that medical "files," personnel "files," and the like are being used to hide "records" which should not be in those files and which the public should have a right to know about. This possibility seems to us rather remote, particularly in view of the attitude of the courts, and we suggest that personnel privacy today may need more rather than less protection.

Section 2(d) of the bill would amend in several respects the seventh exemption, which covers "investigatory files compiled for law-enforcement purposes." The word "files" would be changed to "records," the phrase "law-enforcement purposes" would be changed to "any specific

law-enforcement purpose the disclosure of which is not in the public interest," and the coverage of the exemption would be cut back to exclude (i) records of scientific tests, (ii) inspection records relating to health, safety, or environmental protection, and (iii) any investigatory records which are also used as a basis for public policy statements or rulemaking.

These changes would seriously impair and in some situations render almost ineffective those parts of the Government upon which the Nation must depend to enforce the laws, such as the FBI, the Bureau of Narcotics and Dangerous Drugs, and the like.

The proposed amendment would have a particularly adverse effect on law enforcement in fields such as organized crime, antitrust, and, indeed, any field of serious illegal activity which is characterized by conspiratorial conduct of long duration and very much undercover. Society cannot fight effectively such activities by confining the investigative process to those inquiries triggered by "specific" illegal episodes. Without broad intelligence-type investigation, effective law enforcement in areas like antitrust, organized crime, and other major conspiracies would become extremely difficult and uncertain. America must not become a haven for group crime.

Another effect of the amendment would be to subject the FBI and its voluminous investigatory files to a record-by-record screening at anyone's request.

According to the legislative history of the act, it was not supposed to have affected the FBI's investigative files at all. If section 2(d) were enacted, there would be over a period of time more and more citizens who would become afraid to tell the FBI what they know or suspect about crime.

If the act is to be amended, perhaps the time has come to put in an exemption expressly covering the files of the FBI and other Federal investigators working with the FBI.

One further feature of this subsection should also be noted, the proposed exclusion from the seventh exemption of investigatory files if they also serve as a basis for public policy statements or regulations.

To be sure, all final policy decisions should themselves be subjected to a process of scrutiny and justification, whether emanating from executive action, from an executive session of a congressional committee, or the office of a committee chairman. But it would stultify creative action and the decisionmaking process if all interim hypotheses and false starts were subject to revelation.

Turning now to section 3 of the bill, this section involves a direct attack on the doctrine of executive privilege and is, in our opinion, unconstitutional. It attempts to require every agency in the executive branch to disclose to Congress any information or records in its possession regardless of the contents or consequences.

We have testified on this matter, separately, both here and before Senate committees.

As we look at the proposed amendment, we feel that it goes further than other bills introduced on the subject of executive privilege and violates the separation of powers established by the Constitution.

Section 4 of the bill would require each agency to make an annual report to Congress with various kinds of statistics on its administration

of the act. In this regard, on this section, our feeling is more ambivalent. We fully appreciate and respect the desire of Congress to be informed on how the act is being carried out, but, in view of the uncompensated expense to the agencies for these reports, we wonder why permanent legislation of the Government-wide nature and the scope proposed is needed. In 1971, without such legislation, your committee obtained similar statistics from the agencies by a questionnaire, plus a great deal more information during your 1972 hearings. We feel sure the agencies will be glad to cooperate when asked, without a series of permanent, across-the-board fixed reporting requirements. We feel that the spirit of agency cooperation in reporting may be sufficient at the present time regarding the providing of statistics.

I would now like to comment briefly on H.R. 4960 and particularly on certain of its provisions which are different from H.R. 5425.

Title II of H.R. 4960 would establish a seven-member Freedom of Information Commission to investigate instances of alleged improper withholding by Federal agencies. It is not clear that adequate oversight and review cannot be supplied by the combined efforts of congressional committees, the courts, the Justice Department, professional groups, the press, scholars, and interested members of the public. We believe that with the full spirit of cooperation, measures can be devised for simpler, quicker, less expensive and, perhaps, more effective disclosure than would result under a full Commission on Freedom of Information. At least, we think it is worth further exploration.

Title III of H.R. 4960 contains various procedural changes and reporting requirements. With your permission, I will not discuss the provisions of title III of H.R. 4960 at this time, because most of them are similar to provisions in H.R. 5425 which I discussed earlier.

I conclude now with a few suggestions for the overall advancement of freedom of information. We, in the Justice Department, are in a strategic position to see how the act operates from the inside. We believe the basic obstacle to improved public access is not the present language of the act, as these bills seem to assume. The courts have resolved almost all legal doubts in favor of disclosure, despite considerable risks to private rights and public programs. Similar pressures come from Congress, the press, and others. Where access is still inadequate, therefore, the real need is not to change the law but to improve compliance.

We should realistically face the facts of agency life. An agency employee who is indifferent toward his job would probably not care who browses through agency files. Most employees, however, take their jobs seriously and tend to identify with their assignments, their agency, and "their" files. In these circumstances, some doubts about granting access may be resolved against release, especially in view of the natural fear of creating a bad precedent.

The most practical way to meet this situation, at least at this stage in the development of this field, is to provide help and training for agencies and their staffs in freedom of information matters while respecting the importance, the complexity and the dedication of their regular work. You can help, I would suggest, bring about better administration of this act and its objectives if you continue your valuable oversight in this field with realistic regard for the problems that con-

front people in the agencies, as well as those that confront requesters. The prodding is helpful.

It would be most helpful also to make available some financial support for providing enough properly trained and qualified personnel to upgrade the administration of the act. With such support, we feel we could improve our leadership in such matters as training, research, guidance, and review, and could process requests more quickly to a conclusion. Perhaps this can be done through improvements through means previously mentioned, or through a new interagency freedom of information council. In all candor, however, we are rapidly reaching the limit of effective administration of this act on the basis of squeezing it into the regular workload. Nevertheless, we are confident that with your understanding and support we can continue to improve the administration of the act, handle expeditiously the expanding demands from all manner of persons and groups for disclosure of all kinds of internal documentation and at the same time, protect the legitimate countervailing interests specified in the act. We continue to dedicate ourselves to that end.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Dixon.

I think that probably where we first part ways is really your statement on page 4 that "no agency can operate in a goldfish bowl very effectively." I would agree with you on that point if we had not had the experience here in the Congress of opening up executive sessions of our committees. I was somewhat reluctant to see that come to pass, because I thought that we would not operate effectively in a goldfish bowl. But this subcommittee had its first executive session "in the goldfish bowl" yesterday, and I was very pleased that we operated just the way we had done when the doors were closed. The press was there, and after awhile they got bored with us and left. And I think that most agencies would also find that their routine business is of such a nature that they could operate completely in a goldfish bowl. But we are not even asking them to do that, in this legislation. So, I think we start with this basic difference of opinion and our paths then seem to separate even more.

Now, I would have to agree with you that the legislation does tend to be a little inflexible and, in practice, there may be exceptions to the general rules. So, it occurs to me that maybe we should approach it more along the line of Mr. Horton's essential proposition, which is to establish an FOI Commission and give guidelines to the Commission, and then let them produce that flexibility. Let us say on the publication of indices, that indices shall be published, et cetera, on "identifiable records"—that language, as the Commission could determine; and the 10- and 20-day time limits—leave that with the Commission. And maybe you could do it also with the in camera provisions, but you think it might be too much of a burden on the courts. I would like to have your reaction to these suggestions.

Mr. DIXON. Yes, Mr. Chairman.

Regarding your initial remark about the goldfish bowl, it may well be that we have not yet had sufficient experience and we are still at the stage where the Congress was when it first thought of the concept of operating in a much more open fashion. I think there is room for much give-and-take in that particular area.

In regard to the question about the Commission, our position is somewhat ambivalent on that, and it may be a matter of timing as much as anything else. We are all aware that every new organization does develop its own internal ethnic and procedures and tends to, perhaps in a sense, overformalize. Whether or not that would occur in the proposed Commission regarding freedom of information, we are uncertain, of course, but we would be very worried if there were real danger of over formalization of such a Commission which could then be a device for further delay, further appeal, further briefing, further arguments, and so on. I think that, as I understand the matter at the present time, part of the feeling—of a person working in this area day by day, such as Mr. Saloschin—the feeling is that we have come to a position now where general knowledge of the act's existence is becoming almost universal, which was not the case at the outset, and, therefore, more and more persons are beginning to take advantage of the act.

I should not put it quite that way—they are beginning to utilize the act for requests to the Government that are legitimate, and most requests are honored.

We have further formalized our procedure so as to give more effective notice of appeal rights once a request is denied, and, therefore, there has been a tremendous increase in appeals. I believe you said 2,000 percent in our own Department, perhaps. We are only now reacting to this developing picture. We tried to react to it in part by our own regulations, put in the Federal Register only 2 months ago.

Now, those were put into the Register after much deliberation and much thought, responsive to the experiences we had had up to that time, and, yet, as I mentioned in my statement, we are encountering problems with those regulations, and we have to change them.

So, it may be that our feeling is more a matter of timing than real opposition to the whole concept of a Commission.

With your permission, I might request Mr. Saloschin to respond to the Commission idea a little and, perhaps, the question especially of whether or not he feels further expansion of the Freedom of Information Act Committee in the Department of Justice, more beefing up in the light of our own ongoing experience, might warrant further use for an interim period before reaching the Commission possibility.

Mr. MOORHEAD. I would rather that you direct your attention to this proposition.

Assume that the Congress should enact at least that portion of the Horton bill, Mr. Saloschin, would you then think that some of the objections to the flexibility of the legislation on indexing and on identifiable records could be solved by giving discretion to the Commission to provide relief in particular instances?

Mr. SALOSCHIN. Well, any response that I give you now, Mr. Chairman, will be partly at least just thinking out loud, but I assume that you might consider that useful and accept it in that spirit.

One very critical question in this area was mentioned by Mr. Dixon, and that is the matter of timing. We are somewhat in the situation in administering the Freedom of Information Act that the executive branch was in the weeks right after Pearl Harbor, if I can take an

analogy which may seem overdramatic. I am talking about the fantastic expansion.

Now, our practical problem is very largely, what do we do with our small cadre of really qualified people. I know, in my work, there are people in certain other agencies, a man here, a man there, who are really qualified in this field, who sense the problems, who have the balance, who have the experience.

How, do we make the best utilization of these people and at the same time get the policy input from all concerned sources, including of course, this committee?

I am inclined to say that the best answer to this kind of thing would be the kind of an answer that, perhaps, we could work out at some type of an informal conference rather than my attempting to do so on this spot.

Now, if I were to give an answer immediately, I would say that some kind of an expansion of the Freedom of Information Committee, which is, of course, a Justice Department creature that is oriented toward the rest of the executive branch, would be one way to do it. The creation of an interagency council with two primary functions: one being the function of education and training of agency staff—in which we have a constant problem of turnover, as you know—and the other area being research.

For example, there are whole subareas of freedom of information having to do with the vast numbers of records, for example, in the procurement process, and it very well may be desirable to have a task force on the application of freedom of information to all types of records generated in the procurement process. There are other areas, for instance casualty and accident investigations and many others, which would warrant the task force to define freedom of information principles and develop guidelines in those subareas. That could be done if you had an interagency freedom of information council, as well as the conduct of regular seminars for agency staff involving, of course, public information people and administrators, as well as lawyers.

In time, it might be that the people in this council would have to have some staff support and some leadership, as well as just having people working from other agencies. In time, this council might develop the capability, or our present Justice Department Freedom of Information Committee would delegate to it certain specialized kinds of freedom of information problems—to the same people who had been on task forces which developed guidelines in specific freedom of information areas.

Another well-known example would be, of course, the area of regulatory records which you went into very heavily in 1972 in your hearings. And I think if we do this and maintain good liaison with your committee and your staff, we might have the best prospect of proceeding with the kind of informality which my experience, particularly right after Pearl Harbor, indicates is essential in meeting a crisis situation effectively. You have to have people who are not afraid to make a few mistakes in order to move ahead and get the job done.

Mr. MOORHEAD. Well, we have some differences. But, Mr. Dixon, you say that section 3 of H.R. 5425 would repeal the so-called doctrine of executive privilege. For the purposes of this discussion, let us a-

sume that such a doctrine does exist in the law, although there is some question about it. I understand that there are new guidelines for the exercise of executive privilege that have been issued. Are you familiar with those new guidelines?

Mr. DIXON. I am, Mr. Chairman, barely familiar with them. I received a copy, an official copy, late yesterday, and I have not subjected them to great scrutiny.

Mr. MOORHEAD. Would you submit a copy for the record?

Mr. DIXON. We certainly will do that. This would include a document of May 3 which has three regulations and a document of May 4 which relates to the previous documents on the Ervin committee.

[NOTE.—See hearing appendix, Foreign Operations and Government Information Subcommittee, 93d Cong., 1st sess., "Availability of Information to Congress," April 3, 4, and 19, 1973.]

Mr. MOORHEAD. Mr. Dixon, at the suggestion of counsel for the minority, can we get a copy to have photocopied for the use of the committee?

Mr. DIXON. At the present time?

Mr. MOORHEAD. Yes. I do have some more questions, but I want to go on and yield to the other members of the subcommittee.

Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Dixon, we had previous testimony before the subcommittee by Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel. Is she your employee?

Mr. DIXON. She is a Deputy Assistant Attorney General, yes, in the Office of Legal Counsel.

Mr. MCCLOSKEY. She is Assistant Attorney General, Office of Legal Counsel, and you are the Assistant Attorney General of the Office of Legal Counsel.

Does that make you the head of that Office?

Mr. DIXON. That is correct.

Mr. MCCLOSKEY. In expressing your opinion on the unconstitutionality of the bill, I assume you are expressing your own personal opinion as well as that of the Department.

Mr. DIXON. You are talking now about the section——

Mr. MCCLOSKEY. I am referring to your testimony on page 36.

Mr. DIXON. On regulation of the executive privilege by the bill?

Mr. MCCLOSKEY. Yes.

Mr. DIXON. Yes, we—and I—do have serious problems with that section of the bill.

Mr. MCCLOSKEY. Mr. Dixon, do you agree with Ms. Lawton's earlier testimony before this committee that executive privilege would not apply to an inquiry by Congress into an alleged wrongdoing on the part of a White House assistant?

Perhaps you can give us a "yes" or "no" answer to that question. Do you recall her testimony before the subcommittee?

Mr. DIXON. I do recall a question of that nature being raised and an answer being given. The premise we move from——

Mr. MCCLOSKEY. May I ask for an answer to my question, sir? Do you agree with Ms. Lawton's testimony that the doctrine of executive privilege would not apply to an inquiry by the Congress into an alleged wrongdoing on the part of a White House assistant?

96-576—73——11

Mr. DIXON. Only if the President reached that decision, as I believe has been reached every time the question has been seriously raised. He said that there should be full cooperation in the investigation of an alleged wrongdoing.

Mr. MCCLOSKEY. Do you understand my question? It is the specific question:

Does the doctrine of executive privilege; namely, the right of the President to withhold information from the Congress, extend to an inquiry by Congress into alleged wrongdoings on the part of a White House assistant? I think you can answer that "yes" or "no."

Mr. DIXON. Yes, it could extend if the President so directed in appropriate circumstances.

Mr. MCCLOSKEY. If the President, then, chooses to claim executive privilege, he could deny Congress the right to ascertain the truth about an alleged wrongdoing by a White House assistant? Is that your answer?

Mr. DIXON. Yes, that could occur. The President might, in that instance, be concerned about a concurrent grand jury investigation of the same matter, which he might feel was the initial forum to go into the matter. The President in this area has, we feel, under the separation of powers doctrine—as an implied power of executive privilege like other implied powers of the Constitution such as congressional powers to investigate—he has we feel, regarding executive privilege, a very broad power for this which is rarely exercised. It is almost always waived, and most certainly would be waived, in almost all of the instances that we can conceive of, regarding allegations of wrongdoing.

Mr. MCCLOSKEY. Mr. Dixon, can you tell me whether the guidelines of executive privilege that you have tendered to the subcommittee were prepared by your office or by someone else?

Mr. DIXON. These guidelines undoubtedly were based on prior work of our office but were not prepared at the current time by our office.

Mr. MCCLOSKEY. By whom were they prepared, Mr. Dixon?

Mr. DIXON. These guidelines would emanate from the White House, and that is the extent of my knowledge.

Mr. MCCLOSKEY. Was there any consultation with your office on the preparation of these guidelines that you have handed to us today?

Mr. DIXON. Not to my knowledge.

Mr. MCCLOSKEY. On page 32 of your testimony, you state that a sustainable conviction of a murderer could become very doubtful if the Government is compelled to publicly disclose before trial, incriminating ballistic reports, a type of scientific test. I do not follow your reasoning on that. In what way would a conviction be set aside or be unobtainable if the Government were required to publish its ballistic, scientific data in advance of the trial?

As I understand it, you are required to give it to defense counsel under the existing rules.

Mr. DIXON. Our feeling, though, was that the advance disclosure could jeopardize the conviction by giving to the public and defense counsel, on occasion more information than they now obtain. Mr. Saloschin has suggested that he has a thought on this matter, at least.

Mr. MCCLOSKEY. Let me first establish this point.

Today, under the existing rules of the Supreme Court, is not the prosecution required to make available to defense counsel any incriminating evidentiary matters that may be used at the trial?

Mr. DIXON. Yes, there is a very broad——

Mr. MCCLOSKEY. Pardon?

Mr. DIXON. There is a very broad "pretrial."

Mr. MCCLOSKEY. Then how do you justify this statement that somehow the conviction of a murderer may not be obtainable if you have to publish the ballistics information?

Mr. SALOSCHIN. May I respond to that?

Mr. DIXON. Please, sir.

Mr. SALOSCHIN. The statement says that what the concern is here is not that the Government be compelled to disclose to the defendant or his lawyer before trial incriminating ballistic reports. My colleagues who follow the law of criminal prosecution tell me it is simply pretty much accepted discovery law, pretrial discovery law, as it would apply to a criminal proceeding. That is not what we are talking about in this statement. The key word in the sentence that you read, Mr. McCloskey, is the word "publicly." If the Government is compelled to publicly disclose before trial incriminating ballistic reports, now, the thought behind that statement is the legal principle which we have all read about in the papers—and I think it stems back to a Supreme Court decision—it runs back to the Supreme Court decision in the case involving Dr. Sheppard in which a substantial amount of publicity giving the public the idea that there was serious incriminating evidence against a criminal defendant, that that would prejudice his right to a fair trial and that a conviction could not be sustained. And I take it that those lawyers who were concerned with criminal prosecutions are concerned that they be very careful not to have the Government's evidence and the Government's case tried in the newspapers, because they know that a conviction could be thrown out on appeal.

Mr. MCCLOSKEY. I understand your point. What you are saying then is that there should be an exception to the publication of scientific data if it might prejudice a defendant's case in a pending trial, and I think we would agree with you.

I want to go back to your opening statement, Mr. Dixon, in which you have indicated that you would like to work with this committee in establishing appropriate rules and an appropriate balance. I do not find anything anywhere in your statement—anything but negativism—in response to this bill.

I do not find any careful suggestions or affirmative suggestions.

I find only a negative reaction to points in the bill, but I do not find any indication that the Justice Department wants to help the Congress clarify these things that obviously distress us so deeply, particularly in view of recent disclosures concerning the Justice Department itself, its professional handling of matters, the destruction of records by the head of the FBI, and the withholding of information from the prosecuting authorities such as the *Ellsberg* case where those records were somewhere else in Justice. Have the records of the Internal Security Division, for example, been found since Mr. Mardian left the Department? Have those records been discovered?

Mr. DIXON. I have no knowledge of the present status of the records of the Internal Security Division.

Mr. MCCLOSKEY. There are such records somewhere, are there not?

Mr. DIXON. I certainly assume so.

Mr. MCCLOSKEY. This is your Department.

Mr. DIXON. The Division recently has been dismantled in one sense, but in another sense it has been transferred into the Criminal Division for the discharge of certain of its statutory responsibilities, prosecuting, in the national security field.

Mr. MCCLOSKEY. Well, I would like to say I do not mean to hold you to these matters, but you can understand the desire of this committee to work with the Justice Department if the Justice Department will work with us. But I do not find in your statement any affirmative suggestion as to how this law can be amended to remedy the tremendous number of defects that we have found in the hearings which have gone on now for over 2 years. I think you have adequately commented on the defects in the administration of the act. We find no lack of recommendations by the Justice Department for strengthening the criminal code to punish those who publish Government security information. I refer to your booklet, S. 1400, to revise your form and codify the substantive criminal law to penalize those who report classified information, and to remove the defense that it may have been improperly classified—the very purpose of these hearings. I would ask, respectfully, Mr. Chairman, that in addition to the negative statements you have made on the bills before us, that you provide us with some affirmative amendments that we might pass without compounding the problems of Government which you have very properly pointed out. We do not want to throw the baby out with the bathwater either; we do not want to double the cost of the administration of the law. But without your expert assistance we are very likely in the current environment to pass a law that might impose some burdens on you to remedy the very grave injustices that have now come to light. I would like to invite the witness, Mr. Chairman, to submit, in writing, some affirmative suggestions as to how we can cure some of these defects.

Mr. MOORHEAD. I would like to add to that request. If you do this, Mr. Dixon, just on a technical basis, would you suggest appropriate language that would, in effect, overrule the *Mink* decision?

The reason I think we should do that is that the Congress did not intend what the Supreme Court said we intended in that decision.

Mr. DIXON. Yes.

Mr. MCCLOSKEY. Excuse me. May I make one final comment on that point, Mr. Chairman?

Mr. MOORHEAD. Yes.

Mr. MCCLOSKEY. I notice, Mr. Dixon, in your response to section 3 of the bill, an attack on the doctrine of executive privilege. You point out with respect to executive privilege one example with which I think we would probably concur; namely, the documents entrusted to the executive branch of the Government by a foreign nation should not have to be turned over to the Congress without some guarantee that we will keep them confidential, as you have guaranteed—and by "you," I am referring to the executive branch. And I would cite as a reference the Keelhaul case, in which the British were apparently guaranteed that we would keep the documents confidential. And I

think this is possibly a valid position where Congress should recognize the executive privilege or where the executive right to withhold information from the Congress should, at least where it is without adequate protection. But this example, it seems to me, should not be construed as justification for the doctrine which you announced this morning; namely, that in cases of wrongdoing the President would in effect, have the power to obstruct the discovery of the truth about one of his assistants in a congressional proceeding. Our differences of opinion on that doctrine might not extend to the one example you have cited here in your testimony. Previous witnesses from the administration have indicated that in diplomatic negotiations, in intelligence gathering, and in military operations, the executive privilege might properly be claimed. But it seems to me that the example which you have cited this morning might not be sustainable; and if we could have rated from 1 to 10 those areas of executive privilege which you felt should be recognized by the Congress, we could then more competently enact legislation.

Mr. MOORHEAD. Thank you. Ms. Abzug?

Ms. ABZUG. Mr. Dixon, what is your view with respect to the request for information by a committee such as this concerning members of the executive branch of the Government which effect the failure to provide information or effect the utilization of information from the files which might involve a violation of the law?

Mr. DIXON. If I understood the question correctly, Ms. Abzug, you are rephrasing, in a sense, the question of access to information sought by Congress from the executive branch concerning alleged violations of law, either civil or criminal?

And at the outset I might point out that the doctrine of executive privilege, so-called, is, as such, almost never exercised. It has been invoked only four times in the present administration so far.

Regarding the——

Ms. ABZUG. You mean in this session, in this term of office?

Mr. DIXON. Since 1969. We can provide the committee with that list if you would like us to do so.

Ms. ABZUG. The reason I ask that question is I think it has actually been involved through the administration 19 times, the President having invoked it himself four times, and then the executive branch having invoked it at other times, and, essentially, this privilege which has been invoked still has the implication of executive privilege; so, I think we ought to just correct the record on that.

But please go further.

Mr. DIXON. Yes. We may wish to expand, if you wish, on the Library of Congress' statement of 19 times and so issue our own view as to whether they are well taken in their position.

But, on your question, most requests from Congress for information concerning alleged wrongdoing would involve what are now known as investigatory files, cases contemplated or underway but not completed. It has been the policy of the Executive to reserve investigatory files, in part, for purposes of law enforcement and, in part, for purposes of protecting innocent people whose names get into these files and, of course, that happens in far-ranging investigations. I think that is the primary concern we have regarding requests of that sort.

Ms. ABZUG. I do not know that we have gotten a complete answer.

My question is: Supposing we were trying to find out what a member of the executive branch of the Government was doing with respect to a corporation and information with respect to that corporation that would require it to be subject to criminal prosecution and that in the course of various conversations that might have taken place a member of the executive branch of the Government might say "Well, I can figure out a way for you to get out of this"—I mean, I am trying to be very graphic so that we understand each other. Do you not think we are entitled, if you had some information to that effect, to get that in connection with the exercise of our duties as to what is happening in the executive branch of the Government in the execution of the laws that we have promulgated?

Mr. DIXON. Yes. You have a deep and abiding interest and an important interest. I believe that many of those kinds of requests received are negotiated to the satisfaction of both sides. I get this information from talking with various persons in the Department of Justice, and I could be wrong on that. But my understanding is that requests are made and sometimes the response is not immediate. There is a negotiation and then a release of that information so as not to harm any person or any private individual implicated in the files, which helps Congress in the course of its legislative mission.

Ms. ABZUG. Do you think that an inquiry from the Congress to a member of the executive branch of the Government is subject to executive privilege where it concerns possible wrongdoing under the laws over whose execution we have oversight?

Mr. DIXON. Well, I think the word "alleged" wrongdoing needs to be asserted in this discussion. And the President may consider that element in his response. Our fundamental position so far has been this: that the discretion to invoke or not to invoke rests in the President, that it derives from the separation-of-powers principle, and that is a protective principle for the executive branch vis-a-vis other branches, e.g., to preserve candor inside the executive branch which is also in the public interest. As a protective principle—this is in response in part to your question and also to Mr. McCloskey's question—it could not serve as a protective principle if it is defined by Congress rather than by the executive. Ultimately, of course, as disputes arise in the very difficult area of separation of powers, we sometimes have to get to a court decision as the final arbiter between them—the Congress and the executive—as the final adjudicator of the proper range of the rights asserted by either. But the proposition we start from is that the executive privilege rests in the executive branch, thus in the President, and is responded to by him, and that is probably the fundamental reason why we are concerned about attempts at legislation to regulate it, limit it, or otherwise define it. So, my initial response to the question is that the President is the only one who can invoke the privilege. If he invokes it, he is deciding to stand on the separation-of-powers principle as he understands it, and he would feel that there is a protective interest of the executive at stake.

Ms. ABZUG. Well, let us deal with the Constitution for a minute, and the question of separation of powers. The Constitution provides that an executive officer, an official of the executive branch of the Government, is subject to scrutiny by reason of any misconduct which

would constitute treason or bribery or high crimes or misdemeanor, and if one is investigating the action of an executive officer in the course of the conduct of his duties, would you think that executive privilege would apply in that connection?

We are exercising our constitutional responsibility to look into the official conduct of an executive officer of the Government, and in the event that there might be some cause for concern, an issue of, let us say, bribery, would you believe that the executive privilege would apply there?

I am talking now about separation of powers and the carrying on of the responsibility of the House in connection with its responsibility under the Constitution.

Mr. DIXON. Well, I can conceive of a situation, just hypothesizing along with you and in line with your hypotheses, where the President might have no desire at all to do——

Ms. ABZUG. I did not hear the last part.

Mr. DIXON. I can hypothesize a situation where the President would have no desire at all to protect or shield wrongdoing, or an alleged wrongdoing, but would, consistent with the separation-of-powers concept, feel that the process of grand jury indictment and court trial and conviction was the proper initial process—to be followed by new, corrective legislation by Congress if needed, as suggested by the process of criminal inquiry in the other branch of the Government, the judicial branch.

Ms. ABZUG. Well, I am not discussing that kind of an inquiry. I am discussing an inquiry which, constitutionally, only the House can make, and that is concerning the conduct of an officer of the executive branch of the Government. It could be a judge, for example, as to whom they are exercising the possible imposition of their constitutional power under the section which says that an executive officer of the Government can be found to be violative of their responsibility by reason of either treason or bribery or high crimes or misdemeanors.

Now, that is an investigation which, under the Constitution, the House must conduct, not the judicial branch of the Government. And I am asking you again whether you think it would be appropriate, if such an inquiry were to take place, for there to be an assertion of executive privilege?

Mr. DIXON. I do understand the question. You are in the area of——

Ms. ABZUG. I am following your line of reasoning, professor, which was that you are dealing with the issue not of the Freedom of Information Act and executive privilege but, in fact, the separation of powers. You were trying to point out to us that the executive under the theory of separation of powers has certain responsibilities and prerogatives, and I am merely reminding you of another responsibility and prerogative, and that is of the Congress and, particularly, the House as consigned to it under the Constitution.

I am asking you very specifically whether you think, in the course of an inquiry that might take place by the House pursuant to its responsibility assigned to it under the Constitution to determine whether there is an issue, let us say, of bribery concerning a high officer of the Government—whether you think executive privilege in that instance would apply?

Mr. DIXON. In the impeachment proceedings, you are speaking of?

Ms. ABZUG. I am only talking about an inquiry. I mean you know you are welcome to say whatever you wish.

Mr. DIXON. If you are referring to the Constitution, the constitutional clause, which is the impeachment clause, it has in it a series of misconduct such as high crimes and misdemeanors——

Ms. ABZUG. And bribery and treason.

Mr. DIXON. That is the impeachment clause in article I which is the foundation for the discussion. The question is: In the course of such a proceeding, could executive privilege be claimed by the President, and the answer simply is that it could be claimed, and, if claimed, it might contribute adversely in a certain instance to the Executive's success or lack of success in avoiding the proceeding going through the full route of accusation by the lower House and removal by the Senate. Impeachment is an area where you have, obviously, sometimes a battle between branches. In the past, however, the Executive has furnished information to the Congress in impeachment proceedings. I believe I can give you some examples of that if you wish by a responsive letter.

Ms. ABZUG. Well, you could conceive of a situation under the theory of separation of powers where the executive privilege would not lie in the course of an investigation or an inquiry into the behavior or conduct of a member of the executive branch of the Government.

I am interested also in another issue, and that is the issue of right of privacy. And I note, with agreement, that there should be a major effort to open many aspects of government, as you say at the beginning of your testimony. But I am fascinated by your concept of the right of privacy in your further discussions on various pages of your testimony in that in the constitutional concept it is your impression or your opinion, based upon your scholarly knowledge—which I know you have—that it is the executive branch of the Government that is to protect the right of privacy of individuals.

Mr. DIXON. Insofar as the individuals give the executive information, requested by the Executive, in confidence, as is the case in antitrust matters. There is much material in the Antitrust Division files, for example, for certain law enforcement, criminal law enforcement governmental agencies.

Ms. ABZUG. And in the case where an individual is seeking, for example, information about what is in his own file, do you think that the Government should protect him from that?

Mr. DIXON. Very rarely, but a case could arise. There could be a case arise, in the area of an organized crime situation, where you are disclosing to a given member of an organized criminal conspiracy material in his own files which would be of aid to his coconspirators.

Ms. ABZUG. Do you think it is consistent with your rather broad statements of the need to have open as many aspects of Government information as possible for there to be an accumulation of information about individuals in files and protecting that individual from that information that exists in those files in all branches of Government or many different branches of the Government?

Mr. DIXON. Most of the information is disclosed. But if there is a particular problem of confidentiality, or a particular problem of tip-

ping the Government's hand in an organized crime conspiracy, there would seem to be a legitimate reason in those rather rare instances to follow a policy of nondisclosure.

Ms. ABZUG. Well, I am not confining it to your example. I mean, there are some people about whom the Government has files that have not necessarily been involved in any crimes, organized or otherwise, but it is sort of, you know, part of an operation of Government to collect a lot of information. They might need it sometime. I am talking about one where it is not evident there is any—that it is not part of a prosecution in an antitrust suit which, sometimes, is considered a good prosecution to proceed with and at other times as not a good prosecution to proceed with. I am not talking about that kind of case. But I am talking about a situation where, let us say, the FBI decides that it would like to collect information about people who have decided not to wear long hair but short hair. Do you not think that that is violation of privacy to let that agency collect files on how people wear their hair, and should not that individual be able to get that information from the Government if it is about that person?

I mean, is that not what individual right of privacy is about, to be protected against Government infringing on the right of privacy, instead of the reverse as you seek to describe it in your testimony?

Mr. DIXON. As I understood your question, I do not think we are very far apart on that question of the gathering of information of an odd type, as you suggest, just about hair length. It is very unlikely that it would be involved or intertwined in other protectable records or files. But I am not aware that there is a serious problem of nondisclosure of that information.

Ms. ABZUG. Well, but there has been much testimony before various committees that there are tremendous numbers of files on many individuals, private and otherwise, in the possession of the FBI and people who have requested these files have not had them made available to them?

Mr. DIXON. Regarding FBI files, we have taken a very protective policy vis-a-vis the files for what we feel to be a rather important interest intertwined with law enforcement and not effectively separable. The matter probably winds up in further work and, as I understand it, was the occasion for requests from the committee being considered and processed.

Ms. ABZUG. Let me just ask you one more question on that so that we can illustrate the point and then perhaps have an opportunity to discuss it further.

If the Justice Department is so concerned about privacy, did it, to your knowledge protest the recent Executive order opening up tax returns of farmers to the Agriculture Department?

Mr. DIXON. Regarding farmers, and the Agriculture Department, and their tax returns, there was no intent to invade the farmers' privacy. When it was perceived that the language, as drafted or as it might be interpreted—and I do not know whether it is a draftsman's problem or just an interpretation problem—that there was a basis for fear of invasion of privacy, the regulation was redrafted. That was done in February or thereabouts, and there was a revision of the Executive order regarding access by the Internal Revenue to data concerning farmers. All the Department of Agriculture wanted was access to group data for the purpose of building profiles on farm

income and farm income systems and policies and not access to data on individual farmers which would certainly be a matter of great concern. And the regulation or the Executive order authorizing access was reshaped to respond to the Department——

Mr. MOORHEAD. I think we are going to have a hearing on that subject, Mr. Dixon.

I have some questions I would like to submit to you in writing. Would that be agreeable to you? And if other members would do that, would you submit answers for the hearing record? We are trying to expedite the hearing, and we have another witness this morning.

Mr. DIXON. You request to submit further questions in writing?

Mr. MOORHEAD. Yes.

Mr. DIXON. Yes; and we should be able to respond to further inquiries.

[The questions and answers follow:]

DEPARTMENT OF JUSTICE,
Washington, D.C., June 8, 1973.

MR. WILLIAM G. PHILLIPS,
Staff Director, Foreign Operations and Government Information Subcommittee of the Committee on Government Operations, Rayburn House Office Building, Washington, D.C.

DEAR MR. PHILLIPS: This is in response to your letter of May 15, 1973 transmitting 19 additional questions for written answers, supplementing my May 8, 1973 testimony before your subcommittee on H.R. 5425 and H.R. 4960. Each of the 19 questions with its accompanying answer is set forth in the attachment hereto. References in the answers to "the bill" mean H.R. 5425 unless otherwise indicated, and references to our "statement" mean the full text of my written testimony of May 8th.

We regret that we were unable to furnish these answers by the date you originally had requested.

Sincerely,

ROBERT G. DIXON, Jr.,
Assistant Attorney General, Office of Legal Counsel.

NINETEEN QUESTIONS WITH ANSWERS

1. Question. On page 3 of your statement, you mention the "comprehensive seminar on the proper handling of Freedom of Information requests," held on March 1, 1973, at the Justice Department.

Please supply (1) a copy of the program agenda indicating the major topics included in the seminar and (2) a copy of the Attorney General's keynote remarks.

Answer. A copy of the program agenda, captioned "Tentative Agenda", is attached hereto as Exhibit A. (The program was conducted without change in the agenda as set forth in the "Tentative Agenda".) A copy of the Attorney General's keynote remarks, captioned "Memorandum for Assistant Attorney General Robert G. Dixon, Jr." and dated March 1, 1973, is attached hereto as Exhibit B.

2. Question. On page 5 of your statement, you say that "[D]espite the laudable general purposes of H.R. 5425, we are compelled to oppose its provisions strongly."

Please state for the record which agency of the Executive branch "compelled" the Justice Department to oppose H.R. 5425—was it the Office of Management and Budget, the White House, or who?

Answer. The matter is merely one of semantics. There was no compulsion, beyond our own belief. The sentence would express our meaning accurately if the words "are compelled to" were deleted.

3. Question. On page 5 of your statement, you categorically determine that "the proposed amendments in the bill (a) would lead to increased costs and administrative burdens for government agencies without corresponding public benefits..."

On what basis did you calculate what value could be placed on "public benefits" resulting from more open access by the American people to the affairs of our government as carried out by Executive agencies?

Did you make a corresponding determination as to the "public benefits" that would accrue from a restoration of credibility in the governmental processes of the Executive branch which has reached such a low ebb in recent weeks?

Answer. The statement was preceded by language indicating that this quoted statement was one of 4 statements or reasons intended to "summarize the overall reasons" for our opposition.

The balance of the statement indicates which provisions were regarded as presenting problems in terms of anticipated public benefits in relation to costs. Examples include the government-wide requirement for publication of indexes, section 1(a) of the bill, and the government-wide detailed annual report requirement, section 4 of the bill. Other possible examples are also noted in the statement, for example the proposed amendment of the 7th exemption which would routinely subject FBI and other investigatory law enforcement files to a record-by-record determination. This is discussed in connection with section 2(d) of the bill at pages 33–34 of our written statement.

We believe that the increased administrative burdens are obvious. An estimate of the public benefit to be derived from such proposed requirements as a published index is of course more judgmental.

4. Question. Since you indicate also on page 5 that the Justice Department is concerned about the "personal privacy" of our citizens, how do you rationalize the indiscriminate use of wire taps against news reporters, the opposition to newsmen's "shield" legislation, and the failure of the Department to oppose the issuance of Executive Orders 11697 and 11709, giving the Agriculture Department the right to inspect the income tax returns of an entire class—the millions of farmers of America?

Answer. The Justice Department is deeply concerned with protecting and preserving the personal privacy of our citizens from indiscriminate and unwarranted invasion. The use of wiretapping is not indiscriminately authorized by this Department against any class of citizens. The use of this method of surveillance is restricted to circumstances involving national security (Cf. 18 U.S.C. § 2511 (3)) and in the furtherance of specific law enforcement objectives (18 U.S.C. § 2516) as authorized by Congress. This Department is not engaged and is not authorized to engage in the indiscriminate use of wiretapping. See generally 18 U.S.C. §§ 2510–2520, delimiting the areas of permissible wiretapping, and especially § 2518, setting forth the procedure prescribed by Congress for the authorization of wiretapping.

This Department has not opposed in principle the creation of a qualified testimonial privilege shielding newsmen from being required to reveal sources of information in federal proceedings. See statement of Robert G. Dixon, Jr., Assistant Attorney General, before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, March 13, 1973. However, it is our position that the successful experience under the Attorney General's "Guidelines for Subpoenas to the News Media," issued on August 10, 1970, demonstrates that such "shielding" legislation is unnecessary. The very existence of these Guidelines indicates this Department's support of the principle of a qualified testimonial privilege.

We have opposed specific privilege proposals on technical legal grounds and have raised questions as to whether some of these proposals adequately protect other individual rights such as the right of criminal defendants to compulsory process.

The Executive Orders referred to, No. 11697, 38 F.R. 1723 (Jan. 18, 1973), and No. 11709, 38 F.R. 8131 (March 29, 1973), were promulgated under the authority conferred by 26 U.S.C. § 6103(a) which provides that certain specified tax returns shall constitute public records, but that these records "shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary. . . ." The purpose of these Executive Orders is extremely narrow, namely, to permit inspection of income tax records "to the extent readily available in the Internal Revenue Service" for specified years by the "Department of Agriculture" and only "for the purpose of obtaining data about such persons' farm operations . . . for statistical purposes only."

Treasury Decision 7255, 38 F.R. 2332 (Jan. 24, 1973) promulgates the regulations to be observed in implementing the inspection by the Department of Agriculture of these tax returns. The Executive Orders state that any inspection "shall be in accordance and upon compliance with the rules and regulations pre-

scribed by the Secretary of the Treasury. . . ." Section (b) of this Treasury Decision clearly states that the Secretary of Agriculture must apply in writing, precisely stating who will inspect the records and the reason why specific tax data is needed in relation to statistical goals of the Department of Agriculture. Subsections (b) (3), (d) (1), (2), and (3) deal expressly with the confidentiality of the data examined and its limited use for statistical purposes.

The original order was prepared by the Department of the Treasury in language designed to serve as a prototype for future tax return inspection orders. This Department approved the order as to form and legality. It was not requested to, nor did it, express any policy judgment. The subsequent modification was also approved as to form and legality. In our judgment both orders comply with the provisions of law enacted by Congress. We are not aware of any abuse of the inspection authority conferred.

5. Question. How would the amendments to the Freedom of Information Act, if enacted into law, "create new uncertainties to confuse requesters, agency officials and the courts," as you state on page 5?

Would not the Justice Department issue clarifying guidelines based on the new amendments as was done in 1967 by the Attorney General?

Why has the Justice Department not updated the 1967 guideline memorandum of the Attorney General to reflect case law that has further restricted the withholding of information by Federal agencies?

Answer. Our answer to this question parallels our answer to question 3 above, because the language noted in this question was also one of the "overall" reasons for our opposition stated in our summary. Examples of new, or newly significant, uncertainties are set forth at various points in our written statement, for example in the paragraph about Section 1(a) of the bill appearing on pages 6–7; the discussion of Section 1(b) of the bill on pages 8–9; the last sentence on page 22 about Section 1(e) of the bill; the "public interest" qualification in Section 2(d) of the bill as discussed on page 34, and the provisions of Section 2(d) that would link the investigatory file exemption to public policy statements and regulations, as discussed on page 35.

With regard to the balance of the question, whether the Justice Department would issue clarifying guidelines based on the new amendments as was done when the Act was passed in 1967, we cannot fully answer that question at this time. We would naturally seek to do our best to provide legal guidance in some form to other agencies concerning the requirements of legislation in this field. However, it should be noted that the 1967 guidelines required a major effort to prepare, occupying a large part of the one-year period between the Act's enactment and its effective date, during which exhaustive consideration and coordination with many agencies and other interested organizations was undertaken. This difficult task was made possible largely because the lawyers who undertook it were not then involved in dealing with the steady flow of actual problems under the Act in other government agencies, in our own Department, and in the ongoing work of the courts which now prevail.

As to the last part of the question, we have not updated the 1967 memorandum to reflect case law for the reason just described plus the following additional reasons: (a) The ongoing development of case law in this field would probably make a draft revision substantially out of date between the time of its preparation and the dates of publication and distribution, or shortly thereafter; (b) many of the court decisions are not clear in their ramifications, some of them are in conflict with other court decisions, and some of them represent interpretations of the law which must be taken into account but which we are not necessarily prepared to accept as sound for general application to other disputes. Thus, only one case has been decided by the Supreme Court, dealing with two of the exemptions in the Act, and questions have been raised about legislatively changing one aspect of that decision, while some who have considered the other aspect of that decision find it difficult to apply in concrete situations. In this connection it is interesting to note that the Attorney General's Memorandum on the Administrative Procedure Act, which was issued in 1947 and was widely relied on, has never been revised or updated by this Department despite a considerable and continuing accumulation of court decisions interpreting or applying that legislation; (c) as we indicated in our December 27, 1972 letter to Chairman Moorhead, we believe there are preferable methods for accomplishing the objective in question. See Attachment B to our December 27 letter at pages 7 through 9, outlining a newsletter, a seminar or symposium program, or a combination of

these devices to accomplish the end in question. We should add that our expectations last December of testing one of these methods during the early months of 1973 have been sidetracked, in part by the increased workload generated by our liberalized Justice Department freedom of information regulations and by legislative hearings this year in this general field. We nevertheless hope to undertake steps of this nature as soon as practicable.

6. Question. It is difficult to understand how the spokesman for the Justice Department, in discussing proposed 10 and 20 working day time limitations on responses to requests for records under the Freedom of Information Act, can cavalierly suggest (bottom of page 12) that "agency personnel might disregard the legislative time limits." While recent events in connection with the Watergate case and government misbehavior with respect to the Ellsberg-Russo case strongly suggest that the time-honored doctrine of "government by laws, not by men" has been abandoned, how can an official of the chief law enforcement department of the Federal government even suggest that any lawful Act of Congress would be "disregarded" by the Executive bureaucrats?

Answer. The language, from the statement which you quote in your question is explained by the language which immediately follows it. The context appears when the passage is quoted, as follows, with the explanatory language in italic: "agency personnel might disregard the legislative time limits *on the not unreasonable assumption that the requester is less interested in a negative answer within the specified period than getting the information he seeks, even if it takes a little longer.* * * *."

Viewed in this context, we think the language in question merely reflects a desirable, common sense effort to carry out the central purpose of the Act of greater disclosure, in preference to a meticulous observance of procedural requirements that might give a requester a quicker but negative response. This position was not intended to suggest that any lawful act of Congress would be willfully disregarded by executive personnel.

7. Question. On pages 19–22 of your statement you discuss your opposition to language in H.R. 5425 that would overturn the Mink decision. You state that you "see no reason why Congress should overrule the Supreme Court's recent decision in this area." Contrary to your remarks, there have been numerous arguments advanced that the approach of that decision is, indeed, unfair and circumvents the intent of Congress in enacting the original Freedom of Information Act. In fact, dicta in that decision, in effect, invited Congress to legislate in this area to clarify its intention.

How can Congress or the public have any confidence in the sworn affidavit procedure by Executive personnel that certain information is properly classified, which you advocate on page 20, in view of the overwhelming testimony before this subcommittee of the massive abuses of the classification system, the penchant overclassification, and the rejection of such affidavits by the Court in its decision in the Pentagon Papers case in June 1971?

Answer. We assume this question is directed both to the subject of *in camera* inspection in litigation under the Act and to the subject of reviewing the classification of documents. It is helpful to note that the opinion of the Supreme Court in *Environmental Protection Agency* v. *Mink*, —— U.S. ——, —— L. Ed. 2d ——, 93 S. Ct. 827 (1973) is structured into two parts: the first dealing with exemption 1 (classified documents) and the second dealing with exemption 5 (certain internal communications). The decision on its face precludes *in camera* inspection only with respect to exemption 1 issues, not with respect to issues under exemption 5 or any other exemption. H.R. 5425 would prescribe an automatic *in camera* inspection in all cases under the Act, regardless of the circumstances or the exemption involved.

So far as exemption 1 is concerned, the *Mink* decision makes it abundantly clear that the intent of Congress, derived from a review of the legislative history of the Act, was to defer to a determination of the Executive what information should "be kept secret in the interest of the national defense or foreign policy." (5 U.S.C. § 522(b)(1)). The Court said:

"We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called 'non-secret components.' Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

* * * * * * *

". . . Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficiently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them."

In the second part of the decision, dealing with the applicability of exemption 5, the Court reached a different conclusion on *in camera* inspection. The Court stated that "in some situations, *in camera* inspection will be necessary and appropriate," however, the law does not mandate that such a procedure should "be automatic."

". . . In short, *in camera* inspection of all documents is not a necessary or inevitable tool in every case. Others are available . . ."

We do not read the majority opinion as inviting the Congress to clarify its intent regarding the scope of exemptions 1 and 5 and the use of *in camera* inspection, but the Court did touch upon the powers of Congress as well as their limitations. In ruling against *in camera* inspection under exemption 1, the Court touched upon a constitutional issue when it said that "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—*subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. United States* v. *Reynolds*, 345 U.S. 1 (1953)." (Emphasis supplied.) Therefore, if Congress were to enact an automatic *in camera* review procedure, certain documents and information within the province of Executive privilege would nevertheless be excluded from this procedure by reason of the separation of powers. See discussion in answer to question 9, below.

As to what the question describes as "the massive abuses of the classification system" and "the penchant for overclassification" of information, problems in this area have existed for many years, but they should not undermine confidence in sworn affidavits, in view of the continuing efforts to deal with such problems. The subcommittee is invited to review the provisions of Executive Order 11652 of March 10, 1972 (3A C.F.R. 154) and the National Security Council's Directive of May 17, 1972 (37 Fed. Reg. 10053, 3A C.F.R. 227) concerning the classification and declassification of national security information and material. These two documents both were executive recognitions of past excesses, and both promulgate guidelines for classification and declassification of materials, indicating that it is the policy of the Executive branch not only to classify information properly but also to provide for its automatic declassification, except where a determination has been made that its continued classification is necessary. Procedures are provided whereby the public can challenge a particular classification.

The rejection of the affidavits in the cases of *New York Times Co.* v. *United States* and *United States* v. *The Washington Post Co.*, 403 U.S. 713, 29 L.Ed. 2d 822, 91 S. Ct. 2140 (1971) does not call into question whether confidence can still be placed in sworn affidavits that certain information is properly classified. The Court merely held that the Government had not carried its burden of proof in petitioning for an injunction in the face of the "heavy presumption against . . . constitutional validity" with which "any system of prior restraints of expression comes to this Court . . ." The Court affirmed the findings of the lower federal courts that the Government had not met its "heavy burden of showing justification for the imposition" of prior restraint on First Amendment right of free speech. In other words, the Court's treatment of the affidavits in these cases did not indicate a skepticism of the affidavit procedure nor a lack of confidence in the truth of the affidavits but rather a judgment as to their force in resolving the issue of irrevocable injury in those cases. The decision was that where a prior restraint on the exercise of First Amendment rights had been sought, the Government had not met its heavy burden of proof to warrant the grant of an injunction. Thus, both in the *New York Times* case and in *Mink*, *supra*, the courts used affidavits in dealing with classified documents and were able to decide for the government in one case and against it in another using this procedure.

Moreover, the Department has confidence that the threat of prosecution for perjury provided by 18 U.S.C. §§ 1621, 1622, and 1623 is an effective deterrent against any misuse of the affidavit procedure. It is the opinion of the Department that federal employees are not apt to engage in illegal activity involving the use

in litigation of false affidavits in support of a classification of documents which, under the Executive Order and the Security Council Directive, is unwarranted.

8. Question. In discussing the provisions of H.R. 5425 and H.R. 4960 that would authorize the award of attorneys' fees and costs to the FOI case plaintiff when the government did not prevail in such litigation, you make the preposterous statement (top of page 24) that "some lawyers might take turns in filing these suits for each other."

Are you suggesting possible unethical conduct on the part of the legal profession?

Are you aware of any such abuses in connection with similar provisions that have been contained in certain civil rights statutes for a number of years?

Answer. We believe that our statement with regard to attorneys' fees in these cases, as set forth on pages 22 through 25, contains several reasons why this proposal should be approached with caution. We intended to imply no conclusions as to the ethics of any lawyer's conduct. As to litigation under the civil rights statutes involving the award of attorneys' fees against the federal government, we believe that experience with these awards in such litigation has thus far been too limited, and that the character of such litigation is too different from that under the Act, to have a major bearing on the issue here.

9. Question. Where in the Constitution or any decision of the Federal Courts is there any mention, let alone the recognition, of the so-called doctrine of "Executive privilege?"

Answer. The doctrine of Executive Privilege denotes the constitutional authority of the President in his discretion to withhold certain documents or information in his possession or in the possession of the Executive branch from compulsory process of the Legislative or Judicial branches of the Government, if he believes disclosure would impair the proper exercise of his constitutional functions.

This authority of the President, described by the term "Executive privilege," stems from the separation of powers doctrine embedded in the first three Articles of the Constitution and implicit throughout the document. While not expressed in a constitutional clause, Executive privilege necessarily flows from the powers vested in the President by Article II.

The Supreme Court has recognized the right of the Executive to withhold information from compulsory process of the Judicial branch in *United States* v. *Reynolds*, 345 U.S. 1 (1953).

In *United States* v. *Curtiss-Wright Export*, 299 U.S. 304, 319–320 (1936), the Supreme Court recognized that "[s]ecrecy in respect of information gathered by [the President's confidential sources of information] may be highly necessary, and the premature disclosure of it productive of harmful results."

In *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), Justice Stewart in a concurring opinion joined by Justice White said:

"It is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense." (403 U.S. 713, 729–730 (1971).)

In *Environmental Protection Agency* v. *Mink*, — U.S. —, 93 S. Ct. 827 (1973), the Court stated that the power of Congress to require the Executive branch to furnish documents to the public under the Freedom of Information Act, 5 U.S.C. 522, was subject to "whatever limitations the executive privilege may be held to impose. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953)." (93 S. Ct. at 834).

In *Soucie* v. *David*, 448 F. 2d 1067 (D.C. Cr. 1971), the Court of Appeals considered the doctrine of Executive privilege in the context of litigation under the Freedom of Information Act. Noting that "[t]he doctrine of Executive privilege is to some degree inherent in the constitutional requirement of separation of power," the court pointed out that "the power of Congress to compel disclosure of agency records to the public is no greater than its power to compel disclosure to Congress itself." (448 F. 2d at 1071, n. 9)

In *Ethyl Corp.* v. *Environmental Protection Agency*, — F. 2d ——, Civil No. 72–2355 (4th Cir. 1973), the Circuit Court recognizes and addresses itself to the defense of "Executive privilege" in the following terms:

"Such privilege [Executive privilege] was well recognized long before the enactment of the Freedom of Information Act. The extent and scope of the privilege, which is regarded as in part constitutional in origin and in part common

law, have been explicated in the numerous decisions in which the issue has arisen. While the claim is one to be asserted initially by the 'head of the department which has control over the matter' inquired into, resolution of the right to secrecy is not left to 'the caprice of executive officers'; rather, it is for the courts to 'determine whether the circumstances are appropriate for the claim of privilege.' *United States* v. *Reynolds* (1953) 345 U.S. 1, at 8–10."

10. Question. Why has the Justice Department not been more aggressive in requiring other Federal departments and agencies to comply with the Freedom of Information Law?

Answer. We have no direct power to require other federal departments and agencies to comply with the Act, because Congress has vested the administration of the Act in "each agency" with respect to requests for its own records. 5 U.S.C. 552(a)(3). We will continue to do our best within our available resources to promote better compliance with the Act by other agencies, as was discussed in Mr. Erickson's statement to your Committee on March 10, 1972, in our letter to Chairman Moorhead of December 27, 1972, referred to above, and as summarized in my May 8, 1973 written statement at pages 2–3 and 42 through 44.

11. Question. In reference to your objections to section 2(a) of H.R. 5425, please explain how this language would affect the operations of the various investigative agencies referenced on page 26 of the testimony in view of the fact that the amendment specifically exempts disclosure which would unduly impede the functions of the agency and in view of the fact that investigative functions are generally protected under present exemption (b)(7).

Answer. The proposed language of Section 2(a) would interfere with the protection of internal instructions and guidance, as discussed on pages 26–27 of our May 8 statement, because the amendment cuts back the scope of the second exemption to personnel matters only, thereby excluding operating matters and instructions with respect thereto. The amendment would not exempt from disclosure material which if released would unduly impede the functions of an agency, except in the case of personnel materials.

We do not believe that the phrase "investigatory files" as used in the 7th exemption adequately covers internal instructions, manuals, memoranda or records of practices sought to be protected under the second exemption to maintain the efficiency of investigations, inspections, audits, negotiations, and the like. While an investigative file may incidentally reveal internal operating instructions to law enforcement personnel, and while such instructions may upon occasion be legitimately deemed parts of such files, the common-sense distinction between investigatory files and manuals for government operations of a law enforcement or adversary nature seems too real to treat them generally as parts of the same exempt category. This would mean stretching one exemption to cover what another should deal with, and may lead to confusion. Moreover, the investigatory file exemption applies only when the investigative activity is oriented against violations of law, whereas the internal instructions requiring protection under the second exemption affect not only law enforcement but also auditing and inspection functions aimed against inefficiency, to assure that maximum value is obtained for the tax dollar.

12. Question. Please give examples of confidential information supposedly releasable under section 2(b) of H.R. 5425 which would not be protected under other exemptions in the Act such as (b)(6) and (b)(7).

Answer. Several examples of confidential information which would be unprotected under Section 2(b) of the bill and which probably would not be protected under any other exemption were given on pages 28–29 of our May 8 statement. These include letters of complaint from citizens not falling under any other exemption, for example, a letter complaining about the efficiency or the policies of some government agency upon which the citizen depends for services, where no violation of law is implied but where the citizen might hesitate to complain publicly for fear of antagonizing those employees or officials whose policies or performance may be the targets of his complaint. We also cited casualty witness statements, including speculation on the possible causes of accidents, generated during fact-finding investigations undertaken purely for preventive safety ends rather than disciplinary or liability purposes. Other examples cited included statements of employees given in the course of internal audits, confidential communications from legislators of a noncommercial, nonfinancial nature, and responses to solicitations for citizen suggestions as illustrated in the statement.

In addition to those examples, we understand that scientific experimenters sometimes submit tentative scientific information to government agencies to assist the agencies, with the understanding that the data will not be disclosed or published without the experimenter's consent, because the research is still in progress and the information is not complete or fully analyzed. It appears that such experimenters have traditionally had the right of first publication of the results of their research, and would not make available important preliminary data if the agency were required to infringe the scientist's rights by releasing his results prematurely. In addition, there is a need to protect scientific and clinical safety data on food, drugs, cosmetics and medical devices submitted voluntarily to the government by foreign governments, states, and even private firms, for use by the government in making regulatory decisions designed to protect the public health, data which will be submitted only on a pledge of confidentiality.

These examples should not necessarily be regarded as exhaustive. However, they help show that the 4th exemption is a necessary safety value to prevent undue expansion of the other exemptions in unforeseeable situations where the facts present an overriding ethical or public policy imperative for withholding and no other exemption fairly applies.

13. Question. The purpose of section 2(c) is to insure that individuals will have, to the greatest extent possible, access to their own records held by the government. If this section does not meet that objective, please suggest language which would be appropriate.

Answer. § 2(c) of the proposed bill could be amended to read as follows:

(c) Section 522(b)(6) of title 5, United States Code is amended by adding after the final word "privacy" and before the semicolon the following:

": *Provided*, that nothing in this exemption shall be construed to support a denial of access to a requester seeking the release of his own personnel, medical or similar file, solely on the ground that such disclosure to him would be an unwarranted invasion of the requester's own personal privacy."

We believe that, before further consideration is given to any such amendment, the views of various agencies, such as the Civil Service Commission, should be sought. We believe a very common practice is to waive the 6th exemption and grant discretionary access to the file or most of it to the individual who is the subject of the file. We encourage such practices. There may be cases, however, where showing an employee a file indicating he has a very serious disease might have a dangerous impact upon him, and there may also be problems in identifying a requester as the subject of a file.

14. Question. In view of the fact that the statistical record which would be required to be kept under section 4 of H.R. 5425 may be excessive for Congress's needs and a burden on the Executive departments, please comment on the advisability of requiring a record of only those requests which were not acted upon within ten days of receipt, thus obviating the need for voluminous record keeping of all routine requests.

Answer. It is difficult to respond to this question in a comprehensive manner without a survey of the agencies and their major components. However, to make a record of those requests which were not acted upon in ten days would not obviate the need for voluminous record keeping, although it should reduce the need in some agencies. For example, as pointed out on page 14 of our May 8 statement, the Immigration and Naturalization Service receives about 90,000 requests a year, which are generally processed within a 30-day rather than a 10-day period. If they were required to collect data for an annual report on those requests which were acted upon on or after the eleventh day, the impact would still be very substantial. This suggestion does merit further study.

15. Question. You state that "no money has ever been appropriated to any agency to administer the extra work which the (Freedom of Information) Act involves." However, agency budgets have been going up for years. Is it really the view of the Department of Justice that freedom of information is an extracurricular activity?

Answer. We are not clear on what the question means in referring to freedom of information as an "extracurricular" activity. Our record in this Department demonstrates that we take our responsibilities under the Act quite conscientiously. The quoted reference to the extra work which the Act has imposed upon this Department and on other agencies is quite true. We added that with your understanding and support, however, we confidently expect improved administration of the Act.

96-576—73——12

16. Question. You state that the 10- and 20-day limit provisions "probably would encourage hasty initial decisions to deny." Actually, couldn't they also have just the reverse result of speeding decisions to provide information?

Answer. We agree that it is possible that a rigid time limit provision would also result in hasty decisions to provide, as well as to deny, information. In general, however, a rigid requirement for a quick answer where time does not permit the examination of the records in question, any needed consultation with concerned agencies and knowledgeable personnel, or a resolution of legal and policy doubts, will in our judgment tend to result in denials. Denial will be seen as the safe and cautious thing to do, on the theory that if a mistake is made in denying it can easily be rectified on appeal to a higher administrative authority or to the judicial branch, whereas a mistake in granting access would be irremediable.

17. Question. You state that section 1(d) concerning classified documents raises serious Constitutional questions because the Executive branch determines what constitutes "State secrets." Is it not true that Congress has the Constitutional power to replace Executive Order 11652 on classification and declassification with a statute any time it chooses?

Answer. Any legislation of this nature would be subject to the constitutional powers and duties of the President under Article II of the Constitution to determine what information affecting the national defense and foreign relations of the United States should be accorded particular degrees and kinds of protection.

18. Question. On the awarding of attorneys' fees, wouldn't this help to discourage the Government from litigating weak or marginal cases where information has been refused?

Answer. We agree that the awarding of attorney's fees might in theory be of limited help in discouraging some agencies from litigating weak or marginal cases where information has been refused, but we do not believe it would have a significant effect. The usual reasons for litigating weak or marginal cases are that the agency thinks its policy or legal position is stronger than may appear to others, that the agency believes it will be criticized by a portion of the public or within Congress if it voluntarily releases the information, that the agency considers itself morally obligated to protect third persons or its own employees, or that the agency seeks the guidance of a court decision as to its obligations and options in circumstances of the type involved in the case. To the extent that an agency might decide to release information to avoid the risk of an award of attorney's fees, there is no assurance that such a disclosure would not be at the expense of some legitimate private interest such as individual privacy.

19. Question. You say that most Federal employees take their jobs seriously and tend to identify with their assignments, their agency and their files. Isn't their responsibility first to the public? Are they not public agencies and public files? To whom do they owe a greater loyalty—the President or the people of the United States?

Answer. We take it that the thrust of the question is to emphasize the broad public responsibility of all agencies and their employees. That is an important point to emphasize. Our comment merely recognizes the existence of a natural psychological trait in all organizations—indeed the better the organization as an organization the stronger may be the trait. We think the Freedom of Information Act has had a salutary effect, which we hope will increase, in tempering this normal tendency of an organization such as a government agency to become too insular in its outlook because of its day-to-day and year-to-year preoccupation with its regular functions.

EXHIBIT A

U.S. Department of Justice—Office of Legal Counsel

TENTATIVE AGENDA

Seminar for Department of Justice officials who will be responsible for implementing the Department's revised Freedom of Information (FOI) Act Regulations[1] Thursday, March 1, 1973 at 2:00 P.M. in Room 4510, Star Bldg.

1. Introduction Asst. Atty. Genl. OLC Robert G. DIXON, Jr. (2:00-2:10)

2. Background of Act and Regulations (How the Act came about; functions of D/J; the Administrative Conference; the Moorhead Report; the media, the private and public interest bar, etc.; attitude of the courts)

[1] 28 CFR Part 16 A, as revised effective March 1, 1963, 38 Fed. Reg. 4391 of Feb. 14, 1973.

A. Remarks by Leon ULMAN, Deputy Asst. Atty. Gen'l OLC and chairman *ex officio* FOI Committee, and by Walter FLEISCHER, Asst. Chief, civil appellate section and member, FOI Committee. (2:10–2:25).

B. Questions & discussion on same. (2:25–2:40).

3. New Procedures (Features of the new regulations; informal procedures)

A. Remarks by Fredericka PAFF, OLC, member FOI Committee; by Jack HUSHEN, Director of Public Information; and by Malcolm HAWK, Office of the Deputy Attorney General (2:40–2:55).

B. Questions & discussion on same. (2:55–3:30).

4. Standards for Granting or Denying Access (Statutory exemptions; technical & practical appraisal; discretionary access).

A. Remarks by Robert SALOSCHIN, OLC, chairman FOI Committee. (3:30–3:45).

B. Questions & discussion on same. (3:45–4:15).

5. General Summary

A. Questions, comments, or suggestions on any aspect of the subject. (4:15–4:30).

B. Concluding remarks. (4:30–4:35).

EXHIBIT B

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 1, 1973.

MEMORANDUM FOR ASSISTANT ATTORNEY GENERAL ROBERT G. DIXON, JR.

Re: Seminar on afternoon of March 1st on Improved Processing of Freedom of Information Requests under the revised Justice Department regulations.

Please extend my greetings to the participants in your Seminar.

In a government like ours, whose powers under the Constitution flow from "the People" who established it, there should be no quarrel with the basic philosophy of the Freedom of Information Act. That philosophy is sometimes described as "the public's right to know." But this right is not absolute, and several years experience has shown that it is not always easy to administer the Act well, especially when there is a clash of legitimate interests.

We in the Justice Department are expected to provide leadership in administering this Act. We advise other agencies, and we should set a good example by the way we handle requests for access to our own records.

Our revised regulations should help to achieve faster and better processing of requests under the Act. I earnestly hope that everyone in this Department involved in processing these requests will try to do so in full accordance with the Act and regulations—that is, promptly, fairly, and with careful regard for the interests of all concerned.

RICHARD G. KLEINDIENST,
Attorney General.

Mr. MOORHEAD. When you correct your transcript.

Mr. Gude?

Mr. GUDE. Yes; thank you, Mr. Chairman. I just have two questions.

On page 43 of H.R. 6046 introduced by Mr. Hutchinson and others—that is page 43. Do you have a copy of that?

Mr. DIXON. Yes; I was looking at my statement. It is not in my statement?

Mr. GUDE. No; do you have a copy of the proposed bill?

It is the administration's bill on recodifying the Code in this area.

Mr. DIXON. The Criminal Code?

Mr. GUDE. Yes.

Mr. DIXON. Yes; I do not have a copy with me, but I do have a copy in the office.

Mr. GUDE. Well, on page 43, subsection (d), it states that "the defense is precluded, and it is not a defense to prosecution under this section that classified information was improperly classified at the time

of its classification or at the time of the offense." Is there any doubt in your mind about the question of the constitutionality of such a provision?

Mr. DIXON. Well, Congressman Gude, I am not prepared to testify this morning on those sections of the Criminal Code dealing with national security offenses. There are four sections. They are the subject of testimony by the Criminal Division before Senator McClellan's committee. I am not prepared to go into these four sections in detail this morning. If you wish, I could attempt to respond to your inquiry in writing when I return my corrected transcript of my testimony.

Mr. GUDE. I think that would be very helpful if that were possible.

The memorandum on May 3 from the White House stated that the President desires that the invoking of executive privilege be held to a minimum; specifically, as to past and present members of the President's staff questioned by the FBI, the Ervin committee, or the grand jury, the privilege should be invoked only in connection with conversations with the President, conversations among themselves involving communications with the President and as to Presidential papers.

Now, this would seem to be a constriction of the statement of executive privilege which Mr. Kleindienst previously had stated in reference to the subject matter.

Does this statement by the President mean that executive privilege is being redefined in this instance, or is this just for the purposes of testimony before the Ervin committee? Does the statement of Mr. Kleindienst still provide the larger umbrella covering executive privilege in general?

Mr. DIXON. Well, Mr. Gude, I think the two can be juxtaposed and explained and made consistent in this way: There is a distinction between the authority of the President under the separation of powers doctrine to control executive privilege, and, on the other hand, his decision whether or not to waive it or invoke it in a particular instance.

Now, regarding the first aspect of my response, regarding control, we will oppose legislation attempting to define legislatively the scope of the executive privilege. On the other hand, just created by this document of May 3, 1973, the President really goes all the way with executive privilege in terms of not making it a complete obstacle to access to information. And this document describes the manner in which he is waiving what might be a constitutional ultimate, unless in his view, overridden perhaps in a court decision, and applying it to a particular instance. I believe the three points there are consistent with the historic disinclination of Presidents to get to the issue of executive privilege or if they get to it, to make it a major obstacle to inquiries of this sort. This would become——

Mr. GUDE. Then, you mean that the broader definition which Mr. Kleindienst set forth still prevails?

Mr. DIXON. I believe he was talking about the ultimate power and not the question of how it would be or should be exercised in a particular instance. If the information is privileged information—and the approach has been to only invoke privilege regarding conversations with the President or which may closely involve the President—and if the decision is made not to invoke it, that decision itself constitutes

an exercise of the power, an exercise of the power in the direction of being cooperative in the common interest of law enforcement in a given situation. Maybe I am not responding to the question.

The President has specified his view of the manner in which to utilize executive privilege in this present situation.

Mr. GUDE. I yield.

Mr. MCCLOSKEY. Would the gentleman yield?

Mr. Dixon, I am distressed about that answer in connection with earlier testimony before us. I had always understood that the Office of Legal Counsel prepared the President's position on legal matters. Is that not correct? Is that not essentially your function?

Mr. DIXON. That, very frequently, is the case. We respond to many requests.

Mr. MCCLOSKEY. Yet you are here today testifying before us regarding rules of executive privilege which are drawn by someone else, apparently in the White House and not in consultation with your office at all. Is it your professional and personal opinion that the rules of executive privilege which have been handed us today are constitutional?

Do you have a personal opinion, Mr. Dixon, regarding these rules which were prepared outside of your office?

Mr. DIXON. Well, I think, in this matter, really my personal opin- is not very important.

Mr. MCCLOSKY. Well, it is important, because we are relying on your testimony as one of the august professional bodies, supposedly free of political influence. We have a record that most of the attorneys in the White House have either resigned or have been fired, and some unknown person has prepared guidelines on executive privilege—the most important aspect of these inquiries—and you are presenting the sole testimony of the administration before us on this crucial point. Again, I ask you: Is your personal opinion in accord with these guidelines that have been handed to us, or are you merely defending something that the administration has done?

Mr. DIXON. Well, as I said earlier, I received these officially early last night, and my attention was directed to the FOI Act and not to this matter in preparation for the hearing. So, I would need, in order to give an opinion, personally or officially, either way, more time to reflect on these documents and their relation to prior precedents and understandings.

Mr. MCCLOSKEY. Well, if you only received this document last night, I think we owe you the courtesy of not asking for your professional opinion as to its constitutionality.

Mr. DIXON. I am not prepared at this time, in any event, to say.

Mr. MCCLOSKEY. But I could almost surmise that the morale in any Justice department, with its pride of professionalism, must be at an all-time low when you are handed documents that properly should have been prepared by your office to sustain testimony of this kind.

Mr. DIXON. Well, we do not have exclusive jurisdiction concerning matters in the White House. There are White House officials from whom we receive cooperation, and we are pleased to cooperate and advise whenever possible.

Mr. MOORHEAD. I think, Mr. Dixon. that we will excuse you at this point. But we will try to phrase a written question to you to try to clarify the administration's position on executive privilege.

We have statements from the former Attorney General Rehnquist, we have a statement from Ms. Lawton, and we have former Attorney General Kleindienst's statement. We have also had some discussions with you, and on these new guidelines. dated May 3 and 4—which we will make a part of the record—we will try to phrase a question which will give you an opportunity to clarify the administration's present position on this subject.

Mr. DIXON. Thank you. Mr. Chairman, I am not trying to be at all evasive or at all unclear. When new materials come into the picture we have to take time to evaluate them and reach a considered judgment, and we shall, ultimately, respond to your inquiry as best we can.

Mr. MOORHEAD. Well, we thank you very much, Mr. Dixon, and we may be calling on your professional assistance as we go ahead with this legislation.

Mr. DIXON. Thank you, Mr. Chairman. I shall try to cooperate on the legislation also.

Mr. MOORHEAD. Our next witness will be Professor Thomas M. Franck, director, Center for International Studies at New York University.

Professor Franck is a distinguished student of government secrecy, classification, and foreign affairs. We are indeed fortunate in having him with us here today. Would you come forward, Professor Franck?

I know that you have another appearance before another congressional committee on the other side of the Capitol scheduled for this afternoon. How much time can you give us?

Mr. FRANCK. Yes. I will be brief. I am not under any particular pressure.

Mr. MOORHEAD. Well, then, you may proceed, Professor.

STATEMENT OF THOMAS M. FRANCK, DIRECTOR, CENTER FOR INTERNATIONAL STUDIES, NEW YORK UNIVERSITY, AND PROFESSOR OF LAW

Mr. FRANCK. Mr. Chairman, with your permission: You have copies of my testimony; so, I will just very briefly summarize what I have said in there.

Mr. MOORHEAD. Yes. I have read it and consider it an excellent statement.

Certainly, if you do not read a few lines that I particularly want to hear, I will ask you to read them.

Mr. FRANCK. Thank you.

It is a great privilege to be invited to testify before this commirtee. Those of us who are in the business of teaching and disseminating information at the universities consider this to be perhaps the most important of the committees affecting the long-range future of our professions.

To put these remarks in context, because they are going to be rather critical of the status quo, perhaps I should report that there was a debate last month in the Canadian House of Commons on information

policies of the Canadian Government. That government had tabled a statement on the release of official information to the House of Commons and the public. A number of Members said that the existing situation had been so bad—and they did not think the new rules would make it much better—that the best place for a Member of Parliament in Canada to get information was from the reports of investigatory committees and subcommittees of the U.S. Congress.

So, while you may think you have it bad——

Mr. MOORHEAD. They are in deep trouble.

Mr. FRANCK. There are other places that have even more trouble than you.

The search for better information flow between executive and legislative branches is a worldwide problem among democracies. In Britain, the Franks Commission has just reported in. The Franks report is extremely conservative in proposing reforms for Britain. The British law has been so bad that it has almost been good, because it has had a kind of chilling effect on prosecutions; there have been very few prosecutions because the law has been so bad. But bad as the British law is reported to be, according to Franks, it is less restrictive than S. 1400. If S. 1400 is passed by this Congress the law, here, will be even more restrictive than the British law.

I am going to confine my comments today to the question of flow, information flow, in the field of national defense and foreign policy. The *Mink* case has focused our attention on this issue, and it poses at least three complex issues.

The first of those is whether the executive, as one of the parties to a specific information dispute, ought also to be the judge of that dispute.

The second is whether Members of Congress, in requesting information, ought to be treated differently than the general public; whether Congress should have different and speedier procedures applied to their requests. That seems to be a somewhat less important, but still a major, problem.

And third is the question of my principal concern here: that of standards for disclosability. It has been popularly assumed—and this assumption is implicit in much congressional legislation and conduct, or at least has been in the past—that national defense and foreign policy are matters which, by their very nature are, somehow, sacrosanct and ought to be handled by the Executive and in secret. It is this proposition which I think ought now to be very seriously reexamined as a part of the work of this committee.

John Jay addressed himself squarely to the question of secrecy and conceded that the executive branch might sometimes—particularly in the negotiation of treaties—need perfect secrecy to achieve what he called "immediate dispatch." And I think everyone here would grant that. And there might also have been occasions, he thought, where the most useful intelligence could only be obtained if the person possessing it were sure he could confide without being revealed in public. Reports from other governments from informants or informers might dry up if their confidences were not respected. But Jay certainly did not think that foreign policy and national defense were discrete subjects requiring secrecy per se. On the contrary, he selected very narrow secrecy categories: first, where disclosure would compromise a secret inform-

ant or source, and, second, preparations for diplomatic or trade negotiations, including secret instructions to the negotiators. Beyond that, Jay believed that, in a democracy, the right to know should take priority and that foreign policy was no exception.

Perhaps the time has come for the information gathering agencies operating in the foreign and defense fields to be detached from the executive branch and made responsible equally to Congress and the President. There seems to me to be a particularly persuasive argument in favor of doing this, aside from the obvious ones emanating from democratic theory. One of the things that has come out of the revelations of the Pentagon Papers is the relatively small amount of attention paid by the political decisionmakers in the executive branch to the information engendered by the intelligence community. This complaint has been expressed by persons high in the intelligence community.

Thomas Hughes, former Assistant Secretary of State, Director of INR has said that the work of the intelligence community would receive much better attention from members of the executive branch if they knew that Members of Congress, or at the very least select Members of Congress, were receiving and reading the same intelligence reports. Part of the problem in the past had been the tendency for political decisionmakers to prefer opinion to information. Perhaps the pressure on the decisionmaker to square his own opinion with received information, with data, would be greater if the flow of information were increased beyond the "eyes-only" contingent of the executive branch.

The results of the *Mink* case have made early action by Congress particularly important. Under *Mink*, the courts are not even free to determine whether a classified document actually does pertain to national defense or foreign policy once they receive an affidavit from the executive branch. According to the court, "the test was to be simply whether the President has determined by Executive order"—which has to come to mean, simply, classification by any authorized official under general Executive order, "that particular documents are to be kept secret." The majority of the Supreme Court held "wholly untenable any claim that the act intended to subject the soundings of executive security classifications to judicial review at the insistence of any objecting citizen."

Now, the right of the courts to review matters of this sort, if necessary in closed session, would be restored by the provisions of the Horton bill and the Moorhead bill. These bills would mandate the courts to make an impartial determination of where national defense or foreign policy ends and consumer rights, environmental protection, and trade and commerce begin.

The bill, in my opinion, provides the right answer to the first question: Who shall determine a dispute when one arises? The answer is that the decision should be made, and truly and independently made, by that organ of government designated by the Constitution to be the umpire of the system. The courts, in other areas touching on foreign relations, have proven themselves able to make such determinations. They have made their own findings, independent of the executive branch, in matters having to do with recognition of foreign gov-

ernments. They have held, for example, that the government of East Germany exists and effect should be given to its laws in the domestic courts of the United States. The *Upright* v. *Mercury Business Machine* case is one example. Again, more recently, Congress has mandated the courts to make their own independent determinations in questions of foreign expropriation where the acts of State doctrine has been invoked. The courts do seem to be able to make decisions in matters that have a foreign relations content, even though these are inevitably questions of some political interest.

The second question is whether, in addition to this process of judicial review, which would be available to the general public, Congress needs an administrative remedy for obtaining information that would be speedier, less formal and less rigidly adversary than the judicial remedy. I think there are strong policy reasons that might militate in favor of the Horton proposal for a joint legislative-executive commission to resolve disputes between the two branches and to provide the Congress, or the Members of Congress, into such information, sensitive or not, as may be necessary to the discharge of its consitutionally-assigned legislative and investigative functions.

This brings me to the third problem. The time has surely come not only for reform of the procedure by which to review executive denials of information to Congress and the public but also for a change in the applicable standards and ground rules that pertain to secrecy and disclosure. It will be helpful to have the courts or a commission—rather than the executive classifiers themselves—determine whether the Cannikin Papers, requested by Congresswoman Mink, were or were not properly designated to be within the privileged category of national defense and foreign policy. But let us not assume that courts will not be heavily influenced by the Government's deposition in making that determination. Should Congress not reconsider the category itself? Similarly, other, older, provisions of the Administrative Procedure Act, 5 U.S.C. 551, et seq., 1970, contain procedural safeguards against arbitrary executive rulemaking. But these safeguards do not apply to the extent that there is involved a military or foreign affairs function of the United States. Should not this standard for denying open procedures also be reconsidered?

Foreign affairs is now a much more important part of the business of the United States than it has ever been in the history of the country. It is also more of a Presidential monopoly than it has ever been in the history of the country.

Not only is there more of a monopoly vis-a-vis the other branches of Government but more of a monopoly vis-a-vis other parts of the Executive, that is, the Cabinet, and particularly, the State Department. This makes it incumbent to have a monitoring of Presidential decisions, outside review of the executive branch, based on sufficient information to make that review effective. Such a review must come, first, from the branch that shares the foreign policy power under the Constitution, that is, the Congress, and, second, from the press and the public. Even when the foreign relations power of the United States was less important a share of total Government power, it was never meant to be exercised solely by the President. Today, the issue is far more important.

Foreign relations may at one time have concerned only a handful of professional diplomats and soldiers. Today it is not a category which is discrete from domestic matters. The importation of chrome from Rhodesia is ostensibly based on determinations of domestic need but, as a breach of international law, has an important foreign relations aspect. The sale of wheat to the Soviet Union is ostensibly based on foreign relations components. And it is based primarily on foreign relations or international trade considerations, but it has certainly had a tremendous impact on the cost of living in this country. In the same way, foreign relations initiatives, obviously, have an important effect on funds available for domestic poverty programs, for health programs, for educational programs, and so on. The two subjects are very closely interrelated in the sense that everything foreign has domestic impact, and, conversely, that most things that are domestic have foreign impact. The Watergate matter, from one aspect, is purely of domestic concern.

But, from another aspect, it appears also to affect the capacity of the President to engage in foreign policy initiatives. Even the CIA seems to have found it difficult to observe the line between the foreign and the domestic. In many ways, whether a matter is foreign or domestic is a matter of the perspective of the viewer. Perhaps Congress should provide a better standard for the courts or the commission to apply in determining disputes over access to information than whether the matter pertains to "foreign policy."

A bill drafted by Senator Muskie in 1971 would have permitted secrecy only for "information, the declassification of which would clearly and directly threaten the national defense of the United States."

That seems to me to be a better standard.

Another standard might be: "information concerning ongoing defense preparations or military operations." This standard could conceivably be augmented by also permitting nondisclosure in the specific cases of "current negotiating instructions of U.S. Representatives on matters pertaining to currently ongoing negotiations." A revised statute might also authorize the deletion from documents, prior to disclosure, of "names and other identifying data if such disclosure would tend to interfere with the discharge of the functions of those named or the functions of the U.S. Government, or would tend to impede relations with a foreign government."

A revised standard for nondisclosure should also insure that whoever decides whether a particular piece of information must be disclosed do so by assessing not only whether a disclosure would harm the national defense but also whether nondisclosure would seriously hinder the democratic or legislative process. The court or commission should be mandated to weigh the one desideratum against the other. Such balancing of equities is not at all alien to the third-party process.

Finally, a brief note of caution, and that is it seems to me it would be a very high price to pay for the excellent legislative proposals which are before this committee if, in return for an improvement in the information flow, all information obtained outside the newly mandated procedures were to be subject to criminal penalties. There are initiatives underway to that effect. I think it is important to remember that

in the past self-help, information obtained privately, outside official channels, has been the most frequent and fastest source of information in the area of foreign relations, for the Congress, the media, and for the public.

Even with new and better legislation, self-help, whistle-blowing, is likely to continue to be the principal source. Not all such information flow is socially desirable, but much of it is essential to balance the tendency towards foreign policy by Presidential fiat. The test for when such information flow should be subject to penalties seems to me to be adequately set out in the narrower provisions of the Espionage Act. This makes punishable the taking, or the passing or the communicating, of information with the intent to harm the United States or to benefit a foreign power under circumstances when harm occurs. Anything more than that, if it were to be legislated as a kind of a parallel to improvements in legalized information flow, would, I think, be a bad bargain for this House and for the American public.

Mr. MOORHEAD. Thank you, Professor Franck. And as to that last cautionary note, I think all of the members of this subcommittee would say "amen."

I would also suggest to any of the members of the subcommittee who have not read pages 8 and 9 of your testimony that they do so. I think it is a good analysis of the "pull and call" between the executive branch and the legislative branch. He mentions Executive secrecy on the basis of "functional utility," while the press and the legislative branch argue for "supremacy of the democratic process." I think that should be read in conjunction with your suggestion that whoever makes the final decision, the Commission or court, should have in mind the balance of the two objectives in a democracy.

On page 15 you say, "should Congress not reconsider the category itself," and then on the next page you refer to a bill by Senator Muskie and then you make some additional suggestions. Is it your concept that this is an amendment to the Freedom of Information Act expanding the people's right to know, or is this a change in the Congress' access to information?

Mr. FRANCK. I think the Congress' right to know ought to be pretty clearly absolute. That is, Congress itself might want to establish its own system for regulating the flow of secret information inside the halls and offices of Congress and Members of Congress. Congress itself may want to have internal processes, its own rules, governing who may see what. But the information gathering community ought to report equally to Congress as to the Executive, although not necessarily every item to every Congressman. It ought to be constituted something close to an independent agency responsible both to the Executive and to the Congress. First of all, I think that will improve the use made of its products. It will improve the Executive's attention span vis-a-vis the informants. Second, it will allow an adversary evaluation, by two branches of government, of the significance of the information. Third, it will dispel that myth that the Pentagon Papers has already to a considerable extent dispelled the myth that if you know a lot more information you make sounder judgments. If nothing else, it will help to put that into perspective.

Now, within Congress, I think that there may be quite legitimately some limitations as to which Members of Congress have access to how much information. That seems to be something that could be determined by the rules of Congress rather than by any legislation. But with the possible exception of those times I think the Congress ought to have access to exactly the same kind of, and the same quantity of, information as the executive branch. It may not always request that information. It may be peculiar even for it to request certain kinds of information and that there may be a considerable sanction for or against asking for certain kinds of information, but, as a matter of law, I think the information-gathering agencies ought be equally responsible to Congress and the same information should be made available to Congress as to the executive branch. And any limitations on that ought to be by way of congressional rules.

Mr. MOORHEAD. Thank you, Professor.

[Mr. Franck's prepared statement follows:]

PREPARED STATEMENT OF THOMAS M. FRANCK, DIRECTOR, CENTER FOR INTERNATIONAL STUDIES, NEW YORK UNIVERSITY, AND PROFESSOR OF LAW

I am grateful for the opportunity and consider it an honor to testify before this committee, which is already regarded as historic by many of my colleagues at the universities for its innovative and persistent efforts to protect and enlarge our rights to know and to verify the facts we teach.

I am going to address myself today primarily to the provisions of H.R. 5425 and H.R. 4960 as these pertain to the *Mink* case [*Environmental Protection Agency* v. *Mink*, 93 S. Ct. 827 (1973)]. That is to say, I will confine my comments to the question of information flow in the field of national defense and foreign policy. The *Mink* case focuses on this issue. It poses at least three particularly complex problems. The first is whether the Executive, as one of the parties to a specific dispute about non-disclosure, should be able to make the final determination as to its outcome; and, if not, then who is better qualified to decide? The second is whether Members of Congress—all or some of them—should have greater and speedier access to information than the public as a whole. The third problem is that of standards. If we agree that some information in the general area of defense and foreign policy should not be subject to immediate disclosure, then by what yardstick is disclosability to be measured?

There are, as regards this difficult matter of standards, at least three variables. One, obviously, pertains to the nature of the material to be disclosed; the second to the varying needs of the persons seeking disclosure: Congressmen, press, scholars, general public, etc.; and the third variable has to do with timeliness—how soon after the informaton came into being its disclosure is being sought.

Any thoroughgoing solution to the information flow problem in the foreign affairs and defense fields must address itself to each of these three problems and in terms of all three variables. There are undoubtedly others I have unwittingly omitted.

It has for long been popularly assumed, and this assumption is implicit in much Congressional legislation and conduct, that national defense and foreign policy are matters which, by their very nature, must be dealt with primarily by the Executive and in secret. Secrecy is necessary not only to avoid tipping one's hand to the enemy, but to permit flexibility, maneuver, and, above all, speedy response. An open foreign policy's greatest cost is not that the enemy will know it, but that Congress and everyone else will want to participate in making it.

Nearly three hundred years ago, John Locke observed a degree of contradiction between democratic control of government and the exigencies of foreign relations. He concluded that the control exercised by the legislature and by law over the nation's relations with other states, which he misnamed the "federative function," would perforce be less than over other, domestic, aspects of governance. External relations, he stated, are "much less capable to be directed by antecedent, standing positive laws" than domestic affairs but must, instead, "necessarily be left to the prudence and wisdom of those whose hands it is in

to be managed . . . by the best of their skill for the advantage of the commonwealth." John Locke, *Treatise of Civil Government*, (New York: Appleton Century Co., 1937), pp. 98–99. Moreover, to place this foreign relations discretion in any hands but those of the executive would invite conflict and contradiction "which would be apt some time or other to cause disorder and ruin." *Ibid.*, p. 99.

Dr. Lemuel Hopkins, leader of the Hartford Wits, in his sardonic poem attacking populism and the confederal constitution, said much the same thing:

> "But know, ye favor'd race, one potent head
> Must rule your States, and strike your foes with dread,
> The finance regulate, the trade control,
> Live through the empire, and accord the whole."

Lemuel Hopkins, *The Anarchiad*, published in The New Haven Gazette between Oct. 26, 1786 and September 13, 1787, reprinted in part, including the quoted excerpt, in Vernon L. Parrington, *The Colonial Mind, 1620–1800*, Vol. 1 (New York: Harcourt Brace and Co., 1927), pp. 371–373 at 372.

Some weight has even been given, indirectly, to this view of the institutional necessities for the efficient conduct of foreign relations by the Supereme Court of the United States. In the oft-cited *U.S.* v. *Curtiss-Wright Corp.*, the Court sustained a broad delegation by Congress to the President of discretionary power to prohibit sale of arms and ammunition to parties in the Chaco war. Justice Sutherland, for the Court, spoke of the "exclusive power of the President as the sole organ of the federal government in the field of international relations" and noted that legislation which had to be implemented on the basis of "negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." 299 U.S. 304, 319–22 (1936). What is notable about *Curtiss-Wright* from the constitutional point of view, however, is that it, and the very few similar cases, Cf. *United States* v. *Chemical Foundation*, 272 U.S. 1 (1926), never question the right of Congress to legislate in the foreign relations field but only test whether, in legislating, Congress can delegate its own broad discretionary powers to the Executive. To this question, the court has given a qualified affirmative response. But what Congress has given must be Congress' to withhold, to retrieve, to exercise without any delegation to Presidential discretion.

Whatever Justice Sutherland's dicta may have presumed, the Constitution of the United States is not John Locke's word made law, and quite specifically not in the matter of exclusive executive authority over foreign affairs. The foreign policy and defense powers are divided by the Constitution between Congress and the President, with a very large share reserved explicitly for the former. Alexander Hamilton in *Federalist No. 69* explicitly set out to quiet the fears of Americans that the Constitution did, in fact, propose to give the Executive a foreign policy and defense monopoly. "The President," he wrote, "will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union." *The Federalist Papers*, Willmoore Kendall and George W. Carey (eds.) (New Rochelle: New York, undated), pp. 415–420. The President's power as supreme commander "would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy" but it would explicitly not include the power of "*declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature." *Ibid.* The President is also "to be authorized to receive ambassadors and other public ministers. This, though it has been a rich theme of declamation, is more a matter of dignity than of authority." *Ibid.* Hamilton also emphasized the balancing power of the Senate to concur in the appointment of ambassadors, as did John Jay. *Federalist Paper No. 64*, ibid., pp. 390–396. Jay added that the Senatorial role would ensure that "the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued." *Ibid.*, p. 392.

A policy cannot be cautiously formed and steadily pursued by Congress if it does not know what pre-existing policies are already in force, why they were implemented, where, how and why they have succeeded or failed.

Jay, addressing himself squarely to the question of secrecy, conceded that the executive branch might sometimes, in the negotiation of treaties, need "perfect secrecy" to achieve "immediate dispatch." *Ibid.* There would also be occasions

"where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery." There might be secret informants who would "rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly." *Ibid.* pp. 392-393. However, Jay prophesied that "Those matters which in negotiations usually require the most secrecy and the most dispatch" would be "those preparatory and auxiliary measures which are not otherwise important in a national view." He added that the Senate's "talents, information, integrity and deliberate investigations" would always balance the executive prerogatives of "secrecy and dispatch." *Ibid.*, p. 393. It is worth noting that Jay did not think that foreign policy and national defense were discrete subjects requiring secrecy *per se.* On the contrary, he selected very narrow secrecy categories: first, where disclosure would reveal a secret informant or source—"blow a cover" as Jay would certainly not have put it—and, second, the case of preparation for diplomatic or trade negotiations, including secret instructions to the negotiators. Beyond that, Jay believed that the right to know had to take priority in a democracy and that foreign policy was no exception.

It is not only in the United States, but in every democracy, that the people have constantly sought reassurance that their executive's need for "secrecy and dispatch" in foreign affairs would be balanced and checked by a vigorous, informed legislature and public. In the words of the recent report of the Franks Commission in Britain, "from the earliest times governments of all types have been anxious to preserve secrecy for matters affecting the safety or tactical advantage of the State. It is, however, the concern of democratic governments to see that information is widely diffused, for this enables citizens to play a part in controlling their common affairs. There is an inevitable tension between the democratic requirement of openness, and the continuing need to keep some matters secret." Great Britain, Home Office, *Departmental Committee on Section 2 of the Official Secrets Act 1911*, Vol. I, Cmnd. 5104 (London, H.M.S.O. 1972), p. 9; commonly referred to as the *Franks Report.*

This checking and balancing has two functions: 1) to ensure that executive discretion stays within the boundaries of the foreign affairs prerogative and does not replace legislation as the way to regulate the internal affairs of the nation; and 2) to ensure that the public is adequately, if not in every instance immediately, informed so that their executive could still be held to account, even in foreign affairs. In the words of John Stuart Mill, "if the public, the mainspring of the whole checking machinery, are too ignorant, to passive, or too careless and inattentive to their part," democracy fails. "Without publicity," Mill asks, "how could they either check or encourage what they were not permitted to see?" John Stuart Mill, *Considerations on Representative Government* (London: Longmans, Green and Co., 1872), p. 13.

Not the written Constitution of the United States, nor the half-written constitution of Canada, least of all the unwritten constitution of Great Britain, has succeeded in establishing the balance decreed by democratic theory between the imperatives of executive discretion and secrecy in matters of foreign affairs including defense, on the one hand, and the public's need and right to participate, knowledgeably, in the democratic process—either directly or through their elected representatives. There is no abstract basis upon which to reconcile the demands of the government for "secrecy and dispatch" with those of the demos for access to information. When the executive—the President, a cabinet minister, a senior bureaucrat—refuses information, the government usually argues the case for security, speed, and for preserving the integrity of an internal bureaucratic advisory process. But when legislatures, the press, and an aroused public demand information, they are really calling for a right to participate either in making, or in reversing, a decision. The executive champions functional utility. The demos argues for the supremacy of democratic process. Without concern for utility, the society is doomed from without or disintegration from within. Without concern for process, the society is scarcely worth preserving—at least for those who hold liberal democratic values. All democracies concerned for survival, therefore, must strive to maintain a functional balance between these competing demands.

Such a balance, however, cannot be captured in philosophic abstraction or even in constitutional formulas. If there is a balance, it is likely to be an imperfect, shifting, dynamic, tension-filled equilibrium compounded by numerous small

accommodations between the key actors in a society's foreign policy process. There can never be a final solution.

However, if there is no such thing as a perfect equilibrium, there is certainly such a thing as a temporary dis-equilibrium. The events of the past six years have produced such a dis-equilibrium, not least in the field of foreign affairs and especially as between Congress and the Executive Branch. The Freedom of Information Act as originally enacted was the the product of an era when this dis-equilibrium had not yet become as widely noticed as it is now. Consequently, it provided a wide exemption that permitted the government to refuse to disclose matters "specifically required by Executive Order to be kept secret in the interests of the national defense or foreign policy." Title 5, section 552(b)(1), U.S. Code (1970). The general classification system set out in Executive Order 10501 as amended by Executive Order 11652 has been used to meet this requirement for a specific finding that an item ought to be kept secret. The Congressional reticence evidenced in this broad exemption for national defense and foreign policy is in the tradition of mutual accommodation which, in the past, has made it possible for the executive and legislative branches to share the foreign relations power of the United States as the Constitution requires.

It does not follow, however, that there is a *constitutional* basis for this Congressional reticence. Accommodation, rather, has been evidence of mutual good sense and a desire to make coordinate but separate powers work. To compel disclosure of the name of an informer still employed in intelligence work, or the negotiating instructions of a diplomat still engaged in negotiating, or the exact current strategic deployment of nuclear weapons, is as alien to Congress' as to the Executive's sense of national security. But Congress has never conceded that it is a sieve incapable of keeping a secret. A committee of the House of Representatives during the controversy with President Tyler over the alleged frauds of Indian Agents, in 1843, specifically declared that Members of Congress are "as competent to guard the interests of the State, and have as high motives for doing so as the Executive can have." 3 Hind's Precedents of the House of Representatives, p. 185. Given the secrets-revealing penchant of some in the Executive, of late, this may not be very high self-esteem. But, if Congress has never accepted that it is a collective security risk, it has also acted with pragmatic caution. Very few disputes have arisen, or are likely to arise, over executive secrecy in really straightforward defense security matters. Regarding this hard-core information, Congress has, by its voluntary reticence, in effect, said to the executive branch "we will allow you to act as the judge of what may have to remain an executive secret in the field of foreign affairs so long as we are convinced that you are keeping from us only those matters the withholding of which any reasonable Member would recognize to be absolutely essential to the national interest."

In 1930, for example, the Senate, as part of its advise and consent function, called on the Executive to show it all papers relating to the negotiation of the London Treaty for the Limitation and Reduction of Naval Armaments. The President resisted having to produce *all*, on the ground that some documents contained very frank comments on foreign officials. Although a majority of Senators in the debate confirmed the constitutional right of the Senate to require production of all documents, the body nevertheless voted in favor of an amendment that made the demand for production subject to the usual "if not incompatible with the public interest" proviso. 73 Congressional Record 86 (1930); Mary Louise Ramsey, Library of Congress, Congressional Research Service, American Law Division, "Executive Privilege," Memorandum of June 7, 1971, 43 at 43–45.

Unfortunately, the United States appears now to have entered a period when the mutual confidence underlying this voluntary abstention has been eroded. The responses recently elicited by Senator Ervin's questioning of the Department of Defense concerning Army surveillance of U.S. civilians and data bank programs, the refusal of information to the General Accounting Office of Congress by the Departments of Defense and State, the refusal of environmental data concerning the Cannikin tests for Congresswoman Mink, taken together with Congressional reaction to these refusals, suggest that the erosion has gone rather far. United States, Senate Subcommittee on Separation of Powers of the Committee on the Judiciary, *Hearings*, "Executive Privilege: The Withholding of Information by the Executive," 92nd Congress, First Session, 1971, pp. 5–6;

see also, "Summary Listing of Significant Access to Records Problems in Recent Years," pp. 310–314.

There is no longer a disposition on the part of Congress or the public to permit the Executive complete discretion not to disclose information simply by stating that it is in the field of foreign policy or national defense and requires protection.

The results of the *Mink* case have made early action by Congress particularly important. Under *Mink*, the courts are not even free to determine whether a classified document actually does pertain to national defense or foreign policy once they receive an affidavit from the executive branch. According to the court "The test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret." *Mink* at 833. The majority of the Supreme Court held "wholly untenable any claim that the Act intended to subject the soundings of executive security classifications to judicial review at the insistence of any objecting citizen." *Mink* at 834. The result is not only to confirm the exclusion of national defense or foreign policy from the Act's requirements for disclosure, but to make this category capable of infinite expansion at the sole discretion of the executive. Since American isolationism gave way to American world leadership, there are very few important decisions to be made in Washington which do not have at least some "national defense or foreign policy" implications.

The salutary effect of both H.R. 4930 and H.R. 5425 is to restore to the courts power to make an impartial determination of where "national defense or foreign policy" ends and consumers' rights, environmental protection, and trade and commerce begin. It is not in the tradition of American courts to abdicate their constitutionally-assigned role, merely because the issue is one involving foreign policy judgments by the government. For British courts, in contrast, British recognition of a foreign government is conclusive as to whether that government does or does not exist even for purposes of suing, being sued, or of giving effect to its acts and laws in British courts. *Luther v. Sagor* (1921), 1 K.B. 456. Such diffidence has never been the etiquette of the U.S. courts, which have assumed the duty, however awkward, of making their own determinations of fact. *Upright v. Mercury Business Machine Co.*, 213 N.Y.S. 2d 417 (1916). The two bills before this committee merely restore the Courts to that tradition of equality with the other branches.

This, then, is the answer, and, in my opinion, the right answer to the first question: who, in the event of a dispute, shall decide. The answer is that the decision should be made, and truly and independently made, by that organ of government designated by the Constitution to be the umpire of the system.

This does not mean that any opportunity should be missed for resolving conflicts before recourse to litigation. To this end, Congressman Horton's bill (H.R. 4960) carried forward in somewhat revised form a proposal found in Congressman Moorhead's bill of May 24, 1972 (H.R. 15172). In place of the earlier bill's provision for a Classification Review Commission, the Horton bill proposed a Freedom of Information Commission. Although the new title sounds somewhat more partisan in the cause of Congress, the composition of the new commission is actually, numerically, better balanced to accommodate executive representation. There is something to be said for and against the commission idea. I believe that the experience with litigation to date militates in favor of interposing some form of speedy administrative remedy along these lines. Such a commission could be helpful not only to a member of Congress, press or citizen trying to get information but also to courts which may need expert disinterested advice in deciding how to apply the new discretion in the field of "national defense or foreign policy." On the other hand, the press is afraid—and with considerable justification, that if such an administrative clearance process is instituted, it will be accompanied by criminal sanctions for obtaining classified information by other means, outside the new channels. For the press, even a ten- or thirty-day delay while the Commission procedures are exhausted could have a serious inhibiting effect. Incidentally, Britain and New Zealand have instituted Parliamentary Commissioners for Administration with powers different but comparable to those contemplated by this legislation. Cf. Parliamentary Commission Act, 1967, 15 & 16 Eliz. 2, c. 13.

There is another matter as to which I feel some ambiguity. In the earlier Moorhead draft the right to know was not identical for everyone. There is something to be said for treating differently requests for information from Members of Congress, particularly from members of key committees, and, on

the other hand, requests from ordinary citizens. The ordinary citizen can effect the foreign policy decision-making process primarily every four years at Presidential elections. Congress, through its investigatory appropriations and powers can effect the process much more immediately. Therefore, its needs are distinguished from those of the citizen.

This brings me to the third problem. The time may have come not only for reform of the procedure by which to review executive denials of information to Congress and the public, but also for a change in the applicable standards and ground rules. It is, of course, helpful to have the courts, rather than the executive classifiers, to determine whether the Cannikin Papers, requested by Congresswoman Mink, were or were not properly designated to be within the "national defense or foreign policy" category. But let us not assume that courts will not be heavily influenced by the government's disposition in making so vague and sweeping a determination. Should Congress not reconsider the category itself? Similarly, other, older provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (1970), contain procedural safeguards against arbitrary executive rule-making. But these safeguards do not apply "to the extent that there is involved a military or foreign affairs function of the United States." *Ibid.*, S. 553(a)(1), S. 544(a)(4). This, too, seems much too broad a blanket exemption from normal processes of disclosure and participation. A very great deal of activity within these broad ambits does not warrant secrecy either in the decision-making process or in respect of information-flow.

A bill drafted by Senator Muskie in 1961 (S. 2965) would have permitted secrecy only for "information the declassification of which would clearly and directly threaten the national defense of the United States." This could conceivably be augmented with an exemption for (1) current negotiating instructions of U.S. representatives and (2) a specific authorization to delete the names and other identification of persons from documents if such disclosure would tend to interfere with the discharge of their functions or with relations between the United States and a foreign government.

But whoever makes the review, Commission, Court or both, it should be a balanced review responsive to the balance of objectives in a democracy. The reviewers should be enjoined to determine not only (1) whether a disclosure would harm the national defense but also (2) whether non-disclosure would seriously hinder the democratic or legislative process. Such balancing of equities is not at all alien to the third-party process, even though the standards will at first be vague until narrowed down by precedent.

In conclusion, let me return to a note of caution. The entire process in which this distinguished subcommittee is engaged would probably not be worth the effort if, in return for better procedures to compel disclosure, it were to become criminal to make or receive any disclosures outside the new procedures. Bill S. 1400, under consideration in the Senate, would have precisely this effect. If the price, directly or indirectly, for the enactment of H.R. 5425 or H.R. 4960 were to be the passage into law of Sections 1122–1126 of S. 1400, I think that price would not be right. I am sure that in any report you make to the House of Representatives you will not allow to pass without comment the false syllogisms by which are linked the reforms espoused in the two bills before this committee and the measures to suppress all unauthorized communication contained in S. 1400 and similar proposals.

Mr. MOORHEAD. Because of the time, I am going to try to enforce the 5-minute rule, even on the chair.

Mr. McCloskey?

Mr. MCCLOSKEY. Professor Franck, I want to thank you for the statement. In the 5 years that I have been in Congress, this is the finest testimony by way of help to a congressional committee that I have ever seen. I feel better about the Justice Department now, knowing that Mr. Dixon who preceded you as a witness is an ex-law professor, and that Mr. Sneed, who was at Duke, is now in the Justice Department. Perhaps we can restore some of the independent scholarship to the Justice Department.

I would like to ask you one question.

96-576—73——13

The nature of the arguments presented by the representatives of the Justice Department have been along the lines that the separation of powers and the doctrine of executive privilege are founded on a constitutional right. I have wondered, and I have not yet heard competent legal scholarship to the contrary, on this principle which was established, I think, in 1804, in the case of *Little* v. *Barreme* that in a field involving the President's inherent powers of foreign policy, the President acted before the Congress legislated.

Ms. ABZUG. Would the gentleman yield for 1 minute?

Mr. MCCLOSKEY. Yes.

Ms. ABZUG. I want to echo the comments, if I may, made by my colleague, Representative McCloskey, about your statement. It is a breath of fresh air to read it. But, unfortunately, I have to be excused, and I hope I will be able to talk to you about it; if not at the hearing, perhaps I can ask some questions on the record, and I hope you will answer them for me.

Thank you very much.

Mr. FRANCK. Thank you.

Mr. MCCLOSKEY. I will ask this one question and then leave, but I did want to get, if the Professor would, some response in writing later on to this question.

Mr. MOORHEAD. I am sure you would be willing to answer questions in writing, because we are under the gun.

Mr. FRANCK. Of course.

Mr. MCCLOSKEY. This point of *Little* v. *Barrene* involved the Executive ordering seizure of a ship going out of a French port. Congress enacted a law saying: "You can seize a ship going into a French port for contraband." But it had not gone beyond that, and when the court ruled, requiring the Government to return the ship to its owner, it said that when Congress has acted in a field where the President probably has inherent constitutional authority, then Congress' regulation limits the exercise of that authority. Now, I think we are in the same position on executive privilege, as the *Mink* case pointed out, that should Congress choose to enact a rule the Executive would be bound to adhere to that, as in any other law, and my question is: How far can we go in enacting a law that will require that the Executive produce information for us? Now, how far should we go? How far can we go?

I am inclined to think that these documents provided for the Executive by foreign governments that Mr. Dixon talked about, concerning ongoing intelligence, and as you have pointed out in your testimony, Congress really did not want to know the names of those conducting intelligence gathering. If we had a competent legal group to respond to the Justice Department as to how far we could go constitutionally, and how far we should go, we would then have information that is not presently before this subcommittee. This is the question I would like for you to address yourself to.

Taking the *Little* v. *Barrene* and the *Youngstown Sheet and Tube* cases and, finally, the *Mink* case, we should have legal argument as to how far we can or should go in defining a new doctrine called executive privilege, a constitutionally created doctrine whereby the Executive can withhold something from us. This was the question I

wanted to ask the Professor, if, perhaps, after reflection, since we are not accorded the time in these current days in the Congress, you might give us your opinion.

Mr. MOORHEAD. Do you have anything else?

Mr. MCCLOSKEY. That was all.

Are you able to do that within a reasonable time?

Mr. FRANCK. I would be glad to do that. Should I do that now, or would you rather that I do that in writing?

I would be happy to.

Mr. MOORHEAD. If you want to make some comments now, go ahead, and we can go until the bells ring again the next time.

Mr. FRANCK. All right.

I tend to think the way to resolve this problem is probably pragmatically, that is, speaking bluntly, if one cannot make progress in the field of Government openness today when the initiative is pretty clearly—the public initiative and congressional initiative is with the flow of events—when can one make progress? I tend to find it difficult to answer your question in terms of what this Supreme Court would say, but I would feel that now is the time to try.

I can make out, I think, a much stronger brief on the constitutionality of legislation, which having been accepted by the executive branch or passed by a sufficiently large majority to override a veto by the executive branch would establish a reasoned basis for making information gathered by persons employed by the executive branch available to the Congress as an alternative to Congress setting up a duplicate of that information gathering itself. I think there is nothing in the Constitution that prohibits that.

Mr. MCCLOSKEY. If you will yield. As your testimony points out, it is quite clear we are being forced into this by a sort of an unprecedented exercise of Executive restraint on the flow of information to us. We have formed a whole office of technology assessment last year and have 10 scientists to advise Congress. And probably we would have not done that had the Executive been willing to give us the Government report on the SST 3 years ago rather than withhold it from us. But, faced with the Executive reluctance to give us information, we are now being pushed into areas where we may go too far in this achievement of balance. I just cannot resist commenting that I think that is the secret of what we are trying to achieve now and now is the time to do it. This is why, in the legal brief, I would like for you to include also *McGrain* v. *Dougherty* and *Barry* v. *Madison*. I think that pretty well parallels *Little* v. *Barrene*.

But, thank you, Professor. I just cannot tell you how much I value your testimony. This quote from John Stuart Mill, I am going to use in some of my advocacy before this body.

Mr. MOORHEAD. Thank you very much, Professor.

Mr. FRANCK. Thank you.

Mr. MOORHEAD. I am sorry that we could not spend even more time.

At this time the subcommittee will adjourn until 2 o'clock, at which time we will hear from Mr. J. Fred Buzhardt, General Counsel of the Department of Defense.

[Whereupon, at 12:30 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will come to order.

When Government witnesses were asked some 8 years ago to testify before this subcommittee on a proposed Freedom of Information Act, they argued without exception that the Government would grind to a halt if the bill were passed. They argued that efficiency in Government was more important than public participation in Government. Incidentally, that was included in Professor Franck's testimony this morning.

Witnesses for every agency contended that they were already doing an excellent job to keep the public informed of everything the public needed to know.

In spite of the unanimous opposition from the executive agencies, the Congress passed the freedom of information law, and the agencies reluctantly administered that law.

Last year this subcommittee held hearings to find out how well they were administering the law. As a result of this public exposure of their information practices, most agencies agreed to make some improvements in their administrative handling of freedom of information matters.

We want to make sure that all agencies honor both the spirit and the letter of the law. To do so requires amendments to clarify some of the provisions which many agencies have been reluctant to follow.

So far, agency comments on the proposed amendments are reminiscent of their attitude toward the original law 8 years ago. They want no changes, no improvements.

We have been assured by President Nixon that his administration will support all efforts to improve the administration of the terms, policies, and objectives of the freedom of information law. I hope the testimony from Defense Department witnesses whom we will hear this afternoon will be in the spirit of cooperation and not the blanket opposition to change which has characterized executive agency comments so far.

We will hear from the Defense Department's General Counsel, J. Fred Buzhardt, and from the head of the Department's publicity operations, Assistant Secretary of Defense Jerry Friedheim.

Mr. Buzhardt, we are delighted to have you with us.

Mr. BUZHARDT. Mr. Chairman, members of the subcommittee, before I give my prepared statement let me say that there is no reluctance on the behalf of the Department of Defense to provide information to the public. We consider it our responsibility, and we are anxious to work with the Congress in any way possible to improve both the law and the administration of the law. To the extent that our methods seem different, it is not that we disagree with the purposes, but I think at times there might be disagreement with the methods to achieve the purposes.

Now, I will address the legislation itself.

STATEMENT OF J. FRED BUZHARDT, GENERAL COUNSEL, DEPARTMENT OF DEFENSE; ACCOMPANIED BY JERRY W. FRIEDHEIM, ASSISTANT SECRETARY OF DEFENSE

Mr. BUZHARDT. I appreciate the opportunity to appear before you today to present the views of the Department of Defense on H.R. 5425 and H.R. 4960, both introduced to amend section 552 of title 5, United States Code: the so-called Freedom of Information Act.

Although there are some similarities between these two bills, I believe it would be preferable to discuss them separately. I will, however, confine these comments on the two bills to the issues they raise that are of greatest concern to this Department. Additional technical points regarding H.R. 5425 are included in the written report submitted to the Committee on Government Operations, House of Representatives, on behalf of the Department of Defense.

With respect to H.R. 5425, the Department of Defense strongly opposes the significant substantive modifications of the second, fourth and seventh exemptions, 5 U.S.C. 552(b)(2), (4) and (7), as well as the unequivocal and inflexible time constraints for answering requests and complaints that this bill would impose on the agencies. In addition, the proposed requirements for the maintenance and the reporting to Congress of data on some Freedom of Information Act requests for records would be highly burdensome, not very useful, and, perhaps, misleading.

Specifically, we oppose the proposed modifications of the second exemption, 5 U.S.C. 552(b)(2), to limit its applicability to only those "internal practices" which come within the description of "internal personnel practices." There are many nonpersonnel, internal practices that should continue to be protected from disclosure to any and all who may request the records in which these procedures are set forth. The Defense Contract Audit Manual is a prime example of the kind of record which should not be available outside the Government. The Defense Contract Audit Agency has determined that public release of this manual must be avoided if the Agency is to fulfill its responsibility for auditing Government contractors' records in an effective manner and thereby better insure protection of the taxpayer's interests. Because this manual is related solely to the "internal practices" of this Audit Agency, it cannot fairly be characterized as relating solely to "internal personnel practices." Yet, I cannot believe that this subcommittee, the Committee on Government Operations, or the Congress as a whole, would wish, by restricting the applicability of the second exemption in the manner proposed in H.R. 5425, to hamper the Audit Agency in the protection of the taxpayers' interests through forced public release of the manual. There are numerous other Department of Defense records that come within the ambit of "internal practices," but not personnel practices, that cannot be made available to the public without serious disruption of the operations of the Department of Defense. We agree with the position of the American Bar Association that the preferable amendment of this section is the deletion of

the word "personnel" so that all records concerning "internal practices" can be withheld if their disclosure, in the words of H.R. 5425. "would unduly impede the functioning of such Agency."

The proposed modification of the fourth exemption, 5 U.S.C. 552(b)(4), is objectionable because it would make even more difficult than under the current ambiguous language of the fourth exemption the responsibility to carry out the clearly expressed congressional mandate of insuring that the traditional evidentiary privileges, such as doctor-patient, lawyer-client, and priest-penitent, are preserved, along with a guarantee to every citizen of his right to communicate with his Government in confidence. The revised language in H.R. 5425 would limit the protection of "privileged or confidential" records to those which are trade secrets, or which contain commercial or financial information. No language would remain under this exemption by which an agency could justify withholding noncommercial or financial records containing information submitted by private citizens, members of the Armed Forces, and civilian employees to their Government, or its officers, in confidence. The inability to protect such information from public disclosure would have the effect of discouraging potential sources from providing valuable information about accidents, about improper agency activities, the conduct of superiors, or countless other sensitive matters of proper official concern. Thus, the net effect of the proposed revision would be contrary to the public interest and actually make more difficult the discovery or development of relevant information about the operations of Government agencies.

The proposed revision of the seventh exemption, 5 U.S.C. 522(b)(7), is perhaps the most objectionable of all the substantive changes contained in H.R. 5425. First, it is objectionable because of the ambiguous effect of the apparent intent to limit the applicability of the exemption to investigatory records compiled for "any specific law enforcement purpose." We frankly do not know what supposed abuse under the present language of the seventh exemption that this limitation is intended to remedy. Any investigation conducted for a law enforcement purpose has a specific law and specific purpose in view. Otherwise, there would be no investigation because there would be no justification for conducting it. If the intent is to limit the exemption to those investigations focused on specific individuals or organizations against whom some law enforcement action is contemplated, then we believe that the result will be injury to innocent parties and a serious hampering of the investigative process. Those who possess relevant information about suspected deviations from proper enforcement of laws will be reluctant or totally unwilling to disclose fully and completely that information to Government investigators if they cannot be assured of its confidentiality. This consideration is even more acute if the inability to protect the information results from the failure of the investigation to confirm any law enforcement violation or to settle on any particular violator. The consequence of this change may, therefore, be that violations of law will go undetected, uncorrected, or unpunished.

The second serious deficiency in the proposed revision of the seventh exemption is that it will deny agencies the right to protect investigatory records compiled for the purpose of enforcing health, safety,

and environmental protection laws, as well as investigatory records containing the results of scientific tests, reports, or data. Very often the success of an investigation concerning health, safety, or environmental protection depends on the cooperation of the employees of the organization being investigated. It is unrealistic to suppose that the investigator will be able to obtain complete and candid information from these employees if he cannot assure its confidentiality. The likely diminution in information can only have the effect of poorer investigations and poorer law enforcement to the detriment of all who are dependent on the health, safety, or environmental protection involved in the investigation.

Since the bill contains no definition of the term "scientific," it is impossible to determine the total adverse impact on this Department's ability to protect from public disclosure to "any person" every scientific test, report, or datum developed in the course of a law enforcement investigation. Blood tests, urine samples, even polygraph results, may be unprotectable, though they support the innocence of a suspect against whom no enforcement action is taken. The unfair effect on the reputations of innocent persons or organizations, resulting from the revelation of various aspects of the investigation is too apparent to belabor. Conversely, the potential detrimental effect on an ongoing investigation caused by the premature disclosure of "scientific tests, reports, or data" alone should provide sufficient justification for those interested in vigorous law enforcement to reject this proposed provision of H.R. 5425.

Although we agree that an agency should publicly announce the basis for its public policy statements and rulemaking actions, we cannot agree that investigative records concerning particular individuals and organizations should always be available to the public simply because they stimulated a rulemaking action or a public policy statement. A particular law enforcement investigation may still require protection even though its results may have caused the agency to take corrective action of general applicability. The resulting public policy statement or rulemaking should stand on its own rationale, independent of any related investigatory record. To the extent that these are deficiencies in the rulemaking process, we recommend that they be corrected by amending the section of the Administrative Procedure Act that specifically addresses this activity. Amendment of the seventh exemption of the Freedom of Information Act as a means of addressing this rulemaking issue will only serve to interfere with the accomplishment of other worthy objectives.

With respect to the administrative and procedural requirements that would be imposed on the agencies by H.R. 5425, we believe that they are for the most part unworkable and undesirable. By contrast, recommendation No. 24 of the Administrative Conference of the United States offers realistic proposals for improved agency implementation of the Freedom of Information Act. These provisions have been almost totally incorporated in a draft revision of Department of Defense Directive 5400.7, which currently is being circulated among the various components of the Department of Defense for comment or concurrence. Its promulgation will, of course, await a determination by Congress as to whether the Freedom of Information Act is to be modified, and if so, the exact nature of those modifications.

More specifically, the Department of Defense strongly opposes the requirements in H.R. 5425 that initial requests under the act be determined within 10 working days, appeals in 20, and that complaints filed in the U.S. district court be answered within 20 calendar days. In an agency the size of the Department of Defense, with millions of records all over the world, meeting such requirements would simply be impossible.

Hence, these unrealistic time limitations would mean that we would have inadequate opportunity to evaluate the difficult requests, or even to find some records to determine whether they can be released. This will cause requestors to initiate unnecessary litigation, which will only serve to shift evaluative burdens from the agencies to the already overburdened courts. Moreover, this evaluation by the court is limited to a determination of whether the record comes within an exemption. By contrast, the agencies also evaluate whether reliance on the exemption serves any legitimate and significant purpose. It is our experience that more often than not the decision to release a record is made on this basis, rather than because an exemption does not apply. If the agencies have inadequate time to make these discretionary determinations, those seeking release may be put to unnecessary trouble and litigation expense.

Further, the courts would be obligated to make their judgment in freedom of information cases without the benefit of a carefully considered and prepared Government answer because of the requirement that it be filed within 20 days of receipt of the complaint by a U.S. attorney. Yet, these severe time limitations on the agencies do not assure the requestor a prompt hearing or judicial determination on the availability of the record. This still remains within the court's discretion, a discretion which they may exercise under the present language of 5 U.S.C. 522(a)(3) to insure that freedom of information cases "take precedence over all other cases."

We favor the flexibility that is inherent under the current language of Section 552(a)(3), title 5, United States Code, by which the judge may evaluate the particular facts of the case to determine whether it merits expeditious consideration over other cases. Although we believe that freedom of information cases are important, we do not concur in changes which, in effect, create an unrebuttal statutory presumption that they generally merit priority over every other type of adjudication.

The flexibility of the courts would also be unacceptably limited by the requirement of H.R. 5425 that the judge examine in camera any agency record which a complainant has been denied. We believe, as the U.S. Supreme Court stated in *Environmental Protection Agency* v. *Mink*, 93 Supreme Court 827 (1973), that a court should have the discretion of satisfying itself by whatever means it deems appropriate that the agency has sustained its burden of demonstrating that the withheld record falls within a statutory exemption.

We are particularly disturbed by this requirement as it would be applied to records which are classified for security reasons under Executive Order 11652. The judge is in a poor position to second-guess the validity of a security classification, and an ex parte procedure where the agency explains the justification for the classification is not satisfactory to either the requestor or the agency. One U.S. district

court judge has opined that such a procedure is contrary to the traditions of our judicial process insofar as it denies the requestor an opportunity to present his arguments on the validity of the classification. It is objectionable to the agency which often must rely on additional classified information to justify the classification of the requested document. It is preferable to permit the agencies to follow a procedure by which they support the withholding of classified information with a detailed affidavit explaining to the court the relationship between the information withheld and the criteria by which it was classified under Executive Order 11652. This affidavit procedure is well established as a means of resisting discovery under the rules of civil procedure and has been expressly recognized by the Supreme Court, *Reynolds* v. *United States*, 345 U.S. 1 (1953), as an appropriate method of assuring the court that classified and other privileged information should be disclosed.

Finally, we believe that section 4 of the bill, relating to the reporting requirements, is unnecessary, as well as unwise in some of its terms. A simple request from the Committees on Government Operations of the House of Representatives and the U.S. Senate to each agency for the compilation and submission of data on freedom-of-information requests would undoubtedly be sufficient to insure compliance. If, however, such a request is made, and particularly if it is incorporated in legislation, we urge that it be modified to delete the requirement for maintaining statistics on the total number of requests for records made under the Freedom of Information Act and for the number of days taken by each agency to make initial determinations on any such requests.

In addition to being burdensome and costly, this requirement is not likely to be helpful to Congress or the agencies. Indeed, it may be misleading because the Department of Defense, like other agencies would be required to report all requests for records regardless of form or regardless of reference to the Freedom of Information Act. Most of these are routine, and the records are provided without any consideration of the applicability of the Freedom of Information Act. Consequently, the resulting statistics would prove little or nothing. Compliance with the act is best judged only with reference to those cases in which there has been an initial or final denial of the requested record. Consequently, we recommend that any request or requirement for reporting be limited to these troublesome cases.

H.R. 4960 is less objectionable to the Department of Defense in many respects than H.R. 5425. It is more realistic and workable in its substantial tracking of the time limitations for response to Freedom of Information requests that are included in recommendation No. 24 of the Administrative Conference of the United States. We object only to the requirement in H.R. 4960 that "the head of the agency personally" must authorize 30-day extraordinary delays for responding to both initial requests and appeals which have not been answered within the normal extended time limits. Although such delays should not be granted lightly, we believe that it is impractical to require the personal involvement of the Secretary of Defense or the Secretary of a military department in such a technical and particular matter. Moreover, it would be anomalous to impose such a burdensome requirement when final decisions on appeal for records are made by subordinate

designees. Consequently, we recommend that the word "personally" be deleted from proposed new paragraphs (6)(C) and (6)(E) of 5 U.S.C. 552(a).

Another problem under any statutory time limitation for responding to Freedom of Information Act requests is created when the desired record has a security classification and is more than 10 years old. Such records are currently reviewed upon request for declassification under procedures established by the departmental regulations that implement Executive Order 11652. We believe these procedures are sound, but, because of the right to appeal adverse decisions, they do not permit compliance within the proposed statutory deadlines for substantive response to requests for their declassification and release under the Freedom of Information Act. Separate time limitations are imposed, however, under the regulations establishing these declassification review procedures for documents over 10 years old. We, therefore, recommend that a parenthetical exception be inserted after the word "records" in the first line of the proposed section (6)(A) to read as follows: "other than those over 10 years old and classified for security reasons pursuant to Executive order or statute."

The proposed revision of the seventh exemption for investigatory records in H.R. 4960 does not raise the same kinds of serious problems discussed in connection with its counterpart in H.R. 5425. The amended language would limit the withholding of investigatory records to those which, if produced, would constitute "(A) a genuine risk to enforcement proceedings, (B) a clearly unwarranted invasion of personal privacy, or (C) a threat to life." Although this is a good description of many of the underlying reasons for withholding most investigatory records, it would be improved by the addition of section 552(b)(7)(A) of the phrase "or to investigative procedures," and by the addition of a subsection (D) to protect those records which, if revealed would constitute "a threat to the fairness of the proceedings."

The protection of "investigative procedures" would avoid any revelation of records which, in themselves, disclose procedures that are employed on a regular basis by the Agency and which, if revealed, would lose their effectiveness. Such a protection would be consistent with the second exemption which protects records revealing internal practices, which if disclosed, would unduly impede the functioning of an agency. The addition of authority to withhold records which, if revealed, would affect the fairness of the proceeding, is closely related to the protection of those which, if revealed, would constitute a genuine risk to enforcement proceedings. It would, however, constitute an express recognition that some investigatory records can properly be withheld when the Agency concludes and is prepared to demonstrate to the court that due process or equity so dictate.

The modification of the fifth exemption, 5 U.S.C. 552(b)(5), accurately translates most of the current judicial interpretation of the present language of that exemption. We suggest, however, the addition of the term "evaluations" to insure protection of those inter- or intra-agency records which are not factual, but which require candid evaluation of facts for the benefit of those making policy decisions. Such evaluations may not be accompanied by recommendations,

opinions, and advice, yet require the same kind of candor that justified the witholding of recommendations, opinions, and advice.

In sharp contrast with the other changes in the exemptions proposed by H.R. 4960, the modification of the fourth exemption, 5 U.S.C. 552(b)(4), would be seriously objectionable for many of the same reasons discussed in connection with the proposed revision of that exemption in H.R. 5425. Additionally, it is inadequate as authority for protecting many records containing trade secrets and commercial or financial information received in confidence because it imposes a requirement that this information be obtained under a statute specifically conferring an express grant of confidentiality. To the extent that such records are protected under the terms of a statute that confers a specific grant of confidentiality, the third exemption, 5 U.S.C. 552 (b)(3) already applies. Consequently, this proposed revision has rendered the fourth exemption a nullity, and would require the production of many commercial or financial records which can only be obtained through an assurance of confidentiality that will stimulate cooperation and willingness on the part of the originator to be open and candid in his submission of information.

The proposal in H.R. 4960 to establish a Freedom of Information Commission is recognized as an effort to insure objective evaluation and advice by an independent body on problems arising under the Freedom of Information Act. The flexibility of its authority to insure full consideration of all aspects of freedom of information complaints and problems is commendable, and one could hope that it would result in fair and impartial findings and useful recommendations with respect to improvement in the enforcement of the act. Nevertheless, we believe that the creation of such a Commission is unnecessary and is likely to impose additional work loads that would not resolve the more important disagreements on proper interpretations of the law.

In spite of a determination by the Commission that a record has been improperly withheld, the requestor would still be required to take the Agency to court to force release of the records, and the Commission's determination would be only prima facie evidence that the record should be released. Since the burden is already on the Agency to justify the withholding of records, the value of this prima facie determination to the requestor may not seem sufficient to warrant the trouble and delay in pursuing this route.

Moreover, this subcommittee and other committees of Congress have proved more than able to attract complaints from persons outside the Government who do not believe that the agencies are properly implementing the act. Such complaints have resulted in oversight hearings and recommendations which have convinced the agencies, including the Department of Defense, that review of their procedures was in order, and to take corrective action where justified. We doubt that the imposition of an intervening bureaucracy of the kind contemplated by this proposal to establish a Freedom of Information Commission will significantly lessen reliance on Congress or on the courts as a means of insuring faithful compliance with the statute.

The comments on parallel provisions on H.R. 5425 regarding ex parte in camera court evaluations of records and the compilation and

submission to Congress of freedom of information case data are all equally applicable with respect to H.R. 4960.

In addition, we note that the proposal to modify section 552(a)(3) of title 5, United States Code, which would require a court to grant an injunction whenever it concludes that an agency has not demonstrated that a record comes within one of the exemptions of the act, is a dangerous limitation on judicial discretion. Functioning as a court of equity, a U.S. district court should have the option of declining a requested injunction when its issuance will deny equity, shock the conscience, or be contrary to public policy or the public interest. Certainly there has been no reluctance on the part of U.S. district courts to grant injunctions against agencies which have improperly withheld records under the Freedom of Information Act. We know of few cases in which an injunction has been denied when no exemption was found to apply, but we believe that it would be a serious error to deprive the courts of this safety valve which experience has demonstrated to be necessary and appropriate to the proper functioning of a court of equity.

I recognize that much of what I have said here about these bills is critical. This is not intended to imply that improvements in the language of the statute, as well as in its implementation by the agencies, are not in order; but I am constrained to say that several of the revisions proposed in these bills, and particularly in H.R. 5425, are, in my judgment, likely to prove counterproductive should they be enacted. There has just been brought to my attention an article in the Maryland Law Review, volume XXII, No. 3, entitled: "The Freedom of Information Act: Suggestions for Making Information Available to the Public," written by Mr. Charles H. Koch, Jr., an attorney in the Office of the General Counsel, Federal Trade Commission, which in my opinion merits the attention of this subcommittee.

Mr. Koch discusses many of the problems of great concern to the Department of Defense, and which, I believe, should be of concern to this subcommittee. Although I do not agree with all of Mr. Koch's observations, nor with all of his recommendations, I believe that he has attempted to offer constructive solutions to most of the more serious freedom of information problems. Similarly, the discussion of the Freedom of Information Act found in the 1970 supplement to Prof. Kenneth Culp Davis' Treatise on Administrative Law contains many worthwhile observations about difficult interpretation problems under the language of the act which deserve the attention of this subcommittee and the entire Congress.

The Department of Defense is willing to provide whatever information or whatever other help it can to illustrate our concern with the operation of the act as presently written and with the proposed revisions. We believe that improvements should be made, and we stand ready to contribute to the effort which is necessary to their accomplishment.

I am ready to answer any questions you may have on our response to these bills.

Thank you.

Mr. MOORHEAD. Thank you very much, Mr. Buzhardt. We may very well be taking you up on your kind offer. For example, I think that a majority of Members of Congress believe that the intent of Congress

in the *Mink* decision was different than that which the Supreme Court said our intention was. I believe the majority of us would like to overrule that decision. If the Court had examined the documents, they could have separated some of them out of the entire file, so that there would not have been any particular problem there.

We might be calling on you for technical assistance in drafting language to overrule the *Mink* case decision. Maybe this legislation can be improved. There may be another alternative to in camera examination by the Court. If I read the mood of Congress correctly, we were disappointed—all, or almost all of us—in that Court decision.

But sometimes when you want to overrule a Court decision, you might go too far. So we have to be careful. We might be calling on you for help.

Mr. BUZHARDT. Yes, sir.

There might be a problem in overruling, of going too far on the other side of the spectrum.

Mr. MOORHEAD. On the assumption that the intent of Congress is not that set, how would it be best to reflect that in our legislation? Much of what you had to say in your testimony was critical of the proposed legislation. Some of it, I am sure, may be justified; some of it also brings to mind the negative testimony that was given by the Department of Defense in 1965 when the present law was enacted.

In general, the Department of Defense was opposed to the whole concept of limiting by the legislative imposition of specific categories of privileged informaton to the discretion of Defense officials to provide appropriate protection for information or records that were in their custody, and for which they were responsible. Let me quote from that 1965 testimony:

> This limitation is made more objectionable by the fact that such protection might ultimately depend on the concurrence of the Court. In the Defense officials' judgment the protection is permitted under the imprecise language of the bill. Since jurisdiction is vested in any District Court, the possibility is evident of inconsistent interpretations of the statute, to be settled ultimately by the Court of Appeals and the U.S. Supreme Court.
>
> In order to comply with requirements of H.R. 5012, if it were enacted, it would be necessary in each component of the Department of Defense to build a large staff whose duties would be to determine the availability of records and information, and facilitate its collection from a variety of historic sites, and to assist in defending each suit in U.S. District Courts anywhere in the United States.
>
> Such an organization requirement would be exceedingly costly.

That is the end of the 1965 quote.

Mr. BUZHARDT. Mr. Chairman, if I might comment on the latter part, of the number of people that we have had to devote to this type of activity, it is substantial. As you know, a substantial number of cases have been developed across the country.

Let me say, I think, I do not believe that anyone can say the courts are prejudiced in favor of the Department of Defense.

Mr. MOORHEAD. I'm disappointed that there aren't more FOI cases, not against the Defense Department particularly, but that there haven't been more cases.

One of the reasons for these hearings is that we think that the original act was so cumbersome that it discouraged plaintiffs from bringing suits. I'm not saying specifically against the Defense Department.

I think that part of the attitude expressed in Defense and other agencies in 1965—and this was honestly held, I believe, on the part of the executive branch—that you can do a better job for the people if you don't tell them all that they want to know. I say that was an honestly held opinion.

We in the Congress believe that even if you don't do as good a job for them, they are entitled to know more about their Government than they are being told now—even if it is a little bit less effective as a result.

I am interested in your comments about Mr. Horton's proposed Freedom of Information Commission. You talk about the overburdened courts, and of course, once upon a time as a practicing lawyer, I agree with you, sir. But don't you think that the Commission, developing an FOI expertise, could actually relieve the burden on the courts? Even if it couldn't dispose of every case, finally, but if it could dispose of a substantial number that would relieve the courts? Wouldn't it be of help?

Mr. BUZHARDT. Frankly, Mr. Chairman, I doubt if it would be much help, and I think it would slow down a number of cases.

Mr. MOORHEAD. Of course, the plaintiff would still have the option to go straight to the court for relief.

Mr. BUZHARDT. That's based on the experience of those reviews that have reached a point where it was apparent that the denial was controversial enough to go to court. We are trying to lean over to give the information, to give it to the public. I don't recall a case offhand where our judgment has not been upheld.

So it indicates that we are trying to lean over to give the information. That's the kind of case they are going to deal with. I doubt if it would produce a significant amount of information to the public. That's a personal opinion and subjective, obviously.

Mr. MOORHEAD. I suggest to you that the Commission could also give some flexibility. If you couldn't answer a request in 10 days, you could file a statement with the Commission and that would give you some flexibility.

I'd now like to ask Mr. Friedheim this question. When freedom of information cases have come up—not just the routine ones that are handled with a yes or a clear no—but when there is a difficult question, are you brought into it as a general practice?

Mr. FRIEDHEIM. Mr. Chairman, Mr. Buzhardt and I—which I think is evidenced by the fact we are here together before you today—consult and discuss those cases that go beyond the routine. We have, in the Department of Defense, divided up some of the responsibilities of how we handle freedom of information cases. There has been a suggestion, from time to time, that we have some kind of information center that would pull it all together in one bureaucracy someplace.

It has been done in some agencies, and has perhaps worked in some agencies. It's our experience that ours is such a large one, spread out geographically, 3½ million people, that our existing procedures have worked well in that the requests are made to those that are cognizant of where records are filed and held.

Many requests are handled at that point on a routine basis, many that go on beyond that point are discussed in consultation between myself and Mr. Buzhardt and the administrators that hold the records.

In many cases our procedures of allowing the heads of our organizational entities to make final decisions on these things has, in my view, resulted in cutting down the number of appeals that might have to be brought to Mr. Buzhardt in his final legal capacity. Of course, he and I do talk about those problems.

Mr. MOORHEAD. It has been our experience on this subcommittee that when the legal profession—of which I am a member—is the only one making the decision, the decision tends to be more negative than in the agency where the public information officer is brought into the case.

Specifically, Mr. Friedheim, what about the *Daily Oklahoman* case, that involved the Army? Were you involved in that case?

Mr. FRIEDHEIM. That was a matter of some long standing, involving a considerable exchange of correspondence. I am sure this subcommittee recalls being involved in some of that exchange of correspondence. The case is primarily in the Army. Of course, in my capacity, I have an interest on behalf of the Secretary of Defense, in that his public information principles have charged the whole Department and——

Mr. MOORHEAD. Did you say that you believe the Army's handling of that case did comply with the public information principles issued by Secretary Richardson?

Mr. FRIEDHEIM. I have not reached that point in my sentence, Mr. Chairman. I was prepared to come to that point. I have an interest in that case, although it is an exchange between the Army and an individual newsman, because I am responsible for assuring the implementation of the public information principles of the Secretary of Defense. These principles specifically include a charge to the Department in the same words that you used in your opening remarks, to adhere to the letter and spirit of the Freedom of Information Act.

I have followed the progress of that exchange, and a good deal of the early exchange. If we brought the exchange of correspondence here and put it on the witness table, it would be about 4 feet high. So I didn't bring that today.

But the fact of the matter is that in many cases the Army and my office have been charged with working with the Daily Oklahoman and specifically Mr. Taylor. In fact, we have worked at great length and have had a considerable exchange of correspondence and telephone calls with him. He has not been satisfied with all of our answers. None of the newsmen with whom I work are satisfied with all of my answers. I would be surprised if they were.

The case is one which involved, in the early days, what has been known as the Peer's Report. There were a great many newsmen, not just Mr. Taylor, who were interested in obtaining release of that report. It was a matter that was pursued all the way through the district court.

The district court upheld the position of the Army, that as long as the appeal is running, which it still is, that material should not be released. Mr. Taylor, even after that court decision, still chose to seek those materials, which is his right.

We have chosen to adhere to the recommendations of the court. My office and the Army respond to the Daily Oklahoman on all their inquiries. They have also engaged us in a lengthy correspondence of

hundreds of letters asking for many materials, biographical sketches, pictures of general officers, and a lot of material that is probably available in the nearest Federal Register library. We have tried to respond to those.

The Army found it advisable to discuss with them the setting of priorities or the order in which their written requests to us would be filled. That was agreed to by the Daily Oklahoman, and we are proceeding to meet those requests in a priority way.

We have worked in my view in a professional and a forthcoming manner with Mr. Taylor. I think it should be noted that we attempt to work in that way with every other reporter, every other newspaper in this country. Mr. Taylor is one of many, many thousands. If we spent as much time with everybody else as we do on Mr. Taylor's request, we would not begin to satisfy our obligation to the public.

We respond to all requests. In this case, we have had to do it in somewhat of a priority manner. But I think we do have a handle on how to go about it, and to the best of my knowledge, the Daily Oklahoman has agreed to what I regard as a professional relationship and a recognition that both sides in a professional relationship must seek to do what is possible, not to ask for the impossible.

Mr. MOORHEAD. Do I understand then that it is your belief, Mr. Friedheim, that you have worked out an amicable situation as far as this tall stack of correspondence is concerned?

Mr. FRIEDHEIM. That certainly has been the desire of the Army. That has been our counsel and sugestion to the Army Chief of Information.

Also, other Departments are involved besides the Army. Mr. Taylor regularly queries the Air Force and the Marine Corps. He calls my office for a break in news stories. We respond to his requests. We also have an obligation under our freedom of information principles, under the Freedom of Information Act, and under the Constitution and the first amendment to respond to the request of all the news media. And we try to do that.

We have to apply some professional standards from time to time, and that we have tried to do in this case. This is not to say that Mr. Taylor or his publisher or his editor have been in total agreement with us at all times throughout this exchange. We happen to have a feeling in the Department, which we express with some regularity, that both we and the press are part of the same constitutional system, and that it is possible to pursue that check-and-balance system, an adversary relationship, without being antagonists.

We would be surprised, and a little frightened, in fact, if it were not an adversary relationship. It is supposed to be. It doesn't surprise us that it is. We think that can be pursued in a nonantagonistic way, and that has been our intent in this particular case as in all others.

Mr. MOORHEAD. I hope that to the extent that the legislative and executive branches have different opinions, and we are sitting here and you there, we could have that same kind of feeling.

Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Friedheim, that adversary relationship with the press you have described, do you in the Department have the same feeling that you are in an adversary relationship with the Congress?

Mr. FRIEDHEIM. As I say, we view this constitutional system as a whole.

Mr. MCCLOSKEY. Perhaps you can answer my question, yes or no, please, and then comment on it.

Mr. FRIEDHEIM. Yes, sir. There is a check-and-balance relationship between the executive and legislative branches of our Government, and also with the press, which is also in the Constitution.

Mr. MCCLOSKEY. In connection with that response, Mr. Friedheim, do you subscribe to the comment once made by Assistant Secretary Sylvester, that in some cases the Government not only has the right to lie but the obligation to lie?

Mr. FRIEDHEIM. No, sir, I do not. You will find my exchange on that in my confirmation hearings before the Senate; that question was asked me by Senator Thurmond.

Mr. MCCLOSKEY. Mr. Buzhardt, in your testimony I found no reference to section 3 of H.R. 5425, the section which would require the executive branch to furnish information to Congress upon request.

Had you intended to omit any reference to section 3 of the bill, or was that inadvertent?

Mr. BUZHARDT. As I said in addressing the bills as a whole, that I would comment on those that gave us greatest concern. We do not believe that we have a major problem with providing information to the Congress. We generally think we can.

Mr. MCCLOSKEY. Generally, do you have any objection to section 3 of the proposed bill H.R. 5425?

Mr. BUZHARDT. Let me look at it again, if you will.

Mr. MCCLOSKEY. I can quote it to you, briefly. It merely states that "any agency shall furnish any information or records to Congress or any committee of Congress promptly upon written request to the head of such agency, by the Speaker of the House of Representatives, the President of the Senate, or the chairman of such committee as that case may be," and that included subcommittee under the definition of committee.

Mr. BUZHARDT. Let me say, as I noted earlier, we did submit comments and the official report on the bill. This is what we say with respect to section 3.

Mr. MCCLOSKEY. You were referring to comments I have not seen perhaps. What is that date of those comments? Is this your letter?

Mr. BUZHARDT. Yes, sir. It is a rather detailed comment on the bill. It says: "The provisions"——

Mr. MCCLOSKEY. What page?

You are quoting from your letter of May 7?

Mr. BUZHARDT. Yes, my letter to Representative Holifield.

Mr. MCCLOSKEY. Page 10?

Mr. BUZHARDT. Yes, sir.

The provision of Section 3 of the bill that agencies shall furnish information to the Congress and the Committees upon written request is consistent with the current policy established by President Nixon in his memorandum of March 24, 1969 to the heads of executive departments and agencies; and by the statement by the President dated March 12, 1973.

To the extent that proposed Section 3 is intended to modify the procedures set forth by the President, and based on his Constitutional prerogatives and responsibilities, it would of course be ineffective.

Mr. McCLOSKEY. Let me speak to that first point. I have in front of me the letter of the President dated April 7, 1969, to Chairman Moss of this committee, and the memorandum for the heads of executive departments and agencies dated March 24 to which you refer.

That memorandum indicated that all information requested would be furnished unless the President himself made the determination to exert executive privilege. If a department head were in any doubt as to whether executive privilege should be claimed, the question would be referred to the White House, and after careful consultation there, the President's determination would be related to the appropriate agency.

Now, I have three letters in front of me, Mr. Buzhardt. One comes from you, and two from either Mr. Doolin or the related individual in the Defense Department. In these letters, I specifically requested information from the Defense Department, and I received a response that the information would not be forthcoming, because it was either not productive to furnish the information to me, or, as in the case of your own letter to me, I think in this case, a lieutenant general, a head of the DIA, in view of the sensitivity of some of the information, it would be deleted from the information furnished upon my request.

Let me be more specific about these three examples. I would like to offer them at this point for the record, Mr. Chairman, if I may.

Mr. MOORHEAD. Without objection, they will be made a part of the record.

[The material referred to follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., May 19, 1971.

Mr. RADY JOHNSON,
Assistant to the Secretary, Department of Defense, The Pentagon, Washington, D.C.

DEAR MR. JOHNSON: In your letter of May 13, responding to my letter of April 29 to your predecessor, Mr. Richard C. Capen, no mention is made of the photographs requested from the Air Force in my earlier letters to Mr. Capen and to Major General Giraudo.

Specifically, inasmuch as the Air Force has referred all priority inquiries to your office for response, I would like to reiterate the following request for photographs:

1. The most recent photographs taken of the 196 villages on the attached list. All of such villages are located in the Plain of Jars area and testimony has been received from a number of refugees from that area that their homes were damaged or destroyed by United States bombing in 1969. This information was previously requested of the Air Force in my letter of April 20, 1971, addressed to Major General John C. Giraudo, a copy of which was enclosed in the letter of April 29 to which you partially responded in your letter of May 13.

2. The two photographs of Laotian villages handed to me for examination on April 15, by Major General Evans, Commander 13th Air Force, Udorn, Thailand. These are the photographs which General Evans discussed with General Clay on April 16 in Saigon and which Major General Hardin on the same day advised me that General Clay had decided to refuse release, suggesting that I should request the pictures from the Air Force Liaison Office in Washington. I made such request to Major General Giraudo in my letter of April 19, a copy of which was enclosed in the letter to your predecessor, Mr. Capen.

3. A copy of the photograph of an F–105 bombing four huts with a direct hit with white phosphorous, such photograph being the one formerly hanging in the office of the Vice Commander, 7th Air Force, and from which the present oil painting behind General Hardin's desk was copied. This photograph was also referred to in my letter of April 19 to General Giraudo, aforesaid.

From a personal inspection of your photographic records in Udorn I am satisfied that it is a simple matter for the Air Force to collect the photographs in question from those records and forward them forthwith.

The Air Force had no difficulty whatsoever in furnishing us with 12 recent pictures of Laotian villages, these being the following:

1. Ban Toumlan, photograph dated, November 14, 1970.
2. Ban Le, photograph dated, February 27, 1971.
3. Ban Khe Louong, photograph dated, February 21, 1971.
4. Ban Donbouag, photograph dated, November 14, 1970.
5. Ban Khammouan, photograph dated, February 15, 1971.
6. Ban Nambak, photograph dated, April 1, 1971.
7. Ban Toumlan, photograph dated, November 14, 1970.
8. Ban Nanhang, photograph dated, April 1, 1971.
9. Pak Beng, photograph dated, April 1, 1971.
10. Mahaxai, photograph dated, February 15, 1971.
11. Saravan, photograph dated, November 14, 1970.
12. Attopeu, photograph dated, November 14, 1970.

None of these villages were named in the list previously requested, however, at least to the best of our knowledge.

Needless to say, this request is made with the understanding that no photographic missions should be flown nor lives placed in jeopardy for photographs not already in your files. It was my understanding that you already have a complete and comprehensive file of photographs for each village located along lines of communication (LOC's) in Laos.

If photographs of any of these villages are unavailable in your files I would appreciate being immediately so advised.

Respectfully,

PAUL N. MCCLOSKEY, Jr.

ASSISTANT SECRETARY OF DEFENSE,
INTERNATIONAL SECURITY AFFAIRS,
Washington, D.C., June 11, 1971.

Hon. PAUL N. MCCLOSKEY, Jr.,
House of Representatives,
Washington, D.C.

DEAR MR. MCCLOSKEY: Mr. Johnson has asked me to reply to your letter of May 19, 1971.

I have reflected on your various requests for photographs of villages in Laos. Your understandably humane interest in the effect of the war on the civilian population in Laos is shared by the many in the Defense Department who over the years have wrestled with this problem. I hope our basic agreement on motives is not obscured by the differences we may have over issues of management.

With regard to management, we have explained repeatedly that we have established restrictions up to the limits of the safety of our pilots in order to minimize the effects of the war on civilian populations. Ambassador Sullivan, along with knowledgeable and competent witnesses from State, AID, and Defense, has discussed the refugee situation thoroughly with cognizant bodies in the Congress. As you know, we are convinced that the overwhelming cause of refugees in Laos is the offensive military activity of the North Vietnamese Army. Finally, when civilians have been caught up unavoidably in the web of warfare, we have given strong support through AID to ameliorative programs.

It is neither feasible nor useful to go beyond these steps to furnish extended photography of Laos. Much of Laos is inhabited by itinerant groups who establish their villages temporarily and then move on. The abandoned villages, in various stages of decrepitude, dot the countryside. Those which have suffered military damage may be indistinguishable from those ravaged by the weather; those which have suffered identifiable military damage may have been struck by the enemy rather than by US bombs; finally, even if it appears from current photography that US bombs might have damaged a village, we come back to our assertion that only valid military targets come under attack as an unavoidable consequence of enemy activity, an assertion which you implicitly are challenging.

In sum, I cannot see that the cause of the civilians in Laos will be advanced by our further exchange of photographs. The public record is as complete regarding

our efforts to minimize the effect of the war on Laotian civilians as we can make it without disclosing information which the enemy would certainly use further to endanger the lives of our pilots. Let me assure you that we are resisting a ruthless and aggressive enemy as humanely as the circumstances permit.

Sincerely,

DENNIS J. DOOLIN,
Deputy Assistant Secretary.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., July 27, 1971.

DIRECTOR OF LEGISLATIVE LIAISON,
Department of the Air Force,
The Pentagon, Washington, D.C.

DEAR SIR: I read in the June 9, 1971, issue of the Air Force Times that the service is nearing completion of a five year-long study, code named Carona Harvest, and evaluation of the effectiveness of the air role in Southeast Asia.

The article says that formal reports totaling about 10,000 printed pages already have been completed, verified and sent to the Hq. USA air staff for a study and comment. The article further states that one feature of the project is the compilation of more than 300 "oral histories" of the AF role in SEA as recorded on tape by prominent military and civilian officials involved in the war effort

I wonder if you would be kind enough to call my Administrative Assistant, Paul LaFond, 225-5411, and advise when and where he and I can go over this material.

Respectfully,

PAUL N. MCCLOSKEY, Jr.

DEPARTMENT OF THE AIR FORCE,
OFFICE OF THE SECRETARY,
Washington, D.C., September 3, 1971.

Hon. PAUL N. MCCLOSKEY, Jr.,
House of Representatives.

DEAR MR. MCCLOSKEY: Reference your request to view Project CORONA HARVEST study papers.

I regret that it would not be productive to provide access to the CORONA HARVEST papers. Although, as reported by the Air Force Times, a substantial amount of reporting has been done by the operational elements of the Air Force, the overall project is far from complete. Because of the sheer volume of the current working papers, which are primarily after-action reports, and because they are still in the process of being collated and evaluated, there is little to be gleaned in the way of definitive material at this time.

Thank you for your interest in CORONA HARVEST and the United States Air Force.

Sincerely,

JOHN C. GIRAUDO,
Major General, USAF,
Director, Legislative Liaison.

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C., April 5, 1973.

Vice Adm. VINCENT DE POIX,
Director, Defense Intelligence Agency,
The Pentagon, Washington, D.C.

DEAR ADMIRAL DE POIX: Some time ago, I requested the opportunity to see a copy of the Defense Intelligence Agency Manuel No. 58-11, commonly known as DICOM. The existence and nature of this manual had been testified to by an ex-Army enlisted man, K. Barton Osborn, in testimony before the Government Operations Committee's Subcommittee on Foreign Operations and Government Information. His testimony commences on page 315 of the hearings entitled "U.S. Assistance Programs in Vietnam," held in July and August 1971.

Today, Col. Charles W. Hammond, USAF, came to the offices of the Subcommittee with a copy of the DICOM, formally requested by a March 27, 1973, letter from Subcommittee Chairman William S. Moorhead to Col. George Dalferes, Office of the Secretary. He handed it to me without reference or comment as to the fact that chapters 11–18 had been removed from the manual.

Upon inquiry, Colonel Hammond stated that he believed that the decision to remove the last two sections of the manual had been made by the former Defense Intelligence Agency Director, General Bennett, when the manual was first requested and delivered for review to the Subcommittee office in Sepember 1971. Colonel Hammond further stated that he thought he was delivering to us today for inspection the same portions of the manual which had been delivered to the Subcommittee in September 1971.

I would like to be apprised of the precise reasons for the removal of these pages from the documents requested by the Subcommittee Chairman.

We are faced with the drafting of legislation to define the precise extent of information which can properly be withheld by the Executive from the legislative branch, and it would be extremely helpful if we can have a candid understanding of the policies and procedures, as well as the reasoning behind such policies and procedures, governing DoD's response to requests of this kind.

I would like to add that Colonel Hammond's forthright handling of this matter has met the highest standards, and I in no way mean to criticize any aspect of DoD's conduct thus far revealed.

A question arose during our review of the manual as to whether or not the manual or documents brought over by Mr. Rady Johnson in September 1971 included reference to the termination of clandestine agents. It is the recollection of Mr. Cornish of the Subcommittee staff that the copy of the manual reviewed in September 1971 contained reference to the terminology "termination with extreme prejudice," a term used by Mr. Osborn in his testimony before the Subcommittee.

It is therefore requested that you review your records and determine by the control number the precise copy of the document inspected in September 1971 to ascertain whether or not such language was included anywhere in this document.

Sincerely,

PAUL N. MCCLOSKEY, Jr.,
Member of Congress.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., April 23, 1973.

Hon. PAUL N. MCCLOSKEY,
U.S. House of Representatives,
Washington, D.C.

DEAR MR. MCCLOSKEY: Your letter of April 5, 1973 to Vice Admiral dePoix, Director, Defense Intelligence Agency, concerning the DIA Manual No. 58–11 (DICOM) has been referred to me for reply.

In accordance with your request, the Department reviewed its records to determine whether the document shown to the Subcommittee Chairman on Foreign Operations and Government Information on September 23, 1971, is the same document that was furnished you on April 5, 1973. Because of the passage of time, it is no longer possible to trace the precise copy through the control number. However, we have no reason to believe that the document shown to Congressman Moorhead in 1971 was different from the document submitted to you. In both instances, the Department of Defense representatives who offered these documents for inspection had been informed that Parts III. and IV. (which cover Chapters 11–18) had been removed from the Manual. Furthermore, the two Subcommittee Staff members present when you reviewed the Manual were cognizant of the fact that those sections had been deleted when it was shown to Congressman Moorhead, as well as the reasons therefor.

Regarding the suggestion that the copy furnished in 1971 referred to "termination with extreme prejudice," it is believed that this term is attributable solely to K. Barton Osborn's testimony. The term is not used in the Manual furnished you, and does not appear in Parts III. and IV. of the Manual.

As for the reasons why Parts III. and IV. were not forwarded to the Committee, it is my understanding that Mr. Rady Johnson, then the Assistant to

the Secretary for Legislative Affairs, advised Congressman Moorhead at their meeting on September 23, 1971 that these portions of the Manual had been omitted because of their "extreme sensitivity," and that Congressman Moorhead accepted this response. In any event, we have no record that the Subcommittee Chairman made any further request following these discussions.

As to the sensitivity of the document, I am informed that Colonel Hammond has already discussed this with you. Upon reviewing the matters with respect to Congressman Moorhead's 1971 request, I find that the decision to delete Parts III. and IV. was made following consultation between Mr. Richard Helms, former Director of the Central Intelligence Agency, and Lieutenant General Bennett, then Director of the Defense Intelligence Agency, because of the sensivity of the material.

During my testimony before the House Subcommittee on Government Operations and Government Information in May 1972, I pointed out to the Committee that when it was necessary to provide to the Congress extremely sensitive material, it would be furnished solely to the Congressional Committee having primary jurisdiction over the matter. Your attention is invited to Part 8 of the Hearings, "U.S. Government Information Policies and Practices—Problems of Congress in Obtaining Information from the Executive Branch" before a Subcommittee of the Committee on Government Operations, House of Representatives.

Sincerely,

J. FRED BUZHARDT.

Mr. MCCLOSKEY. The first is a letter dated July 27 to the Director of Legislative Liaison of the Air Force from me asking for access to a study entitled "Corona Harvest," concerning the effect of the aerial bombardment of Southeast Asia, which was then published, I believe, in the Air Force Times.

A response from General Giraudo dated September 3 stated, "I regret that it would not be productive to provide access to the Corona Harvest papers."

Executive privilege was not claimed in that case, was it, sir?

Mr. BUZHARDT. No, sir.

Mr. MCCLOSKEY. On what basis, then, did General Giraudo refuse to make available to me materials on Corona Harvest?

Mr. BUZHARDT. Let me say, personally, I have not discussed this with General Giraudo.

Mr. MCCLOSKEY. Was this ever brought to your attention before this day?

Mr. BUZHARDT. Not to my knowledge, but let me address that if you will, and when you look at the bill, you will see it will bear out what I say.

Mr. MCCLOSKEY. Before you answer, let me try to make my question precise.

You have indicated that there is no problem in furnishing information to the Congress, because the President has said that you will furnish information unless executive privilege is claimed. I cite this example as a case where information was not furnished, and executive privilege was not claimed. We are somewhat interested in how we might remedy this practice.

Mr. BUZHARDT. Let me say, Mr. McCloskey, if I may address it. When the President speaks of furnishing information to the Congress, he is speaking of Congress as an entity, as a legal institution which acts through its committees, but not through its individual Members.

Your request was made as an individual Member for a classified document. I suspect that the answer would have been different had it come from a committee through its chairman.

Mr. McCLOSKEY. In that situation the Defense Department would not hesitate to deny information to an individual Congressman, but if a committee were to request it——

Mr. BUZHARDT. Let me say that I hope that we would hesitate in any case to deny information to an individual Congressman. We might hesitate, we might in the final analysis do it, but we would certainly hesitate.

Mr. McCLOSKEY. Mr. Buzhardt, is there an internal document in the Defense Department that describes your internal procedures for handling requests from individual Congressmen?

Mr. BUZHARDT. No, sir. There is not.

Mr. McCLOSKEY. There is no manual, no standard operating procedure?

Mr. BUZHARDT. No, sir. They are handled basically under the Freedom of Information Act, as implemented by DOD Directive 5400.7. However, the response to all congressional inquiries is also given by the procedural requirements of DOD Directive 5400.7.

Mr. McCLOSKEY. On a case-by-case basis?

Mr. BUZHARDT. Yes, sir.

Mr. McCLOSKEY. Let me go to the second example. I have a letter from myself dated May 19, 1971, and responded to by the Assistant Secretary of Defense, Mr. Dennis J. Doolin, on June 11, 1971, in which this statement is made: "I have reflected on your various requests for photographs of villages in Laos. It is neither feasible nor useful to go beyond these steps to furnish extended photography of Laos."

I had requested specific photographs. Would your answer to the first example raised be the same; namely, that because this was an individual Congressman asking for photographs, it was treated differently than a committee's request?

Mr. BUZHARDT. Again, I don't recall discussing the case with Mr. Doolin. I suspect it would, and I suspect the photographs were actually shown to committees.

Mr. McCLOSKEY. The third example, Mr. Buzhardt, is a letter that I addressed to the head of the Defense Intelligence Agency on April 5, 1973, and the response came from you personally in this case, dated April 23, 1973.

Here we had requested the Defense Intelligence Manual No. 58–11, referred to as DICOM. In this case, you state in your letter that it was the decision of the Lieutenant General, then Director of DIA, and Mr. Richard Helms, former Director of the CIA, that because of the sensitivity of the third and fourth parts of that manual, you would furnish—previously this was to the full committee—to Mr. Moorhead, and subsequently to me, only the first two parts of that manual.

Here was a request by a chairman of a committee, and yet the decision was made to give the committee only roughly half of the manual that was requested. What was the basis for that, sir?

Mr. BUZHARDT. The basis is this, sir, as to the two portions which were not provided to the committee—they involved sources and methods of intelligence collection, and the authority to make the determination to disclose them to anyone—is vested by statute in the Director of the Central Intelligence. It is not ours to give. It's that simple. We don't have the authority to make that decision.

Mr. MCCLOSKEY. The men in charge of DIA, an Army lieutenant general, participated in the decision according to your letter.

Mr. BUZHARDT. He secured the determination from the Director of Central Intelligence, because he is the contact point.

Mr. MCCLOSKEY. You see, this example would seem to indicate that the executive branch, without claiming executive privilege, is still not adhering to the policy that Mr. Nixon laid down when he said that without the claim of executive privilege, the information will be furnished.

In your letter, you don't refer to any claim of executive privilege on the DICOM, do you?

Mr. BUZHARDT. No.

Mr. MCCLOSKEY. So no executive privilege was claimed, was it?

Mr. BUZHARDT. No, sir.

Mr. MCCLOSKEY. Is it fair to say that the procedure established by the President was followed in that case?

Mr. BUZHARDT. Yes, sir.

We did not have control over the information. We can only provide to you, from the Department of Defense, that information that we control.

Mr. MCCLOSKEY. I understand that in this particular case, the joint decision was perhaps in the hands of the CIA; but at least the CIA then, in this particular case, did not follow the directive laid down by the President.

Did they?

Mr. BUZHARDT. I am not sure on that case. We have a problem here, and this is a very difficult problem. Let me say, where you have involved the statutory authority of the Director of Central Intelligence, I think, it would be better to discuss that in executive session at some point, and far better with him than with me.

But we do have a peculiar statute involved in this. I think it's an anomaly, that the protection of this type of information is not vested in the President of the United States, but in the Director of Central Intelligence by statute.

Mr. MCCLOSKEY. Mr. Buzhardt, let me go back to an earlier point here, if I am not overstepping my bounds. The DICOM is a Defense Department manual, it is not a CIA manual. Is that not correct?

Mr. BUZHARDT. It is, but the information therein relates to sources and methods of intelligence collection, and the Director of Central Intelligence has a great deal of authority. In fact, he has the exclusive authority over this type of information even though it is handled by the Defense Department. He nevertheless has overriding authority.

Mr. MCCLOSKEY. I want to make very sure of your answer to this. Your testimony is that this Army manual, the DICOM 58-11, which is used in the Army Intelligence School to train Army officers, is not within your power to release to the Congress by law.

Is that your testimony?

Mr. BUZHARDT. Yes, that is my testimony.

Mr. MCCLOSKEY. What is the statute upon which you base that opinion, sir?

Mr. BUZHARDT. It's in the National Security Act of 1947 as amended. I forget the exact provision. I would be glad to supply it. That gives the Director of Central Intelligence the responsibility to protect information concerning the sources and methods of U.S. intelligence.

The Director of Central Intelligence has two jobs: one, as the Director of CIA; and the other as Director of Central Intelligence. As Director of Central Intelligence he has responsibilities and authorities across the board with reference to anybody in the Government that collects information.

One of my assistants here just handed me section 102, Mr. McCloskey.

Mr. MCCLOSKEY. Section 102 of the National Security Act?

Mr. BUZHARDT. Yes, of 1947, as amended.

Mr. MCCLOSKEY. I want to ask you this question then, without being unfair. Perhaps your assistants would want to help on this one.

Is there any other example to your knowledge in which information within the control of the Department of Defense cannot be released except by the acquiescence of some other agency of Government?

Mr. BUZHARDT. Except in those cases where the President has claimed executive privilege, or a case which we have reason to believe that he might claim executive privilege if asked. In those cases, in accordance with his memorandum, we have to refer to it.

Mr. MCCLOSKEY. I think I would concur in the executive privilege question. But aside from executive privilege or information you might not want to release until such time as you have consulted with the President to determine if you were going to use executive privilege and other than this intelligence manual and matters related to the protection of the intelligence collection, are there any other examples, to your knowledge, in the law where defense information would be excluded from release at a proper request from a congressional committee because of the exercise of control by an agency other than the Department of Defense?

Mr. BUZHARDT. No, not to my knowledge. There might be occasions where we think it is a better part of judgment perhaps not to release it when requested, and we may go back to the committee, and reason with them or try to, or suggest an alternate means to provide the information.

Occasionally, we think because of the sensitivity of information it's much better to discuss with the committee a particular document. The committees have worked very well in that respect.

Mr. MCCLOSKEY. Thank you.

I think I have exceeded my time, Mr. Chairman, but I would like to establish one question if I may. These past examples in which individual Congressmen have requested information and have received letters such as the one from General Giraudo or Mr. Doolin—I will assume that if those questions are properly submitted by any appropriate congressional committee in the future, you see no problem at all with the Defense Department requesting full information and response

thereto unless executive privilege is claimed pursuant to the President's memorandum.

Is that correct?

Mr. BUZHARDT. I would say I would see no legal basis to withhold. I can see a lot of problems sometimes, Mr. McCloskey, but the problems have to be ignored if the Congress wants it.

Mr. MCCLOSKEY. When these problems come up to your office as General Counsel, you will see that either the memorandum of the President is followed or the information is released?

Mr. BUZHARDT. That is correct.

Mr. MOORHEAD. Ms. Abzug?

Ms. ABZUG. Thank you.

You indicate that you object to altering the language of section (b)(7) to accept only files compiled for specific law enforcement. I think you say on page 4, that any investigation conducted for law enforcement purposes has a specific law and a specific purpose in view.

If that is the case, then the addition of the word "specific" should give you no trouble.

Mr. BUZHARDT. Our problem is, we really don't know what the purpose of the word "specific" is.

Ms. ABZUG. But, I'll give you an example. If on the other hand the fact is that an agency is out compiling data on "suspicious" persons who were in no way at the time at all suspected of any particular offenses, then I would trust that you would agree with me that there is a need for the word "specific."

Mr. BUZHARDT. If you gather information in an investigatory role, I think there is a need for exclusion in order to protect the privacy of the individuals investigated. Unless there is some law enforcement purpose, the investigation shouldn't have been conducted in the first place, if it's a law enforcement type of investigation.

I think, however, that you would not, even when you are doing a statistical study or a crime study, or should not reveal names of individuals or reports on the activities of specific individuals; that you would not want to be in a position of being forced to release it. It might be inaccurate. It might be defamatory, even though there were no grounds for prosecution.

I really don't think that type of information should be released in whatever type of investigation it is turned up in.

Ms. ABZUG. Then you believe the only one that has the freedom of information is the bureaucrat or the Government agency that decides to collect a certain amount of information; even if it's not needed for any specific law enforcement purpose. And that the individual's right of privacy only goes to a very interesting proposition-- that the Government is protecting the individual right of privacy, where under our constitutional view it was that the right of privacy of the individual should not be invaded by Government.

Mr. BUZHARDT. I think we're addressing two different questions. If you want to talk about limiting the Government's authority to investigate, I think that is the question you are really addressing, and that is something that is best not addressed under the Freedom of Information Act.

But if the Government has a legitimate investigation, I am sure you know that prior to the evaluation of the information, you get

all types of allegations. It's the inclination of people during investigation to often exaggerate, sometimes to settle old scores. There may be no validity to the information whatsoever. That information should not be released to the public, because quite frankly, you can't catch up with it, and it is not responsible to provide that type of information in whatever type of investigation.

If your objection is to the scope of the investigative powers of the Government, I suggest that would be better addressed in some legislative forum other than the Freedom of Information Act, because we're dealing with another subject. That's what I'm really saying.

Ms. ABZUG. Is that what you're saying in testimony?

Mr. BUZHARDT. Yes; I think so.

Ms. ABZUG. In other words, you feel that there should be no limitation in investigations of any kind, because you don't believe there should be any right to information, which is specific except for a specific law enforcement purpose.

Mr. BUZHARDT. Again, I think we are in a semantic problem here. I do not think that the limitation should be limited to that information derived from a specific law enforcement purpose. If you mean by that, that to be "specific"—and again, we are at a loss to understand what it precisely means—if you mean that it has to be obtained in the investigation of a particular person, if you have a prima facie case to start with—or are concerned about a particular violation, which you know before the investigation was committed, then I think we are missing the point.

We might have a situation where we have indications that an agency of Government is not properly functioning—that there are things going on, that there's some indication that there's some money missing perhaps, or that it might be just improper auditing—and we conduct an investigation. It could be for a specific law enforcement purpose. It could be for a general law enforcement purpose to make the law work better in that particular agency.

I don't think that the question of specific purpose is intended to delineate between that case where we have a great deal of information, at the start of an investigation very little information to start the case, whether it be specific instead of general.

I don't think that should be the dividing line on whether we should provide the information derived from the investigation to the public; because it can be equally misleading regardless of which investigation you get it in, and that can be equally harmful to the individual in an unfair way.

Ms. ABZUG. What is your suggestion with respect to the issue of classification? There has been a great deal of evidence before this committee and other committees that many items have been classified that really are necessary for public information as well as for the public as for the Congress.

In your testimony, you object to a court of judicial review as to whether material should not be made available in camera if it is classified. You oppose the provision here which seeks to address this question.

Do you believe that Congress has any role whatsoever with respect to the issue of classification?

Mr. BUZHARDT. Yes. Although Congress has not assumed a large role with respect to classification, and that's the point from which we start

now. In the Atomic Energy Act, the Congress established by statute the classification system. The remainder of the system is largely one of executive order.

As to the in camera proceedings, I think the in camera proceedings, as a number of judges have said, should be by no means mandatory. Often the purposes of justice, with fairness to both sides, can be better served by other means.

I don't know if you are familiar with the affidavit approach that has been used in many of these cases, where the Government sets forth the type of information in the affidavit that is contained in the document, the criteria that were used in adjudicating the classification of the document, and the relationships between the criteria and the type of information. It almost insures a very thorough review has been made.

This is more workable for the courts in most cases. I anticipate some cases where the courts look at the classified documents in camera, and I suppose in some cases that is really the only way to get at the problem. It's disadvantageous in more instances than one.

But an ex parte in camera proceeding, even though the judge reaches a conclusion in favor of the Government—that the enforcing party will always, perhaps, have some doubt as to whether the judge came to the right conclusion. They will also have a doubt that if they could have looked at it, too, they could have convinced the judge otherwise.

So you have a real problem in that respect with the in camera proceedings.

On the other hand, if you go into the judgment of the validity of the classification by the judge, in most cases, you will have to go beyond the information in the document and provide additional classified information in order to give the judge a basis upon which to make a judgment.

This again gets you into a area of the judge's understanding of classified information. You can almost get into a school session and teaching. I think great flexibility should be allowed the courts to make the determination of what is necessary in a particular case for the court to satisfy itself that the classification was, indeed, valid and done pursuant to the criteria of the Executive order.

Ms. ABZUG. You think great flexibility should be given?

Mr. BUZHARDT. To the court, yes.

Ms. ABZUG. You only oppose the amendment then because it suggests that there be a requirement of the courts in the hearing of complaints to force the use agency records to examine the contents in camera?

Mr. BUZHARDT. Basically. I don't think that should be mandatory.

Ms. ABZUG. Do you believe that Congress is entitled to have any decisionmaking with respect to whether or not a document is classified?

Mr. BUZHARDT. I'm sorry. I didn't understand.

Ms. ABZUG. Do you think that Congress or a committee of Congress has the right to make a determination as to whether or not a document is classified properly?

Mr. BUZHARDT. No, I do not believe a committee of Congress has the legal authority to make that judgment. Congressional acts are

by the Congress as a totality under the Constitution, and if I read the cases properly, I believe the cases hold that Congress cannot delegate its lawmaking function to a committee or a group within the Congress. I believe Congress can—certainly has the authority to enact criteria for the classification of documents, to say documents will be protected, or will not be protected, because of their particular character.

Certainly, Congress has that authority. But on a particular document, and on a particular judgment, that is not a legislative function. It's an executive function.

Ms. ABZUG. You testified before to a question asked by Congressman McCloskey, that certain information would be furnished, would be made available to a committee, but not to a Member of Congress.

And I take it that behind that is some issue of whether or not the material involved is classified or relates to some important issue of national defense and so on. Is that right? Just answer that question.

Mr. BUZHARDT. Generally correct, but might I explain?

Ms. ABZUG. Yes, you may. I am struggling with a very difficult question in my mind, and that is that a Member of Congress, who is, as you know, elected by a great number of people, seems to have very much less right, according to your testimony, than a bureaucrat appointed by another bureaucrat and responsible really only to maybe one person, to determine what the nature of this material is, that a Congressman requires in connection with his legislative responsibility, or even an oversight responsibility; that he as a member of a committee might wish to propose.

I really find this a great conflict in my mind as to how this position is sustainable.

Mr. BUZHARDT. I think it is by the very character of the two branches; that one has a legislative function and one has an executive function. Might I say, that if you look at it in a different way—in the executive branch you will find people who have executive functions with respect to a relatively narrow range of Government activties, of which they have very great responsibilities and decisionmaking authorities.

On the other hand, members of the legislative branch, acting collectively, have very few limitations at all in scope of authority, except those in the Constitution. And that's the way this system of government was devised, so that you in the legislative branch do not have executive or judicial functions.

On the other hand, if you're talking about it with regards to a decision on the execution of the laws—if you are on the other hand talking about information—then the Congress does have the right, acting through the mechanism which the Congress creates, to the information on which it bases its legislative decision.

Ms. ABZUG. The Congress has a right to have information on which it can act, and nobody in the executive branch under our constitutional framework and our concept of separation of powers, has a right to say that this is an executive power; that the executive has a right to decide that a certain bit of information cannot be made available to a Member of Congress, that has to act on in order to be able to fulfill his or her function as a legislator.

I am fascinated as to your concept of executive power, and I realize the concept of executive power is a very exaggerated concept at the moment, which seems——

Mr. BUZHARDT. I don't have a very exaggerated concept of it.

Ms. ABZUG. You are suggesting that information—a member, who is a member of the executive branch of Government, can simply decide that this is simply executive ground, where it's not in anybody's realm. It's in the realm essentially of the information, or the realm of the people or Members of Congress to know, or to inform themselves to be able to act on it—on the people that they represent.

This information doesn't belong to the executive branch of Government, or a bureaucrat who decides to make it unavailable to anybody else. It's very contrary to our whole concept of Government since you mentioned the Constitution.

Mr. BUZHARDT. I think you either misunderstand me, or we're running on different tracks.

Ms. ABZUG. We seem to be doing that, that is running on different tracks.

Mr. BUZHARDT. We have no lawmaking ability in the executive branch. We must follow the laws made by the Congress and the President. We do so. We provide information to the Congress as requested through the means established by the Congress, mainly its committees.

When dealing with anyone but the Congress as an institution, we follow the laws, for instance, of the Freedom of Information Act with respect to any of it.

Ms. ABZUG. We understand that. We realize that there has been some difficulty in getting information both for the individual and for the Congress. It's a question of whether there is really any legal authority. That has to be changed.

For example, I assume that you believe that Members of Congress do not have the right to see the Pentagon papers, that clearly contain material necessary and vital to a legislative role under the Constitution. But some other people, having nothing to do with it either in executing the law or carrying out the law, were able to see it. How do you expalin that?

Mr. BUZHARDT. That's correct, too, but let me say that no one except the President has this authority to make such a determination. Nobody in the Department of Defense had that authority under his direction to make that determination. It was something that was peculiar, and had to be a Presidential decision.

Incidentally, he had not made the decision at the time the Pentagon papers were released. It was under consideration.

Ms. ABZUG. What if we wanted to find out in connection with a law that is passed concerning our involvement in the war in Cambodia, whether there are any ground troops there, and we request you to give us some information as to whether there are ground troops at such and such a place.

And the answer comes back, this is information that is necessary for the national defense.

Mr. BUZHARDT. The answer wouldn't come back that it was necessary.

Ms. ABZUG. What would be the answer?

Mr. BUZHARDT. If you asked and it was classified, it might or might not be provided to you because as an individual it would be a determination under the Freedom of Information Act.

Ms. ABZUG. I didn't get that.

Mr. BUZHARDT. If you requested as an individual, a Member of Congress, it would be a decision under the Freedom of Information Act. If it were requested by a committee, and I'm quite up to date on this, I testified all morning this morning, answering questions in the Armed Services Committee on the resolution in Cambodia, and I answered every question.

Ms. ABZUG. Now, the specific statute that provides that seven members can request information, the Government Operations Committee is supposed to get that information.

Mr. BUZHARDT. If such a statute were on the books I'd have to see it beforehand. If it were on the books, it would be a new law.

Ms. ABZUG. I am referring to a specific statute, and that statute is section 2954, title 5. Let's assume there is such a statute, and seven members of the Government Operations Committee asked for information as to whether or not there were ground troops in Cambodia.

Mr. BUZHARDT. I'd be glad to answer the question. There are none.

Ms. ABZUG. I will make a note of that.

Mr. MCCLOSKEY. Will you yield?

Ms. ABZUG. I'd be glad to yield for the moment.

Mr. MCCLOSKEY. You would consider a ground troop a man who directs air strikes from the ground, would you not?

Mr. BUZHARDT. He would not be a ground combat force, no.

Mr. MCCLOSKEY. He would not be a member of a ground troop by that definition?

Mr. BUZHARDT. No.

Mr. MCCLOSKEY. Thank you.

Ms. ABZUG. Supposing that information, using this as an illustration, were classified, and the reason these seven members asked this question is because there is a law in the House or in the Senate or in the Congress that says we should not be involved in any military activity in Cambodia.

My question is you may regard this information as classified. I am suggesting that it's necessary for us to have that information in connection with our legislative responsibility.

And where do you find your executive power greater than that of the right of Congress to know?

Mr. BUZHARDT. Let me say in answer to your question, it's in two parts; one is the provision of the information. I assume such a statute does exist, and if such a request were made by seven members, we would provide the information. If it were classified, we would provide it on a classified basis. Because of the fact that you wanted to know it would not be determinative of the issue of whether or not that information was necessary to protect in the interest of national security.

Using this specific example—whether we have ground troops in Cambodia—my own personal opinion would be that there are no grounds for classifying that answer. But on another question, a factual question, the answer might be that it might be necessary to protect the information.

If you ask where some flyer got shot down yesterday and we were conducting a search mission, it would be classified until we could get to him. It would be provided on a classified basis; and the fact that you wanted to know that information would not change the facts

of whether or not it was necessary to protect what would be provided on a classified basis.

So when we are dealing with Congress, as contrasted to when we are dealing with the general public under the Freedom of Information Act and the exemptions of classification—when we are dealing with Congress it does not enter into it. The information would be provided, if possible, on an unclassified basis. If that is not possible, it would be provided on a classified basis. And it is frequent.

Ms. ABZUG. Let me ask another question in connection with that. That is, if the information requested is classified and you are prepared to provide it as classified in that fashion, where do you interchange this question of availability, of it not being available to you because of reasons of national defense?

In your department, in your experience, do you know how that has operated; because there have been certain instances where information has been requested. At first it has been said to be classified and then unclassified. At times it has been suggested that that is not available because it is a matter of national defense.

Is there any measure at which you determine that, when something is classified or something should not be made available because it would be injurious to national defense; or is it the same thing?

Mr. BUZHARDT. It should not be classified unless its release would be potentially dangerous to the national defense, or harm the national defense in the first place. Then, as to the determination of when or where to release it, if we are dealing under the Freedom of Information Act with a request from the public, then, if the information cannot be declassified, under the authority of the law, we do not disclose it under the Freedom of Information Act exemption.

If we are dealing with the Congress, the Freedom of Information Act does not apply. None of the exemptions there provide us authority to withhold information from Congress. So the question then is providing it to the Congress, when it is classified, and providing it to them on a classified basis.

In other words, advising them that it is so classified, and the reasons therefor.

Ms. ABZUG. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Gude.

Mr. GUDE. Thank you, Mr. Chairman.

I was wondering in how many instances has the Department of Defense gone to court in the last several years in regard to security matters?

Mr. BUZHARDT. I do not know offhand, but let me see if I can find if the assistant counsel has any idea. [Pause.]

Mr. Gude, we can only recall one case where it has gone to court recently, where material was denied on the grounds of classification from the Department of Defense.

Mr. GUDE. Was this covering 3 or 4 years or just within the last year?

Mr. BUZHARDT. The last year or so.

Mr. GUDE. The caseload is not very heavy then.

Mr. BUZHARDT. Not on the grounds of classification.

Mr. GUDE. I was just wondering. In your testimony on page 16, you said that you were concerned about the establishment of a Freedom of

Information Commission because you thought it was unnecessary and likely to impose additional workloads that would not resolve the more important disagreements on proper interpretations of the law.

Mr. BUZHARDT. Perhaps I misunderstood your earlier question. I thought you had asked how many cases had gone to court where the denial had been on the basis of classification.

There have been more cases in the Department of Defense than that that have gone to court on appeal, but on other grounds.

Mr. GUDE. How many?

What is the number there?

Mr. BUZHARDT. I would have to supply it for the record. The Department of Defense at any given time is involved in about 5,000 pieces of litigation. To sort these out into different categories, I cannot do offhand.

I would guess it is about half a dozen cases in the last year.

Mr. GUDE. A half a dozen cases in the last year?

Mr. BUZHARDT. Yes.

Mr. GUDE. You honestly think that the establishment of a commission could impose an additional workload on the courts or on the Department of Defense?

Mr. BUZHARDT. I think it would impose no additional workload on the courts. It would on the agencies generally. Each one of these cases does take quite a bit of work. It is not a short time thing.

Mr. GUDE. You mean that because the citizen now has to go to court, whereas with this Commission it would probably be easier to obtain information, that this could be a hurdle?

Mr. BUZHARDT. A real problem with the Commission—I do not have any great problem with it—I think the probabilities are that it would create another bureaucracy level to go through, would create an additional workload in dealing with it; and I doubt sincerely if it would result in substantially fewer cases for the courts, or in greater information released to the public.

Mr. GUDE. With the chairman's permission, I wish we could have the information on the number of cases since 1968, on a yearly basis, in order to determine how substantial the number of cases are.

Mr. BUZHARDT. I would be glad to provide that. As I noted earlier in my testimony, I use that to an extent to gage how well we are doing. And the fact that we do not have a greater number of cases, and the fact that we have a very good win-loss record—I do not recall one that we have lost—tells me that we are doing a pretty fair job.

[The following statement was submitted for the record:]

Since July 4, 1967, there have been 31 cases involving the Department of Defense. Of these, three have concerned records of the Office of the Secretary of Defense for Army records, 10 Navy records, and 14 Air Force records. We do not have available yearly breakdowns for these cases.

Mr. GUDE. I would hope that would be the case, and that you need not look at the establishment of a freedom of information commission as some type of adversary that would be harassing you, but actually would probably assist in clarifying the lines as far as information that should be made available, and information that should be retained.

I would just like to comment on the gentlewoman from New York's interrogation regarding the availability of information. You testified last year regarding weather modification in Vietnam.

Both Senator Cranston and I asked for this information repeatedly and were denied it as individual Members of Congress. We had quite a dialog about this. Then, Senator Pell of Rhode Island, who is the chairman of the Subcommittee on Oceans and International Environment, also asked for information about weather modification; and it was denied to him.

And I think the rationale of the Department at that time was that this information should only be given to the committee of primary responsibility. The question of weather modification is one of the most sensitive things in the scientific field. In its concern with this area, the scientists in this country, the meteorologists and environmentalists and scientists that are very knowledgeable in this area around the world, are very concerned about the developments in this area. And yet, this information was denied to Senator Pell; and he certainly was entitled to it in my opinion as were Senator Cranston and myself. And we continue to be entitled to it.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Gude.

Mr. McCloskey, do you have further questions?

Mr. MCCLOSKEY. I just have one or two, Mr. Chairman, if I may. That term "Committee of primary responsibility" appears in your letter of May, Mr. Buzhardt.

Mr. BUZHARDT. It possibly does.

Mr. MCCLOSKEY. You would consider this Subcommittee on Foreign Operations and Government Information to be the committee of primary responsibility on learning how Mr. Friedheim's operation runs, would you not? Or would you place that under Armed Services?

Mr. BUZHARDT. I would consider both would have a very direct interest—the Armed Services Committee, obviously, in the entire operation of the Department; this committee, and the Appropriation Committee, also this committee with respect to Mr. Friedheim's particular types of activities, as a part of the Department of Defense.

Mr. MCCLOSKEY. I do not mean to belabor this point, but I want to clarify this point. Your previous answer to me was explicit, that if a committee of jurisdiction asks for information, you would furnish it.

You do not mean to imply that this would be only to the committee of primary responsibility?

Mr. BUZHARDT. No, sir.

Mr. MCCLOSKEY. The other thing that I wanted to ask Mr. Friedheim refers to an answer that was given to the gentlewoman from New York.

We had some problem with the statement that the President made back on March 7, 1970, Mr. Friedheim, where he said no ground troops stationed in Laos were in combat operations, and then we had a Library of Congress report 3 months later that some Special Forces teams had suffered casualties. You may recall that situation.

Do you consider Special Forces teams as ground combat forces?

Mr. BUZHARDT. I do not.

Mr. MCCLOSKEY. Mr. Friedheim, would you comment on this?

Mr. FRIEDHEIM. I do not recall the specific instance. There were at the time that the President made that statement no U.S. ground combat troops in Laos. There are still none.

Mr. MCCLOSKEY. There were Special Forces teams that suffered casualties at the time he made that statement, were there not?

Mr. FRIEDHEIM. At the time that he made that statement, we do go back and point out that there had been some casualties prior to that time, most of them under the previous administration.

Mr. MCCLOSKEY. Of ground combat troops, is that not correct?

Mr. FRIEDHEIM. That is correct. As I recall, we did discuss that. Mr. Ziegler discussed that at some length at a White House briefing.

Mr. MCCLOSKEY. It was later conceded that the President's statement had been in error.

Mr. FRIEDHEIM. I do not recall that, Mr. McCloskey.

Mr. MCCLOSKEY. I want to make sure I understand this answer. The statement that there ware no ground combat troops in Cambodia includes the fact that there are no Special Forces teams in Cambodia.

Mr. BUZHARDT. There are no special forces teams in Cambodia. If you are interested in that specific question, I suggest you read the House Armed Services transcript from this morning. There we detail by grade and duty every American military man in Cambodia, and some of the diplomatic ones, too.

Mr. MCCLOSKEY. Thank you. One further question.

Mr. BUZHARDT. That was an open session, I might say.

Mr. MCCLOSKEY. I appreciate your candid and forthright testimony this afternoon. I want to relate to you a circumstance that occurred and ask how this fits up in your testimony.

In 1971 when we asked for the photographs of the villages in Laos, they were ultimately furnished to a committee of the Armed Services meeting in executive session. I was asked to sit in on that committee session, either late September or October 1971.

When the Air Force officers completed their briefings on the bombing practices that were then taking place in Laos, the question was raised whether we might see the photographs of the villages that we had requested, some 196 villages. The response of the Air Force officer to the chairman and to members of the committee present was that the photographs were so sensitive that he would hand the photographs in a sealed envelope to the chairman, and leave it up to the chairman as to which members of his committee might thereafter be permitted to see the photographs.

That does not seem to fit into any of the categories you have mentioned.

Mr. BUZHARDT. If I understand the rules of most committees, the chairman's actions are governed by the votes of the committee. I think the committee could have made a motion when it was delivered officially to the chairman.

We are at somewhat of a disadvantage. At many times we do have information upon which people's lives depend. This does concern us. Sometimes it may overconcern us. But it is hard to imagine—I am sure that he was being very solicitous of the protection of individuals in that case.

Mr. MCCLOSKEY. Here is my question, Mr. Buzhardt. Is there a third category, in addition to requests from committees for information, where you would furnish it without hesitation; and requests from individuals, where you might or might not furnish it, depending on a case by case determination, is there a third category where at the request of a committee, you would furnish the information, but only to the chairman of the committee?

Mr. BUZHARDT. No, sir. Now, we would deliver to the chairman, as the representative of the committee. That is the normal practice. How it is handled in the committee after that is not our determination.

Mr. MCCLOSKEY. The reason I asked the question is that here was a case where there were perhaps 20 committee members present; and the colonel who had the photographs in his possession was obviously prepared to deliver them to the chairman, but was not prepared to make them available to the other 20 Members of the Congress that were present, even though this was an executive session.

I take it from your answer that there is no directive or——

Mr. BUZHARDT. No. There is not. Let me imagine a case of that type. It could happen, as a very practical matter, if we had something extremely sensitive. It is even conceivable to me that we would ask that chairman to elicit from his committee—we would make the request whether or not they would not be willing to establish among themselves special rules for the protection of the information in their group, if it were that sensitive.

Mr. MCCLOSKEY. Mr. Buzhardt, may I ask you, did your office participate in the preparation of the bills now before the Judiciary Committee in the House and Senate, tightening up the criminal laws relating to the release of classified information?

I have particular reference to the sections which would make it a crime to disclose classified information, and remove any defense if the matter was improperly classified.

Mr. BUZHARDT. We participated in drafts, as I recall. We did comment in draft about 2 years ago when there was a draft revision of the code. We commented on that. We commented on the Justice Department draft, to the best of my recollection. I do not remember what our specific comments were section by section.

Mr. MCCLOSKEY. The nature of your testimony indicates that the Defense Department has fears that one Congressman might release information of a sensitive nature, but another one might not. Clearly, you have no concern about the chairman of the Armed Services Committee, but you might have concern about members of his committee releasing information.

I would like to ask, in view of the fact that you have participated in the preparation of legislation to control the dissemination of information and that this legislation has been presented to the Judiciary Committee, that in effect would make it a crime for an individual Congressman to receive information that was unauthorized: why is there a defense in here, if it is delivered to a committee of the Congress, but no defense if it is delivered to an individual Member of Congress? Your office participated in the preparation of this legislation. I wonder if you might, with the staff available to you, give us the precise statutory suggestion that we might enact into law if we saw fit, which would protect the Defense Department by eliciting from Congress requirements on our part that we treat it as classified information.

All of us are accustomed to receiving secret, top secret, and confidential information. We try to treat it, I think, on the same basis that you do.

But if your concern is that individual Members of Congress might not be trustworthy—and there have been enough examples of Mem-

bers of Congress going to jail lately that I think you have a right to have that concern.

Could you give us the statutory recommendation or a recommendation for our own rules to apply when we receive classified information from you?

Mr. BUZHARDT. I would be glad to attempt to at least try.

[The following statement was submitted:]

I do not believe that the enactment of a specific statute to meet the problem you have addressed is the answer. Instead, I believe that the Congress has authority under its own rules to establish the conditions under which classified information will be safeguarded, and under which Congressional Committees may authorize access to that information. An example of this may be found in the "Rules Governing Procedure," Committee on Armed Services, Ninety-Third Congress, and to the "Organization Meeting" of that Committee, February 27, 1973 [H.A.S.C. No. 93-3].

Mr. MCCLOSKEY. I am disturbed about this proposed criminal law to make it a crime for an individual to give classified information to a Member of Congress. If we have gone that far under our system of government where somebody, telling a Member of Congress truthful information, is susceptible of being guilty of a crime, we are in real trouble.

Thank you.

Mr. MOORHEAD. Mr. Phillips.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Would it be appropriate to include in the record, mentioned during the colloquy between Ms. Abzug and Mr. Buzhardt, the text of section 2954 in title 5?

Mr. MOORHEAD. That would be appropriate. Without objection, it is so ordered.

[The text follows:]

§ 2954. INFORMATION TO COMMITTEES OF CONGRESS ON REQUEST

An Executive agency, on request of the Committee on Government Operations of the House of Representatives, or of any seven members thereof, or on request of the Committee on Government Operations of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 413.

HISTORICAL AND REVISION NOTES

REVISORS' NOTES

Derivation: United States Code, 5 U.S.C. 105a

Explanatory Notes

The words "Executive agency" are substituted for "executive department and independent establishment" in view of the definition of "Executive agency" in section 105.

The words "Committee on Government Operations of the House of Representatives" are substituted for "Committee on Expenditures in the Executive Departments of the House of Representatives" on authority of H.Res. 647 of the 82d Congress, adopted July 3, 1952.

Revised Statutes and Statutes at Large

May 29, 1928, ch. 901, § 2, 45 Stat. 906.

The words "Committee on Government Operations of the Senate" are substituted for "Committee on Expenditures in the Executive Departments of the Senate" on authority of S.Res. 280 of the 82d Congress, adopted Mar. 3, 1952.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

Mr. BUZHARDT. I might say in that connection I never doubted there was such a statute that existed. I never had a request from seven members under that particular statute.

Mr. MOORHEAD. I do not think Ms. Abzug took that interpretation.

Mr. PHILLIPS. In June of 1971, seven members of this subcommittee signed such a request addressed to Secretary Laird for a set of the "Pentagon Papers." That request was not acted upon, because a complete set was subsequently delivered to the Speaker of the House and deposited in the Armed Services Committee.

So that request was never acted upon, but a formal request was made at that time, citing section 2954; perhaps someone else handled it.

Mr. BUZHARDT. Somehow it must have gotten lost in the rather tumultuous events of that period.

Mr. PHILLIPS. In response to a subcommittee request for comments on the Freedom of Information Act report that was adopted by the committee last September (H. Rept. 92-1419), you responded, Mr. Buzhardt, in a letter dated November 9, 1972. You said that you would ask the Assistant Secretary of Defense on Public Affairs for advice, on "whether additional participation in Freedom of Information Act decisions by Public Information officers would be practical and useful."

Since Mr. Friedheim is now sitting there with you, could you tell the subcommittee whether or not you asked him for such advice?

Mr. BUZHARDT. Yes. I did. We discussed it at length on the methods of handling Freedom of Information Act requests, and how to get as useful an input from Public Information officers as possible.

In our own case, we have consulted with him, and in a few cases it has reached the Office of the Secretary of Defense. He has taken the position of suggesting more participation throughout the services by the Public Information officers in this activity.

And naturally, when these requests come in, they almost have to be forwarded to the people that have the records in their custody. This is the initial hangup. The biggest delay in providing information to people who request it is finding the records.

We talk about the few exceptional cases where perhaps the information cannot be furnished, or some borderline case that has to be considered carefully. But the biggest problem is not that at all. The problem is a mechanical one of getting the request to the person that knows where to find whatever it is that is requested, and getting the information, and then producing it so it can be evaluated.

I would say that a majority of requests for information—those that are cited under the Freedom of Information Act—comes through Public Information and Public Affairs officers of the Department. Those are the persons from whom the contact comes. That is where the media goes. That is where most of the requests originate. And they come in through those Public Affairs officers in the initial instance. Then they have to be sent to the people that handle the substantive records for location, and finding the information.

Mr. PHILLIPS. With regard to the advice that Mr. Friedheim furnished, has that been incorporated in your new information directive that was issued a few months ago?

Mr. BUZHARDT. I think it was in the old and the new one. I think it is in both.

Mr. PHILLIPS. Then it was not any new advice? It was just a restatement of previous operating rules?

Mr. BUZHARDT. That is right. The Public Affairs Office should be consulted to the maximum extent feasible. And our discussions, I think, relate more to the mechanics of how these officers might be more useful, than on whether there is a policy matter in which they should become involved in.

Another problem is how to best involve them mechanically.

Mr. PHILLIPS. On page 4 of your statement, in discussing the proposed revision of exemption (b) (7) dealing with law enforcement records and files, you say that "you frankly do not know what supposed abuse under the present language of this 7th exemption that this limitation is intended to remedy."

I would call your attention to pages 23 through 28 of House Report 92–1419, in which we enumerate six or eight specific cases that do involve law enforcement activities in a number of different departments and agencies of Government, which are a handful of many such cases that have come to the attention of the subcommittee, and which we explored at some length during our hearings last year.

So that we believe that the evidence uncovered during those investigatory hearings clearly makes a case for a strengthening of language of (b) (7).

I do not know whether you had a chance to look at any of those cases. They do not involve the Department of Defense that I know of, at least the ones that are in the report.

Mr. BUZHARDT. Frankly, I did not recognize these as investigatory records, quite frankly. I really did not perceive them as being of that character. They are not really what we think of as investigations.

Mr. PHILLIPS. There are other cases that have been called to our attention involving the Department of Defense that we did not explore in our hearings last year.

On page 10 you discuss the affidavit approach to the courts in cases involving classified information. Of course, our subcommittee has spent many years investigating the operation of the Executive order classification system. You were one of our witnesses last year, of course.

Any affidavit that states the validity of a particular classification to a court is, of course, predicated on some credibility in the system. Frankly, the overwhelming evidence that we have obtained in our hearings indicates that most, if not all, of the vast majority of documents that are classified are overclassified. So I do not see how any court could put any great weight on an affidavit from a self-serving bureaucrat that classified the information merely stating that it is classified properly.

What would we expect him to say? That it was not classified properly?

Mr. BUZHARDT. I think quite frankly that they deserve more credibility than your assessment of the classification system. I do not think it is that bad.

We do have abuses in the classification system. We have humans administering it. None of us are perfect. We certainly have differences of judgment. But overclassification is no longer that rampant.

As far as credibility is concerned, I never felt my credibility was in question when I made an affidavit to court, as an officer of the court. To the best of my knowledge, I did not know any court that questioned my credibility. The facts have to speak for themselves. And if the facts are inaccurate, the forms that the court requires for the affidavit and the amount of information they require, would usually reveal the lack of credibility of the statement. They do not act on just an assertion. The affidavits do not contain an assertion on classification. They go into some detail.

Mr. PHILLIPS. It is a little disturbing when we hear a witness testify at the Pentagon Papers trial just a few days ago—the gentleman who classified the Pentagon Papers as "Top Secret-Sensitive"—that his training for classification authority consisted of a training film in which he was warned to be aware of "over-friendly Russian blondes."

We do not think that that gives too much credibility to the system. Besides, we have sworn testimony before this committee by experts, who have handled classified information all their lives, that anywhere from 90 to 99½ percent of the documents that they have come in contact with were not really necessary to be classified at all.

Mr. BUZHARDT. I question the qualifications of your witnesses if they so testified. I see quite a few classified documents. On occasion I see some of them that are overclassified. I see some that are classified improperly. At the same time, it is not a substantial portion of the documents that I see by any means.

I think that you have some people who might work in the security system, who think that they are administering the regulations, who probably do not know enough to know whether they are or they are not properly classified; and they are making judgments they are really not qualified to make.

Mr. PHILLIPS. Is that not one of the basic reasons for the failure of the Executive Order 10501? Is that not why President Nixon replaced it with a new order last year?

Mr. BUZHARDT. The basic reason was to try to improve its operation. Yes. That there is always room for improvement; even under the new Executive order we are constantly trying to find ways to better administer the system so we can improve it.

As I say, I do see documents improperly classified from time to time. Because I have worked on the Executive order and had responsibilities in this area, perhaps I am peculiarly conscious of these things.

Mr. PHILLIPS. When you see such a misclassification, what action do you take?

Mr. BUZHARDT. I recall a number of them when they have been sent to me for coordination, writing on the bottom and sending them back refusing coordination, and asking what is the authority for so classifying this document.

Mr. PHILLIPS. Then he reviews it, the classification marking?

Mr. BUZHARDT. And I will say come back to me and tell me the reasons why the document is so classified.

Mr. PHILLIPS. I wish there were more people over there doing this type of thing.

Mr. BUZHARDT. I believe there are many people doing this kind of thing.

Mr. PHILLIPS. One additional question, Mr. Chairman.

Mr. Friedheim, does your office or any other office in the Pentagon produce "canned" articles or "canned" editorials for use in newspapers around the country to support the Pentagon's point of view?

Mr. FRIEDHEIM. No, sir.

Mr. PHILLIPS. You do not?

Mr. FRIEDHEIM. No, sir.

Mr. PHILLIPS. The reason I asked, I saw an editorial recently in a Joplin, Mo., newspaper attacking the chairman of this subcommittee for his criticism of the abuses of executive privilege by the President and it occurred to me that you had once worked as a reporter for a Joplin, Mo., newspaper. I just wondered if there was any connection?

Mr. FRIEDHEIM. I once wrote editorials for that newspaper. I did not write that one, sir.

Mr. PHILLIPS. Thank you.

Mr. MCCLOSKEY [presiding]. Any other questions?

Mr. KRONFELD. Would the Department of Defense oppose a provision in this legislation which did not make in camera review mandatory, but would leave it up to the court—as a matter of discretion.

Mr. BUZHARDT. Speaking personally—and I really have not researched the question thoroughly—I do not think I would. I think the court now, under the present law, does on occasion actually view classified documents in camera. They are in camera when they examine them.

So I think you do not need a change in the law if that is your objective. I do not think there is any need for it, because I think the court exercises that power in some cases now.

I believe that they do not have to in every case. They are not mandated to do that. I do not consider it necessary.

Mr. KRONFELD. It is my interpretation of *EPA* v. *Mink* that under the present language in the Freedom of Information Act the courts are prohibited from going into the body of the documents and examining it under section (b) (1) of the act. That is what I think the amendment in 5425 is trying to reach, not that the courts have to in every case, but they would be given the option if they so wished.

Mr. BUZHARDT. Perhaps that was the situation before *Mink*.

Mr. KRONFELD. So there would be no objection to the language that would insure that the courts would have the option of going into the body of the document enacted under subsection (b) (1)?

Mr. BUZHARDT. I do not perceive any presently. I think the courts will still use their best judgment. I think that is very much a matter of last resort in the more complicated cases.

Mr. KRONFELD. Thank you.

Mr. MCCLOSKEY. If there are no further questions, the committee will be adjourned until the next session of these hearings on Thursday, May 10, at 10 a.m. in this room, to hear public witnesses on information amendments to the Freedom of Information Act.

Thank you.

[Whereupon, at 4:15 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, May 10, 1973.]

THE FREEDOM OF INFORMATION ACT

THURSDAY, MAY 10, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:15 a.m., in room 2154, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, Paul N. McCloskey, Jr., Gilbert Gude, and Ralph S. Regula.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

On this fourth day of hearings on amendments to the freedom of information law which, many of us hope, will make it a more effective freedom of the press law, we will hear testimony from some of the organizations of the press which share a part of the credit for creating the original law. And we will hear from representatives of the other groups which worked on the original legislation or have studied the administrative problems posed by the law.

Over the years, various representatives of Sigma Delta Chi—the national professional journalism association—have worked with this subcommittee to help solve the problems of Government secrecy. Today, Courtney R. Sheldon of the Christian Science Monitor, chairman of the SDX Freedom of Information Committee, will testify on the amendments which have been introduced to make the Freedom of Information law a more effective tool for the press to dig out Government information.

We will also hear testimony from two representatives of the National Newspaper Association, an organization which has been involved in the fight against Government secrecy ever since it began. Mr. E. W. Lampson, president of the Ohio Newspaper Association, will represent the National Newspaper Association, along with Ted Serrill, executive vice president of the NNA, who has been one of the longest and strongest supporters of this subcommittee's work.

John Shattuck, staff counsel of the American Civil Liberties Union, will testify later on the legislation, as will Antonin Scalia, chairman of the Administrative Conference of the United States.

I now yield to my colleague, Mr. Regula, who may want to welcome one or more witnesses because of previous acquaintance with them.

Mr. REGULA. Thank you, Mr. Chairman.

On behalf of the minority party, of which through some quirk of fate I got to be ranking today, and that is an unusual thing for a freshman, I am pleased to welcome all of the witnesses, but especially Ab Lampson from Ohio. Ab and I served 8 years in the Ohio General Assembly together, and he had a number of years before I got there. How many did you have as a total, Ab?

Mr. LAMPSON. Ten.

Mr. REGULA. Ten years in the general assembly.

Mr. MOORHEAD. Won't you gentlemen come forward to the witness table? Why don't you all come forward.

Mr. REGULA. Ab I am sure can bring to us some excellent help and guidance on this proposed legislation for the reason that he had a very distinguished career in the Ohio Legislature. He was chairman of the ways and means committee which, of course, we recognize is one of the vital responsibilities in the legislative process. And we could use some of your expertise here, Ab, on not only freedom of information but on how to provide the necessary funds. I know that you labored through an income tax law in the State of Ohio just recently, and bear the scars to prove it. But, Ab, I am very pleased that you are here.

I might say, Mr. Chairman, I have a radio taping at 10:30, so if I have to leave, it is not out of any lack of respect for our witnesses. We are all so happy to see Mrs. Lampson here and hope that she is enjoying the city. Ab can relax because she is here and not down at Garfinkel's. But, we are especially pleased, and I am particularly, that my colleague from Ohio is going to appear before our committee.

Mr. LAMPSON. Thank you.

Mr. MOORHEAD. Mr. Sheldon, you are first on the list, but maybe in view of this relationship you would yield to Mr. Lampson. Would that be all right with you, sir?

Mr. SHELDON. It certainly would.

Mr. MOORHEAD. That would give Mr. Regula a chance to pose questions to his former colleague.

Mr. REGULA. Thank you, Mr. Chairman.

Mr. MOORHEAD. It would be a rare turnabout really.

Would you proceed, Mr. Lampson?

STATEMENT OF E. W. LAMPSON, PRESIDENT, OHIO NEWSPAPER ASSOCIATION; ACCOMPANIED BY TED SERRILL, EXECUTIVE VICE PRESIDENT, NATIONAL NEWSPAPER ASSOCIATION

Mr. LAMPSON. Thank you, Mr. Chairman and members of the committee.

For the purpose of the record, I am E. W. Lampson, publisher of the Jefferson, Ohio, Gazette and president of the Ohio Newspaper Association, an organization representing 96 Ohio daily newspapers and 261 nondaily papers from the largest in the State to the smallest. I am also an affiliate member of the National Newspaper Association. As has been stated by the chairman, with me today is Theodore A.

Serrill, executive vice president of the National Newspaper Association.

The association has prepared a formal statement which I will ask you to enter into the record of the proceedings. I will not read the association's statement, but I do have a few remarks of my own which I would like to present at this time.

Mr. MOORHEAD. Without objection, the full statement will be made a part of the record.

Mr. LAMPSON. Thank you.

[The document referred to follows:]

STATEMENT OF NATIONAL NEWSPAPER ASSOCIATION

INTRODUCTION

The National Newspaper Association, as I am sure you are aware, is the official representative for our nation's approximately 8,500 community newspapers. These are the 7,500 weekly and 1,000 smaller city daily newspapers of our country whose major purpose is to provide local news and information to the communities they serve.

We are indeed honored to be a part of this prestigious panel which is composed mainly of our colleagues from the big city newspapers and from the broadcasting field.

BACKGROUND

In March 1963, this Association informed this same Subcommittee that it was no "Johnny-come-lately" to the fight for freedom of information. Long before the Cold War era we said, NNA (which then was NEA, the National Editorial Association) had been active in defending the precepts of the First Amendment.

This Subcommittee should should know that the idea for the creation of the Freedom of Information Center at the University of Missouri, which maintains a continuing record of instances of censorships, suppressions, and manipulation of information and assists the Press in overcoming such instances, first emerged at a 1957 meeting of the then NEA. NNA continues to support the Freedom of Information Center, both in spirit and with financial contributions.

NNA has appeared before this Subcommittee in the past and has supported and publicized its activities since its inception.

This Association was involved directly in this Subcommittee's efforts to enact the present FOI law. As you realize, that law is the result of a compromise, as is all good legislation. We would even call the present law an experiment, to answer the question of whether such a concept could be made to work at the Federal level. Government officials warned against its enactment, predicting all sorts of dire consequences should it become law, arguments which they have recently repeated to you in trying to prevent amendments to improve the Act's effectiveness.

In spite of these contentions, it was discovered that the experiment worked—that it is feasible, indeed desirable, to make information possessed by the government available to the public. The fears expressed by government officials simply have not been realized.

What we have discovered, however, is that the law is not as effective or useful as it ought to be, and it is that problem to which we now address ourselves.

It is at the local level where NNA's constituency, the home town press, is the sole defender of the right to know. Policies of the Federal government toward access to governmental information however, are becoming more and more of a problem to this segment of the news media because of the tremendous growth of the Federal government in recent years. This has led to the establishment of branch and regional Federal offices in nearly all of the three thousand-plus counties of our nation.

What happens in Washington today becomes immediately important to local communities everywhere.

The Federal government's information policies are important not only with respect to actual access to information held by the Federal government, but also

by way of educating state and local government officials as to the importance of making public information and public records available to the citizens served by those officials.

FREEDOM OF INFORMATION GOALS

The 21st Report of the Committee on Government Operations on the Administration of the Freedom of Information Act says "Our concern in this Report and those which will follow is the protection, preservation and enlargement of the American people's 'right to know' ".

Former Attorney General Ramsey Clark stated in his memorandum on the implementation of the FOI Act in 1967, "Nothing so diminishes democracy as secrecy".

Mr. Clark continued ". . . this statute imposes on the Executive Branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the Act".

As this Committee has learned, those high goals have not been lived up to by those charged with administering this law in the various agencies and departments of the Federal government. Its Report lists several areas where the law has proved to be deficient.

MAJOR FOI PROBLEMS OF COMMUNITY NEWSPAPERS

This Association, because of the type of newspapers which it represents, is principally concerned with four of these problem areas:

1. The bureaucratic delay in responding to individual requests for information. This Committee's 1972 investigation revealed that major Federal agencies took an average of 33 days for initial responses and when acting on appeals from a decision to deny information, major agencies took an average of 50 additional days.

We believe that amendments to require a preliminary determination as to compliance with an information request within ten days are most reasonable, and if anything, should be reduced.

2. We are concerned about the abuses in fee schedules set by some agencies for searching and copying requested documents. Some agencies have initiated excessive charges for such services as an effective tool denying information.

While the fees charged by many agencies have been modified in recent months, largely due to this Committee's oversight function, some remain unreasonably high. While such fees will not bankrupt a community newspaper, at least in most instances, we do not believe that there is a sufficient reason for inordinately high fees for copying and searching for government records.

3. The cumbersome and costly legal remedy provided by the Act in cases where information is denied is a particular concern. The time involved, the investment of a great deal of money in attorney fees and court costs and the advantages which inure to the government in such cases make litigation highly undesirable for the members of this Association in particular and render the Act less than useful.

4. Many problems are connected with the necessity of requesting an "identifiable record". Many agencies have used the requirement as one means of denying information to the public. In most cases, reporters working on a story do not have an identifiable record, but rather have information from sources which lead them to believe that such records are in the government's possession and a reporter simply needs a reasonable means of obtaining access to them. This requirement must be modified if the Act is ever going to prove to be truly effective.

As you know, the news media has been criticized for failing to utilize the Freedom of Information Act to its fullest extent. The items cited in the above paragraphs are but a few of the reasons for this lack of utilization and are the principle reasons why the community press has not used the Act as much as is desirable.

An overriding factor in the failure of our segment of the Press to use the existing Act is the expense connected with litigating FOI matters in the courts once an agency has decided against making information available. This is probably the most undermining aspect of the existing law and severely limits the use of the FOI Act by all media, but especially smaller sized newspapers. The financial expense involved, coupled with the inherent delay in obtaining the information,

means that very few community newspapers are ever going to be able to make use of the Act unless changes are initiated by this Committee.

A community newspaper generally operates but with a small staff and the staff which is available simply does not have the time to devote to hassling with a government agency over the availability of what should ordinarily be easily accessible government records and information.

ACCESS TO GOVERNMENT INFORMATION ALWAYS AN ISSUE

In recent months, the Press, particularly our colleagues in the metropolitan newspapers, have been subjected to criticism for stories concerning unethical election campaign practices. These stories ranged all the way from illegal fund raising activities to illegal disbursements of campaign funds to charges of illegal spying activities as well as attempts to cover up all of these activities. As a result, there has been a great tendency on the part of this Administration to close many channels of information to the Press. Such a trait, regretfully, is not an exclusive property of this current Administration.

As James C. Haggerty, former press secretary to President Eisenhower, told this Subcommittee on the opening day of its hearings last year,

> Availability of government information "has been a fairly constant issue, in varying degrees, between government, the news media and the citizens of our nation almost since our founding days. From time to time in our country's history it has resulted in public distrust of the credibility of government. It has also raised questions as to the responsibility and integrity of a free press. It has never been definitively solved and I am not sure it ever can be".

While it may be true that no definitive solution can be written in terms of legislation, the mere fact that this Subcommittee expresses continuing interest in the subject gives a great deal of evidence for hope for the future, and much encouragement to our members.

NNA SUPPORTS LEGISLATIVE EFFORTS

The National Newspaper Association endorses the efforts of this Subcommittee to write new legislation in this field to alleviate the problems which we have emphasized in this statement and problems which others have brought to your attention. This Subcommittee will have our Association's full cooperation in efforts towards enacting the legislation which is the subject of these hearings.

We have reviewed the 21st Report of the Committee submitted to the Speaker on September 20, 1972. In our opinion, the Report and its legislative recommendations should be acted on by Congress with all reasonable speed. I assure you, Mr. Chairman, that the National Newspaper Association and its members in every part of the country will be carefully watching the progress of this legislation and that we will be doing all within our power to move the legislation along.

Thank you for providing our segment of the news media with an opportunity of participating in these discussions.

Mr. LAMPSON. And I, of course, will be happy to answer any questions.

There was never a time in the history of the Republic than at this present time that we should have an effective and responsive Freedom of Information Act. Updating the 1967 act to that end is both timely and a genuine need, if the people's confidence in government is to be restored and accelerated and the people's right to know be more than an empty slogan. In addition to my many years of employment as a reporter, editor, and publisher, I also had the privilege of serving for 10 years as a member of the Ohio House of Representatives, the last four of which I was chairman of the House Ways and Means Committee. So, I have a limited knowledge of the task now before this committee in assembling all possible information before acting upon any given piece of legislation or amending existing statutes.

If I may for a moment shift from the Federal to the State scene, during the past 10 years two important pieces of legislation were

enacted by the Ohio General Assembly to improve the people's right to know about their government and what their elected representatives were doing. The first provides that all meetings of any board or commission, agency, or authority, and all meetings of any board, commission, agency, or authority of any county, township, municipal corporation, school district, or other public subdivision are declared to be public meetings, open to the public at all times. No resolution rule, regulation, or formal action of any kind shall be adopted at any executive session of any board, commission, or agency.

May I further add that there is presently before the Ohio House a proposed amendment to further limit executive sessions.

Another section of the Ohio revised code deals with the availability of public records. This section reads in part:

> As used in this section, public record means any record required to be kept by any governmental unit, including but not limited to State, county, city, village, township and school district units, except records pertaining to physical or psychiatric examination, adoptions, probation and parole proceedings and records, the release of which is prohibited by State and Federal law. All records shall be open at all reasonable times for inspection upon request. A person responsible for public records shall make copies available at cost within a reasonable time.

At the State level these statutes have proven most effective in establishing more open government and protecting the people's right to know. But, in this area of expanding Federal bureaucracy, extending into nearly every city and hamlet, State statutes are not enough. We must have an effective and workable Freedom of Information Act at the Federal level.

The proposed amendments in H.R. 5425, 4960, and 6792, I believe, will go a long way in improving the workability of the present Freedom of Information Act.

From the record I find that the news media have not taken full advantage of the law. There may be a number of reasons, but one is the element of time. News is only news when it is happening. A reporter cannot adjourn his story to some future date at the convenience of some Federal agency. The proposed admendments in this direction will be most helpful.

It might further expedite the problem if the Congress could define more closely and precisely what is and what is not privileged material in such a way that the responsible parties in Government bureaus or agencies could not hide behind generality. I noted in the remarks of the Honorable Bella Abzug in commenting on the Freedom of Information Act that there are more than 6,000 full-time Federal Government employees involved in public relations and information work. So, providing request information should not overburden the bureaus.

As an editor, I have found that these Government pronouncements are all too often couched in such cumbersome and lengthy language that it is next to impossible to understand them. Many years ago I had a journalism professor who said that a good reporter should be able to write the story of the creation in a single column. I only wish that some of these 6,000 public relations people might have been in one of his classes.

Mr. Chairman, I want to thank you and the members of the committee for permitting me to appear before you at this hearing. And

with the basic foundation of the present act, I am confident that this committee will ably resolve the problems in providing a more workable and effective Freedom of Information Act.

Thank you, Mr. Chairman.

Mr. MOORHEAD. With your permission, Paul, I would like to yield out of order to Mr. Regula.

Mr. MCCLOSKEY. Certainly.

Mr. MOORHEAD. Mr. Regula, do you have any comments or questions?

Mr. REGULA. Yes, Thank you, Mr. Chairman. Just one. I think Mr. Lampson introduced an interesting dimension into the record here in terms of the objectives of this legislation in stating that the Federal Government has many agencies in local communities. In contemplating this legislation we think in terms of providing access to information in the city of Washington, and yet I would guess that the group you represent are really interested from the standpoint of Federal agencies in the communities scattered around the country. As we propose to decentralize Government this will become even more important. My question would be, in your experience do you find any problem in getting access to information that you would like from agencies of the Federal Government that are located in the local communities, and in our instance such as Cleveland, or even perhaps right down in the county in which you serve?

Mr. LAMPSON. Congressman Regula, I cannot cite any specific examples. However, I can say that frequently in the smaller communities of the newspapers which I represent, one of the difficulties is that the people, the staff people in the particular bureaus are not knowledgeable as to the information that we might desire, so that if through this legislation, if the heads of these agencies and bureaus extended to their field people some authority and some knowledge of what is and what is not to be released, I am sure it would expedite the problems of the smaller community newspaper people.

Mr. REGULA. Mr. Lampson——

Mr. SERRILL. Congressman, may I add a point to what Mr. Lampson said? I have not been active in this particular area for the last couple of years, but the last two instances in which our association has asked me to intercede in their behalf were involved with the Agriculture Department. An agency of the Agriculture Department refused to divulge information in some community in New York State about the financing and development of a country club. We did not know whether they were involved in it at the time, but they were, and they had some legislation that permitted them to support that concept. And in another instance the release of information by a bureau of the Agriculture Department with respect to the subsidies for farmers in western Pennsylvania. In each instance it was a refusal of the local representative of the Department of Agriculture that brought the case back to Washington.

Mr. REGULA. You are saying that it is important that this act extend to all levels of the Federal Government, including any local agencies, in insuring access to information they have?

Mr. LAMPSON. That is correct, Mr. Regula. I think it is quite important, and as Mr. Serrill was talking I do recall an incident that we did have in our own community relative to the release of the Federal

Government concerning the Department of Agriculture, release of figures of the payments of over a certain figure to the individual farmers. And we had great difficulty in attempting to find out specifically farmer A and farmer B and farmer C, what their payments were, although we knew that they were in excess of this minimum figure that they had announced.

Mr. REGULA. Thank you.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you.

The subcommittee would now like to hear from Mr. Courtney R. Sheldon, chairman of the Freedom of Information Committee, Sigma Delta Chi.

Mr. Sheldon?

STATEMENT OF COURTNEY R. SHELDON, CHAIRMAN, FREEDOM OF INFORMATION COMMITTEE, SIGMA DELTA CHI

Mr. SHELDON. Mr. Chairman and members of the committee, there is no question from the standpoint of the public's right to know that the changes you are now considering in the Freedom of Information Act are in the public interest. There is still too much delay and obstruction in the making available to the public information they are entitled to.

We journalists have been negligent in not using the FOI Act to a maximum, sometimes because the procedures could become drawn out and our deadlines are very immediate. But, those who have used it testify to its necessity. We support your efforts to improve the act.

We note the objections that some Government officials are now making to the proposed changes, but getting information to the people about their own Government is more important than saving some time of officials and saving money here and there. Speaking generally, the White House has, for the last 4½ years, severely restricted the flow of news to the public. If it had not ignored the questions of newsmen, and the President had held regular press conferences to set an example for open Government, the country might not today be wallowing in the Watergate scandal. Those close to the President's office have adopted the President's style of secrecy and the aggressive use of White House power. John D. Ehrlichman felt secure enough not to report the crime of burglary by the team of Liddy and Hunt. The fact that the White House was investigating news leaks was well known 2 years ago, but President Nixon and his aides could pick the times when they submitted to questioning. They were usually so infrequent that there was never time for probing deeply and to bring up a host of peripheral subjects of lesser importance than Peking and Moscow. If Mr. Nixon had done as every other modern day President has, held press conferences two or three times a month, someone, just someone might have asked questions about that plumbers team, and Liddy and Hunt might have been put early in the public limelight in a way that would have made their escapades in the Watergate impossible.

At the White House one struggle between reporters and Mr. Ziegler last fall illustrates what we are up against on a daily basis. It has been determined by sources outside the White House that Donald Segretti was in frequent telephone contact with Dwight Chapin, an aide in

H. R. Haldeman's office. Reporters first pressed to have Mr. Chapin come forward. That failed, as has every other attempt of that kind, including efforts to bring Mr. Haldeman to be interviewed.

What is clear now was clear then, that Mr. Segretti and Mr. Chapin, acting for the White House, had engaged in political espionage on behalf of Mr. Nixon. So, Mr. Ziegler stepped forward with a statement that the charges were fundamentally inaccurate. It was a cover-up, cover story that lasted until the more recent disclosures.

Now, last fall when reporters tried to get Mr. Ziegler to say just what was accurate and what was inaccurate about the reports of Chapin and Segretti, he stonewalled. One reporter asked if there was any record of the phone calls to Chapin from Mr. Segretti. Mr. Ziegler did not seem to know anything about them and was reluctant to find out. Mr. Ziegler was then asked if the White House switchboard had any such information and would give it out if asked. Mr. Ziegler's reply was, "I would hope not."

As reporters like myself run from one event to another, there does not seem to be time to even consider whether such a withholding of news is justified under one of the exemptions of the FOI Act. It would not seem to come under foreign policy, national security, trade secrets or internal personnel rules, but who can be sure what the administration would claim if it were asked, and how long it would take to even start the process?

Now, asking White House Press Secretary Ziegler questions about what the President thinks or knows is one of the most frustrating exercises in Washington, and it is not wholly his fault. He does what he is asked to do, not just by the Ehrlichmans and Haldemans, but by the President himself. The President sets the climate for the Government on freedom of information matters, just as on everything else. If the Freedom of Information Act is not working as well as it should, it is because certainly in part the President really is not interested in having it more effective. It might not be a great deal different under another President, but getting the truth in the White House today is certainly more difficult than it has been in my memory of Presidential administrations. The skills of news management are greater and they are used more frequently. There may be flashes of reform, it may be possible for the leopard to change its spots.

Anyway, we are most grateful for the contributions that you and your committee are making toward giving the American public what it has every right to know. Your diligence is a shield and a comfort to many of us.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you, Mr. Sheldon, and thank you also for those kind words with which you concluded your statement.

I have some questions which I will direct to anyone of the panel who may wish to answer them—whoever wants to take a crack at them can do so. It would probably be well if anybody who agrees would say so, or if they have qualifications they would so indicate.

One of the amendments we are considering would require agencies to make a preliminary determination as to whether to comply with the request for information within 10 days of the receipt of it, permitting

additional time to gather the documents if that were necessary. In your opinion, is this a reasonable time limit?

Mr. SHELDON. Well, it is certainly better than what was required before. It seems to me very reasonable. I have never been a public relations officer, preferring to stay on my own side of the fence, but it does not sound unreasonable, and certainly from the standpoint of the news gatherer it still could be quite a stretch of time, delay us, and encourage us not to go forward. Fortunately a lot of newspapers these days are using investigative teams, taking their time to do stories, and so your efforts to compress the time, and our efforts to take more time could bear fruit for the good of us all.

Mr. MOORHEAD. The amendments would require an individual refused access to public records to file an administrative appeal of the denial within 20 days, and would require an agency to act on the appeal within 20 days of receipt. Do you think this is a reasonable limit?

Mr. LAMPSON. I would think that that would be more than a liberal time. It seems to me that an agency should be able to prepare their position in a shorter period of time. However, it is an improvement over the existing situation, and I think would be welcomed by the news gathering people as an improvement.

Mr. MOORHEAD. If a request for public records goes to court, H.R. 5425 requires the Government to answer the complaint within 20 days instead of the 60 days now required by law. Is this, in your opinion, a reasonable time limit?

Mr. SHELDON. I would certainly say it was, and anything you could do to shave that down would be desirable. Courts and lawyers are very expensive processes, and except for the very large papers they are not used too often. And anything that could make the process easier would be a tremendous step forward.

Mr. MOORHEAD. The amendments would permit the court to assess the Government for reasonable attorney fees and court costs if the Government is found in violation of the Freedom of Information law. Would this amendment permit citizens to enforce their right to know more effectively and mitigate against unreasonable Government court action?

Mr. LAMPSON. I would say most certainly, Mr. Chairman.

Mr. MOORHEAD. I am assuming that when there is no dissenting remark that you both are in agreement with the answers?

Mr. SHELDON. That is right.

Mr. MOORHEAD. The amendments would require each agency to file an annual report with Congress on its administration of the Freedom of Information law. Would this provision make public and congressional oversight of the law more effective as well as requiring agencies to give more careful consideration to their administration of the law?

Mr. SHELDON. Well, I certainly think it would be useful. I am not sure how many of us read these reports, but if the committee can somehow use them as a police means, I certainly would say they would be most valuable. But, I guess obviously what is most needed is their day-to-day reaction rather than the summation. But, I am sure they would be valuable.

Mr. MOORHEAD. I would think that the objective would be to give the Congress the necessary data to isolate the recalcitrant agencies so

that in the following year hopefully they would be more responsive on a day-to-day basis.

Mr. SHELDON. Yes; I think that is a good point.

Mr. MOORHEAD. H.R. 5425 would also require all agencies to furnish any information or records to Congress or its proper committees. Do you think this would help clarify the right of congressional access to Government information?

Mr. LAMPSON. It would appear that it would be such, and I would assume from the recent history that it would be helpful to the Congress.

Mr. MOORHEAD. H.R. 5425 would require the courts to examine the contents of agency records—including classified records—in private, if necessary, to determine whether the records must be withheld from the public. This involves the *Mink* v. *Environmental Protection Agency* case. Would this provision make possible a qualified, independent judgment on whether an agency has sufficiently proved the necessity for withholding specific records?

Mr. SHELDON. Yes; I am sure it would, because obviously so much is overclassified in Government that that review at that point would be very helpful.

Mr. MOORHEAD. H.R. 4960, commonly called the Horton bill, would establish an FOI Commission—a majority of the members of which would be appointed by the Congress—to investigate cases of withholding of public records and to issue findings which would be prima facie evidence against an agency in a later court suit. Would this concept be a workable system to help to enforce the Freedom of Information law?

Mr. SERRILL. I would like to comment on that. I wonder if there is a need for another commission, another department of Government in this instance, or whether it might not be better to assign this responsibility, say, to a Federal district court, in the District of Columbia or some other agency in being, or to some standing committee of the Congress? I just feel that we have a great proliferation in the years I have been around Congress and State government, and we establish more commissions and agencies than I think we have need for. And I raise that question rather than having a definitive answer for it, but we have discussed this, and I discussed it with counsel yesterday. And we came to no definite conclusion insofar as that area is concerned.

Mr. MOORHEAD. To make the point completely clear, I am convinced that H.R. 4960 does not intend to have the Commission as a required step. It would still permit the requester to go directly to the court. But, in the case particularly where a requester did not want to spend the money for court costs, he could go to the Commission and a lot of the groundwork could be done for them at no cost.

Mr. SERRILL. That sounds good. I mean to eliminate cluttered courts, if we can do so, in other words, I do not think that we have studied this in the depth that probably it should be studied with respect to the ultimate results of establishing such a Commission. I am sure I would be interested in what Sigma Delta Chi has to say about this particular aspect of it.

Mr. SHELDON. Well, I guess if I thought it was just another commission being put into a picture, doing a job that somebody else was already doing I might raise some reservations. But, it sounds to me

as if it could be a very useful tool, someone to turn to short of the courts to get a very quick opinion. And the mere presence of it would exert pressure on Government agencies and public relations officers to tread a little softly in areas that they might be a little bit more heavy handed.

Mr. MOORHEAD. I noticed in your prepared written statement, Mr. Lampson, that you mentioned bureaucratic delay, abuses in fee schedules, and cumbersome and costly legal remedies. I think the bill we are considering deals with these bureaucratic delays. We have not attacked the fee schedule directly, except that we might give the Commission authority to review fees to make sure that they are reasonable. The commission might also cut down on the costly legal remedies, which we also try to solve by permitting the award of court costs and attorney fees to a successful plaintiff. We have attacked the problem of "identifiable records." Our proposed language, I think, is better from your point of view.

Mr. LAMPSON. Thank you.

Mr. MOORHEAD. Mr. McCloskey?

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

I am interested in the question of how this committee might assist to get a broader distribution of accurate information about what happens here in Washington into the interior of the country. I am particularly concerned about the small newspapers throughout the country who are either limited to wire services or what they can perceive on the network news, but do not have the resources to station a reporter here in Washington with all of the problems that a reporter who is here faces in keeping up with the canned news releases and the like that come in such copious quantities out of this Government, including those of us in the Congress. What do you see as the possibility of enhancing the small rural newspaper's ability to keep up with this tremendous volume of news from Washington?

Mr. LAMPSON. Mr. McCloskey, we do rely for interpretive material from our association office here in Washington, looking at the national scene. But, in a community press we do limit most of our news to our immediate area, with the exception of the wire service information. And I think my personal concern, and the concern I am sure that others in the smaller communities have, other publishers, is an ability to get information from those Federal agencies that are operating in our area.

Mr. MCCLOSKEY. Your contact then with the local offices has been essentially disappointing?

Mr. LAMPSON. Many times, yes. Sometimes that might not be a reluctance to give us the information. It sometimes is their inability to put their hands on the information.

Mr. MCCLOSKEY. Well, coming from our particular area in the country in California, it has been almost impossible to get square statements of any information from regional offices because of the tendency of the bureaucrat to be reluctant to issue any statement or provide any information that is likely to be overruled by a policy decision in Washington. I wonder if you would comment on the problems that would be raised or the benefits obtained, and any drawbacks that would accrue from adding to these amendments to the Freedom of Information Act a misdemeanor section that would make any Government employee

guilty of a misdemeanor and subject to prosecution in the event he willfully and deliberately withheld information or took any steps to unduly delay the delivery of such information? It might have a salutary effect, and if it might, what problems do you see in it?

Mr. LAMPSON. Well, I would be reluctant to take a position on whether or not there should be a criminal section in the Freedom of Information Act without exploring it to a greater degree than at this moment. I know that that avenue is followed frequently in State legislation, and it is a debatable avenue to follow. In some instances I am sure that it could be implemented without any undue harm one way or another. But, it would be something that I would want to think on more than an immediate response as to whether it should go that far.

Mr. MCCLOSKEY. Well, I think we have found in the hearings we have held over the last 2 years that in classification and in the release of information there is an inherent tendency on the part of the Government employee to overclassify as to secrecy, and to decline to reveal that which may be embarrassing, if there is any reason to do so. I have growing questions in my mind whether or not there should not be some counterbalance sanction against the employee who overclassifies this to secrecy or who exercises his discretion not to release that which may prove embarrassing. I suppose the basic question is this: We have accepted until this recent point in our history the arguments of Government employees that they cannot operate in a goldfish bowl, that they are inefficient if they are forced to disclose to another their interagency communications. I am sure that is true. But, with the present crisis of confidence in Government, would it not be better perhaps to give up some efficiency in order to require the complete disclosure of these matters which might make it a little more difficult to act in Government effectively, but at least would reduce the public's present concern that most of us in Government represent a conspiracy against the public?

Mr. LAMPSON. Well, offhand, Congressman, I would say that the news people can go to the Government bureau or agency to get the information, if there was a sufficient definition so that the newsman himself would know that this particular information was not the type of information that would be classified, that he could get a story and get the information. But, when he goes in blind and the head of the bureau says, "Well, I am sorry, Joe, I just cannot give you that information, that is confidential information," whether it is or is not, then he is met with a roadblock which if he has the connections and could possibly come to Washington and prosecute it under the Freedom of Information Act, he does have that avenue.

Mr. MCCLOSKEY. Let me ask another question along those lines. Ordinarily a Congressman finds that perhaps a quarter of his time here is occupied in servicing the complaints of constituents because of the arrogance or the caprice or the pure redtape of the Government agencies, and I suppose that all of us get hundreds of complaints each year on Social Security, the Veterans' Administration, and immigration rights. But I cannot recall ever having a reporter in my 21 weekly newspapers or 4 daily newspapers complain and ask my assistance in unlocking some Federal agency with whom they had

had difficulty in getting Freedom of Information Act information. Is there some reluctance on the part of the reporter or the small town newspaper to ask the assistance of their Congressman when they run into this abuse you have testified about?

Mr. LAMPSON. Well, there could be; yes. I have had personal experiences with my own Congressman in which I have obtained valuable information. It did not happen to be controversial information, but I have relied on his office to supply me with information.

Mr. MCCLOSKEY. Well, I just suggest the possibility, and I would prefer to see this remedy pursued as opposed to inserting a criminal section in the law at this stage. Perhaps if we might publicize to the small newspaper editors in the Nation that whenever they run into this problem of getting information from a Government office, their Congressman can serve as an ombudsman in that situation, just as he can in getting committee reports and other information, because I think your testimony today, and the importance of this issue is crucial to the country. We find the further we go out into the hinterlands of the country, that the diminishing amount of the information in the small communities as to some of the evils practiced by Government really has caused those areas to be somewhat less critical of Government itself and less demanding of its change. Now, I think that this committee and individual Congressmen would want to do everything possible to assist these smalltown editors and reporters in getting immediate information. The first Government office that looks at all dilatory in producing it should receive the attention of the Congressman and that this is something the Congressman ought to make as just a matter of his ordinary operations, to unlock it or widely publicize it.

Mr. LAMPSON. I think that is right, and I am sure it would be appreciated by the small town papers.

Mr. MCCLOSKEY. I just mention it because I cannot recall a reporter or editor faced with the problem you described ever having asked my assistance as a Congressman, and yet most of these agencies are funded by us, and most of them are immediately responsive to a congressional inquiry as to why they have withheld this information.

Well, thank you. I think I have exceeded my time.

Mr. MOORHEAD. Mr. Lampson, do you think that most of your members are familiar with the existence of the Freedom of Information Act?

Mr. LAMPSON. Yes, I think they are. We have had this subject on our convention programs, we have had speakers on it, we have a special committee—the freedom of information committee. Of course, their essential office operates out of Missouri, but each State has its own committee on freedom of information, like my own son happens to serve on that committee in Ohio.

Mr. MOORHEAD. Thank you, sir.

Mr. Phillips?

Mr. PHILLIPS. Thank you, Mr. Chairman.

Along the lines of Congressman McCloskey's questions about newspapers coming to Congressmen for help, I would say that quite a great number of journalists have called upon our subcommittee for assistance in various cases. And in a number of such cases they have been referred by their own Congressman to the subcommittee. In some cases we try

to act like an ombudsman between the news media representative on the one hand, and the Government agency on the other, to try to help resolve those problems, or to answer the specific questions about the Freedom of Information Act. For example, to explain the way various exemptions have been interpreted by the courts and through agency regulations. So, we have had a great deal of experience over the years since the act has been in effect in doing this very kind of thing.

I think there is a growing awareness in the last 2 years of the existence of the act, how it operates, and how it can be used by the news media. There has been a tremendous increase in our workload along that line, and statistics that we have seen as to the increase in the number of requests being made from all sources to Government agencies is another indication of how this awareness of the law is growing. There is also a corresponding growth in the number of cases that are pending in the courts. At the time of last year's investigatory hearings on the way the Freedom of Information Act was being administered by Federal agencies there were some 42 cases pending in the Federal courts under the Freedom of Information Act. In the latest figures I have seen, there are over 70 cases, and that is just in a year's time. Although we do not measure the effectiveness of the law by the number of court cases that are brought, it is another significant indicator. Hopefully, when positive case law is made interpreting various provisions of the Freedom of Information Act, this would make Government officials more open and less likely to deny information when it is requested, whether it be by the news media or by an individual citizen. I would ask all of the panelists a broad question that is covered to some extent in Mr. Lampson's statement as to the reasons why more people in the news media have not made greater use of the Freedom of Information Act? I know we have talked about time problems, the high costs of litigating, and the fee schedules which in many cases are exorbitantly high. But, from your own experience and from your conversation with colleagues in the news field, can you shed any light on why you feel the law is not used more often by the news media to get information from Government officials?

Mr. SERRILL. Mr. Chairman and Mr. Phillips, I think the fact is that the law has had a very esoteric effect upon the country, and I am not speaking about Washington itself. I think newspaper editors and reporters are well aware that this law exists. With the trade press, professional press since 1966 when this law became effective in July, there has been a great deal written about those cases which have been, mostly by nonmedia sources. And I think many reporters have cited this law when they get into difficulties, and they are getting greater access to information. And reporters and editors, they do not like to go to court very much. I mean, it is just—I think that it is indicative of our type of people. I think they tend to be more professional in their approach, and I do not think they go threatening court cases or go through with them.

I think one of the other things that is helpful, in California, for example, the Brown act, the State laws have been tightened up, and the Sunshine law in Florida. These laws in many of these States are tightened up. And I think at the local level our problems have been helped materially by the act. The defects in the act have been pretty

much ascertained by these court cases. And I think that your greatest reluctance is among Federal agencies at the local level and here in Washington to release information because of this great cloud of classified documents that have developed over the last—well, since World War I, and particularly since World War II. And I think the next thrust of this act, and this is evolution here, and we expected this when we worked on the act back in the sixties, we expected it would be a less than perfect instrument, and we have found out where these imperfections are, and I think when this act is amended, when the present act is amended it will have another thrust forward of getting more access to information for the reporters and the editors of the country, both the print media and the commentators.

I would like to hear what Sigma Delta Chi thinks on this. They cross all boundaries of the media.

Mr. SHELDON. I would not disagree with anything you have said about it. I am trying to think beyond the reasons that we have talked about earlier.

I would suggest that maybe the fact that newspapers have been on the defensive during the last 4 years more than at any time that I can recall has played a very large part. You have organizations like the Los Angeles Times spending hundreds of thousands of dollars and goodness knows how much man-hours just defending themselves. That is part of the picture.

I think another part is that the decisions as to whether to press are not on the part of the reporter. They are on the part of the management, the editors and management. They tend to be less aggressive. They have other concerns, and I suppose maybe it would be a good idea to address this question more often to publishers and editors than to a reporter.

Mr. PHILLIPS. Of course, we are well aware that the active interest and tremendous support given by the news media when the original Freedom of Information bill was before the Congress was one of the major reasons it was finally enacted. What we had was a Freedom of Information law, but it has not been translated into, by any stretch of the imagination, a "freedom of the press" law. What we are hoping to do by the amendments that we are considering now is to make it a more useful and workable tool for the news media so that some of the high hopes that we all had 10 years ago or 8 years ago when the bill was before this subcommittee for hearings can be made a reality, and become truly a "freedom of the press" law that can be more readily used on a day-to-day basis by working reporters, editors, and others in the news media field. This is one of the reasons why, of course, we are considering the time limit on agency responses to FOI requests. Witnesses last year indicated that when they are on a tight deadline story, there just is not time to use the FOI law. A free-lance writer working on an article perhaps has 2 or 3 months to complete it, but that is another matter. We have found that in those kinds of situations the law has, on occasion, been a useful tool. But, for the average daily working reporter who has a tight schedule, as you all well know, the law has not always proven to be the kind of instrument that we had hoped that it would be.

Could I ask one more question, Mr. Chairman? This is along the lines of whether in your experience you have ever encountered a situation where you have asked for information from a Government official, and have gotten the old runaround, put-offs, delays, and so on, where perhaps you have been in a negotiating situation for some part of the information you have requested. Have you ever had occasion to cite the Freedom of Information Act as your right to that information and gotten any kind of response from the public information officer or other Government official that you have been dealing with?

Mr. SHELDON. Well, I would suggest, of course, that when a reporter is out on the beat, a good share of the time he is not out after information which is documentary in the sense that he can go into, say, somebody in the White House and say, look, this information I want is in, I know is written in a document somewhere. A lot of the best news is carried around in the heads of the principals.

I might just, and I did not quote this case earlier because I do not think it is representative, but in talking to some other bureau chiefs about the problem in the use of the FOI, one of them said to me that he had found that some of the sources which he had before the act was passed had turned less cooperative and had begun to use the rules. Now, as I say, he is the only one that said that. I do not consider it representative.

Mr. PHILLIPS. We have heard that expressed on other occasions, too, and it is distressing if that is a general rule. We do not think that it is, but there are instances where that has happened.

Mr. SHELDON. No, I do not think it is representative myself. I would not want to call this a game, a matter of trying to get information for the public because it is too serious for that. But, the fact of the matter is in practice, as you toughen up our side of the operation, the nature of the beast on the other side is that they seem to find new ways, new devices to withhold. They are more careful about what they put in writing and all of these things come into play. So, as your latest changes showed, it is something that you just have to live with, and ride with, and shoot down what pigeons you can.

Mr. PHILLIPS. In your press meetings with Ron Ziegler, or Gerald Warren, or any of the other people in the White House Press Office over the years, have you ever heard any reporter ask for information and cite the Freedom of Information Act as a basis for his request?

Mr. SHELDON. Yes. I somewhat ducked your question earlier because I was not able to really give you an answer that I am sure would be to our credit on it. No, I have not, and the closest that I can come to it, instances where it could be invoked actually, and we are talking now about the briefing sessions, is in the case like asking for the telephone records. But, no, I have not heard him threatened with that. But, times are changing a little.

Mr. PHILLIPS. I was wondering how he might have responded, such as citing some exemption under the act that would be used to deny it. But, I think this illustrates part of my earlier questioning about the problem. I do not know, perhaps some reporters feel that it is a crutch that they do not need. If they have good sources, obviously they are not going to have to rely on the law to get the information that they

need. I think most reporters pride themselves on their ability to ferret out information from a variety of sources, and perhaps there is some feeling that using the Freedom of Information law would be a sign of weakness, or a less than total profession in the field. Do you feel that perhaps might be a factor?

Mr. SHELDON. No, I think you make a valid point. Yes. I think there is a tendency on the part of reporters not to want to appear and, in fact, there was an article in the paper this morning where somebody said reporters do not even like to report that someone would not comment. They think that that is a reflection on their ability. But, I just guess I would have to say I do not see quite as much reluctance to use that, to admit that over a period of time as there used to be.

Mr. PHILLIPS. Of course, we had a number of news reporters testify during our earlier hearings last year who had used the law and cited it on many occasions, and in most cases they were successful. And even in cases where initially information was denied, when they quoted that part of the law to the public information officer or other official they had been talking with, in some cases there was a turnabout by the agency in the position they were taking once they read over the exemptions and could not find one of them that applied to that precise situation and, therefore, made the information available.

Mr. SHELDON. No, I think the point was made earlier at this table that the fresh interest in it is going to stimulate more interest on the part of the reporters. And there has been a lapse of time when we have had a flare of publicity on the Freedom of Information Act, and now coming as it does in the wake of Watergate hopefully we will do more of what you are suggesting.

Mr. PHILLIPS. If we are able to enact strengthening amendments to the law, perhaps it would be used even more effectively.

Thank you, Mr. Chairman.

Mr. LAMPSON. Mr. Chairman, Mr. Phillips, may I continue?

Mr. MOORHEAD. Yes, Mr. Lampson.

Mr. LAMPSON. It is not in direct response to your question, but I think the press, and particularly community press use it indirectly in a way. We comment on it frequently during certain periods of the year editorially, and then the fact that there is such a Federal law, I am sure the impact of this Federal law tends to open the door on the local level to a good degree, because while we do have, as I have pointed out, State laws, the Federal law seems more powerful, more all inclusive. And editorially we refer to the Freedom of Information Act when we have a local problem, and it does ease the avenues to these local people. So, it really has more than a Federal purpose, and we do use it in that way.

Mr. PHILLIPS. I think that is an important point because since the Federal law was enacted in 1966 there have been a great number of open-access laws enacted at the State level, and increasingly at the municipal level, so that there is a growing public awareness. In fact, some of the so-called "Sunshine Laws" that have been enacted at the State levels are much more effective and comprehensive than the Federal law is. We are even receiving inquiries from foreign countries as to how our Federal law is working. We have provided information to about a half dozen embassies or directly to individuals abroad in response to inquiries about our law. So, there seems to be this growing

awareness around the world of the importance of open government in a free society.

Thank you, Mr. Chairman.

Mr. MOORHEAD. Any questions here, Mr. Gude?

Mr. GUDE. Yes. Thank you, Mr. Chairman.

I wondered what experience any of the witnesses might have had insofar as the receipt of canned editorials from Federal officials? Is this a practice that has come to your attention?

Mr. SHELDON. I have not had any personal experience, and I do not think my paper has had any personal experience. I think I would only say that most respectable papers would recognize them for what they are, unless there is some kind of a throwaway sheet, semipropaganda sheet. They are just not a large factor.

But, going on from your question, you are really asking the extent to which, say, Herb Klein's operation might be influencing the press. There was a period when he and his agents were very actively calling up editors after a presidential speech and asking their opinion. You can say, well, as they say, that this is harmless and so on. I take this as a subtle effort to influence the editors, to flatter them, to let them know that the White House is watching and interested in it. And I would suggest that editors simply do not take those calls under those circumstances to discourage it. But, I have not even heard so much of that lately anyway.

Mr. GUDE. That is what you call a fresh editorial, not a canned editorial?

Mr. SHELDON. Right.

Mr. SERRILL. Mr. Chairman and Mr. Gude, incidentally, I used to be a resident of your area when I first came to Washington. But, I have since moved into the District of Columbia. Traffic problems are difficult back and forth.

I would say that in my years representing community newspapers there has been a great deal of lessening of acceptance of canned material. There has been such a growth of community problems in the newspapers which I see and have seen over a period of years, and I do see them. I just came back from North Carolina, for example, and my staff assistant is in Wisconsin today. We do see these newspapers, and they are written locally by reporters. Now, occasionally I would say maybe an editor is influenced by some of the material that might emanate from the offices in Washington. But, I think the whole character of the community press of this country has improved immensely in the last few years. The quality of staff is so much better, and the management has improved quite a bit as the press has grown. And in your own county, for example, there have been tremendous changes in the community press.

Mr. GUDE. We have under consideration legislation which would define executive privilege quite narrowly. I was wondering to what extent this had come to any of your attentions and whether you have any thoughts in its regard? Do you have any comments on the specific legislation and also to what extent do you feel it is necessary?

Mr. SHELDON. Well, I can answer the last part very readily. I regret that I am not fully aware of the legislation which you are talking about, but certainly, it certainly is terribly needed, especially at this

time. And this ought to be the time when Congress moves in on it in a big way. But, I am handicapped by not knowing precisely the legislation that you are talking about.

Mr. SEBRILL. My comment is this, that when I first came to Washington in March 1933, the Federal establishment of the Congress was about the same size as it is today, with fewer committees and fewer staff assistants. But, the proliferation in the period I am familiar with Federal Government is the fact that it has grown so large that I think it is intolerable to have the kind of thoughts about executive privilege that you once had. For example, I have read somewhere where there are more than 4,000 individuals reporting directly to the Office of the President, and each of the departments of Government have grown so tremendously that by putting an umbrella of executive privilege over all of these people is really not good Government. And in this I am speaking personally, not as a newspaper man, but just trying to relate myself as a citizen.

Mr. GUDE. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Yes. Thank you, Mr. Chairman.

Mr. Lampson, I am always glad to see anybody from my native State of Ohio, which I tell my colleagues here is the heart of America. And I am very happy to see that you have served in the Ohio General Assembly, which I used to cover as a correspondent for the United Press a number of years ago.

I am also very happy to see that Ohio has adopted an open meeting law and open records law. I remember very vividly my first assignment as a reporter for the Cleveland Plain Dealer, going to a meeting of the Lakewood (Ohio) School Board and found out when I got there that it was a closed session, and I was not permitted to enter and report on the events going on there, which I understand under the new State law would be illegal?

Mr. LAMPSON. That is correct.

Mr. CORNISH. Is it your experience that you receive a large number of press releases from the U.S. Department of Agriculture?

Mr. LAMPSON. Yes, Mr. Cornish, we do, particularly through the Extension Service, the Federal USDA to the State colleges, and to the newspapers. I think I am not too active on the editorial desk there.

Mr. CORNISH. I understand. I might say that it has been my impression that most of the rural papers in the United States receive a blizzard of news releases from the Department of Agriculture, ranging from watercress to beetle nuts. We had a hearing yesterday on a new Executive order issued by President Nixon which permits the Agriculture Department to obtain certain financial information of a private nature from the income tax returns of farmers. We found out that neither the Department of Agriculture nor the White House issued any news release in relation to that new Executive order. And I am sure it would be of interest to many farmers in Ohio and throughout the country. I think that is the type of story that probably most community newspapers would have been very glad to print from a news release from the Department of Agriculture. Would you agree with me on that?

Mr. LAMPSON. Yes, I am quite certain that it would be newsworthy, and it is true that we get reams of stuff. But, a very small percentage

of it is used. Generally in a community such as my own community, which is a town of about 3,000, the county seat, we rely upon the local agricultural agents. We rely upon the head of the Soil and Water Conservation Service. They have offices there, and as I say we go to those sources for our information. It may be from a lead from one of those sheets, but locally I mean that is the method of operation for most newspapers to go.

Mr. CORNISH. Would you agree with me that the Government has a responsibility if it is going to be in the process of disseminating information to relay to the people the bad news as well as the good news?

Mr. LAMPSON. I would agree with you, but that is rather a utopia, I think. I would not anticipate receiving very much of the negative.

Mr. CORNISH. Yes.

Mr. Sheldon, I was very interested in your testimony because most of it seems to be centered on your experiences at the White House, where I assume you have spent most of your editorial time. But how about your experiences in dealing with the line agencies in obtaining information? Do you run into many obstacles there at all?

Mr. SHELDON. Well, as you say, I have spent most of my time following the President, so to speak. I at this moment in my career do not have many contacts with the line agencies. The people in my bureau do. They have the usual frustrations. I do not always hear about them. I am trying to think of a specific instance which would illustrate their difficulties. We do get a fair amount of cooperation on some of the things that we write about. Some of the things that my particular paper might write about may even be something that the agency wants to cooperate with 100 percent. And it is when you get into the area of investigating, when you get into the area of trying to uncover something wrong that they did, or something that they did not do that you start to have problems.

Mr. CORNISH. That seems to be the real problem area—when you start submitting inquiries—is it not?

Mr. SHELDON. Yes; but particularly when you are dealing in foreign policy and defense matters. As was said earlier, really our best sources there are not documents or not asking to see documents. They are speaking to and seeing people who can give you what is in the documents and are willing to do so. When those dry up we are in real trouble.

Mr. CORNISH. Are you familiar in any detail at all with the various exemptions in the act which permit the Government to withhold certain information?

Mr. SHELDON. Yes, in specific areas.

Mr. CORNISH. Do you have any recommendations that might pertain to the possible elimination of any of those exemptions; that is, a narrowing of the act? There has been some feeling as we review the effectiveness of this act over a period of years, and in future Congresses that actually what the Congress should try to do is to narrow the exemptions in the act and attempt to eliminate them over a period of time as much as possible. Do you think that is a good objective?

Mr. SHELDON. Well, yes; I think that is a very desirable and necessary objective. I think most of us, most of us feel that there are very few things which the Government does and says which cannot stand the light of day, and that the public does not deserve to know. But,

when we see the Government protecting the Pentagon papers which are some 10 years old, we can see what we are up against. I cannot—I think I would have to be more familiar with every clause of the exemption and think through them a little bit more before I would say where is the major weakness in there. The difficulty in the areas that I am interested in is classification, and I do not know as any of the exemptions really get at that problem.

Mr. CORNISH. That is a problem the subcommittee is going to deal with at a later date, and I hope you will give us the benefit of your views in some manner at that time, because that apparently is the area which concerns you most.

Mr. MOORHEAD. Any further questions?

[No response.]

Mr. MOORHEAD. Thank you very much, gentlemen, for your most helpful testimony. We appreciate your taking the time and the effort that you have put into your statements.

Mr. LAMPSON. Thank you for the privilege.

Mr. SERRILL. Thank you.

Mr. SHELDON. Thank you, Mr. Chairman.

Mr. MOORHEAD. The subcommittee would now like to hear from Mr. John Shattuck, staff counsel for the American Civil Liberties Union. Mr. Shattuck has appeared before this subcommittee before, and has given us much valuable help.

I have read the statement that you have prepared, Mr. Shattuck, and you have done just what we had hoped a lawyer of your capability would do, taking it section-by-section and giving us your analysis of which bill you think does a better job, and also when you think neither bill does an adequate job. This statement will be, I think, one of our chief reference works when we get down to the legal draftsmanship. I would suggest, if you can eliminate some portions as you go along, for example, the long citations of cases and things like that, because the hour is getting late and we want to be sure to have plenty of time for discussion.

STATEMENT OF JOHN SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. SHATTUCK. Thank you, Mr. Chairman. I appreciate this opportunity to appear before you on behalf of the American Civil Liberties Union to follow up our testimony of last year in the areas which we felt the act needed strengthening. And as you have suggested, I have submitted a rather lengthy statement, and will summarize it as briefly as possible.

I would like to point out at the outset an aspect of the act which I think is often overlooked by courts and by commentators, which is its constitutional premise. I do not know whether any of your other witnesses have addressed themselves to this, but I would like to highlight that aspect of my prepared statement. The legislative history of the act, and a few of the courts that have construed it have pointed out that it flows directly from the first amendment. And the Supreme Court has in other areas, not under the Freedom of Information Act, recognized that the first amendment does cover the right of the public to receive information. And I, of course, cannot think of any time in

which this right is more important than today, as illustrated by recent events in Washington.

Because the act places certain limitations on the right to know, I think the best way to regard the exemptions is to see them as licenses on first amendment rights. In other words, they should be strictly limited and construed as narrowly and objectively as possible, not just because Congress says so, but because they bear directly on the exercise of the first amendment rights. As the hearings last year pointed out, and your excellent report in September pointed out, the act has certainly not worked out the way I think it should, given its constitutional premise. The conflicts in the legislative history and the bureaucratic hostilities and judicial reluctance to give it broad effect, all of these impediments have been chronicled in the hearings, and we have brought them out in some of our own testimony.

Both of the bills before this subcommittee go a long way toward remedying these snags, but I have in my statement highlighted various ways in which one bill is sometimes stronger than the other. However, I think they both reflect significant progress on the issue of bringing the Freedom of Information Act into conformity with the first amendment right to know.

Since the exemptions have in many ways turned out to be the biggest stumbling block, I would like to look at them first. The difficulty with the exemptions, as I am sure the committee is aware, stems from a very restrictive interpretation of the act by the Attorney General in a memorandum issued in 1967. At least in part the difficulty stems from that. The memo gave a very broad construction to the exemptions, relying on a conflict in the legislative history, and the agencies have generally followed that memorandum in applying the exemptions, and in some cases so have the courts, although some courts have realized that the Attorney General's memorandum is hardly a reflection of the statutory intent of Congress.

The first exemption, national security, has come to cover all classified documents, although the provision is "national security information specifically exempted by Executive order," and there is no mention of classified documents in the statutory language. I feel that the first exemption, at least in my litigation experience, has acquired the appearance of authorizing an unreviewable executive power to classify documents, which is precisely the opposite from the purpose of this statute. And I do not think Congress intended to provide the executive with authority to create an unreviewable classification system. But the difficulty here, I think, lies more with the courts than with the Congress, and Congress must now point out to the courts that they have the power under the statute, even without amendment, to review classification. The two amendments proposed in both bills emphasize this by requiring in-camera inspection of classified documents. I think this is what Justice White, at least in my optimistic view, was saying in the Supreme Court's *Mink* decision. He was saying that the Congress has not clarified this matter for us, and the courts, at least reading the first exemption narrowly, are not entitled to review classification if a classification has been made under an Executive order.

We, as amicus curiae in that case, made the argument that an Executive order, according to our reading of the language of the exemption, would have to have been promulgated for each classified docu-

ment. That did not win approval by the five-man majority of the Court. In his majority opinion, however, Justice White invited Congress to "adopt a new procedure," for classifying documents, and in another statement this morning I and another ACLU witness have stated that we believe the *Mink* decision in fact suggests that Congress does have a constitutional power in this area to act on the classification system, and could, by additional statutory provisions, change the entire system. Not only does the *Mink* decision suggest that, but it also invites Congress to give the courts the power to conduct in-camera inspections. Justice White simply said that we do not have this power at the moment.

I think the standard in H.R. 5425 for conducting an in-camera inspection is considerably clearer than the standard suggested by H.R. 4960. You have got to show the courts the way in this area, and as I recall the language in H.R. 5425 is disclosure unless "harmful to the national defense or foreign policy." This language requires the courts to make a review which is more comprehensible than the one they are required to make under H.R. 4960 "to determine if the documents are being improperly withheld." I am not at all concerned about the propriety of forcing the courts in each case to make these classification reviews in camera. I think Congress has got to act very vigorously in this area because the courts so far have indicated that they are extremely reluctant to review any national security matters unless specifically given authorization by Congress. So, I would make this provision mandatory as it is in H.R. 5425, requiring in-camera inspection, and I would not merely suggest that the courts have the power to do so. If the language is not intended to be mandatory, I suggest to the committee that it should be.

There are many reasons, of course, to require in-camera inspection. The political abuses and the administrative abuses of the classification system have been well documented by your committee and by others, and I would just like to address the subcommittee's attention to the example that I have given on page 6 of a professor at Smith College who is seeking to write a book about the *Alger Hiss* case and is trying to get access to documents which are between 25 and 40 years old, and are considered both investigatory files and national security documents. But, he has been barred in a way that other writers, unabashed publicists and apologists of the FBI have been permitted access to these documents. So, quite apart from whether or not the exemptions should apply to the documents, if the executive is not going to apply them even-handedly, they should not apply at all.

In another case illustrating the administrative abuse, is cited on page 7 of my statement—a rehash of the *Operation Keel Haul* files case, which I am sure the subcommittee is aware of. Following the decision in *Epstein* v. *Resor*, the files of the forced repatriation of Russian refugees after World War II were declassified by the U.S. Government, but they continue to be withheld solely for the administrative convenience of the British Government who claim that they do not have time to address declassification of post-World War II documents. The U.S. Government is not even asserting, in claiming the first exemption, in this case that there would be any injury to the national security if the documents were released, but they

simply say that they are required under Executive order to yield to the British desire that they not be released.

I would like to say just one more word about classification before going to the second exemption. A memorandum in the National Security Council that has been requested, as I understand it, by the chairman of this subcommittee as well as by myself on behalf of some clients in the American Civil Liberties Union. This memorandum purports to underlie the new Executive order for classification, and it is based on a study that was done by a special White House team that originally was directed from the Justice Department by now Justice William Rehnquist, but then subsequently by Mr. David Young at the White House. And the study I believe covers the extent of over-classification and gives some very important statistics about that within all of the branches of the Government. When the new Executive order was first promulgated, Mr. Ehrlichman, in a press conference, stated that this study had been completed 6 months previously, in January 1972, and it was supposedly not classified. And he stated that it was not classified at that time, and he gently chided the press for not having gotten hold of it. Subsequently when we began to try to get hold of it we were told that, first it was simply a directive and not a document available to the public; then that it was an internal memorandum, even though it clearly contained many statistical evaluations about the Government's classification practices. Finally, there is now a hint that it is classified, even though at the time that it was announced it was not. I think this is an extremely important document, and I would urge the chairman to do everything that he can do to acquire it. And I represent that by the middle of this month if I have not gotten hold of it I will probably file suit to do so. I believe that it would be the first glimpse of the Government's study of its own overclassification practices.

Well, briefly on the second exemption, the internal personnel rules and practices, there is a very important amendment in H.R. 5425 which would make it crystal clear that the exemption is to cover only documents, the disclosure of which would unduly impede the functioning of an agency. This is very important. We have two cases where matters of public importance or constitutional importance have been withheld under the second exemption, and they do not appear to me in any meaningful way to be internal personnel rules or practices. The first is a press credentials case where a client of ours was denied admission into the White House as a newsman. We discussed this in our testimony last year. He was not told the reasons for this denial because the Secret Service claimed that it would reveal the internal practices of the Secret Service, an extraordinary citation of the exemption since there is no way without filing suit, claiming that he has been arbitrarily denied access to the White House, that this person can find out why he was not permitted to get in.

Now, the second case is a case where we are trying to obtain documents concerning the honor code system at the Air Force Academy, a subject which is so celebrated that I notice that it appeared, with respect to one of the other service academies, on page 10 of the New York Times this morning. Nevertheless, the district court decided that case against us on the ground that the second exemption applied because in

the court's view the documents were internal matters in the Air Force Academy. Because of these overly broad interpretations of the current exemption, we support the amendments proposed for subsection 2.

The fourth exemption is amended in H.R. 5425 to bring it in line with the decision in the *Consumers Union* case. It is an excellent amendment, and I believe that many witnesses testified that it was necessary in hearings last year. The amendment proposed in H.R. 4960 we feel is counterproductive. We may misunderstand it, but it appears to allow an executive agency to give a pledge of confidentiality for any financial information that it receives. But, the purpose of the exemption would be to protect the person submitting the information, not the agency, and we do not feel that pledges of confidentiality should be given by any agency. Furthermore, the burden of proving that the information given to the agency was confidential should be on the person submitting it.

The fifth exemption, the internal memorandum exemption is one of the muddiest areas in the statute. I hear rumors that some people would like to abolish it entirely. We feel that it does serve a purpose, but we were disappointed to find that neither bill proposed what we thought was necessary to separate facts from fiction, facts from opinion or advice, and to require the production of all factual information in any internal memorandums. H.R. 4960 appears to require a separation of information generally exempt from nonexempt information, but this does not seem to apply to exemption No. 5 because the bill would amend subsection 5 to permit the withholding of documents containing presumably in any part opinion or advice. That is a broadening of the exemption, so we are very strongly opposed to the H.R. 4960 approach, and suggest that a further amendment is necessary which would require courts, in camera, to separate fact from advice and, in fact, this is the solution that was proposed by Justice White in the *Mink* case. If a flexible approach similar to the one that he suggests is taken, I think that would possibly solve many of the problems under the internal memorandum exemption.

The sixth exemption, the privacy exemption, would be amended very minimally by H.R. 5425 to prevent a commingling of exempt and nonexempt information in one file. In other words, if there were some privacy-invading documents, they should not be covering other documents which are not privacy invading. We think an additional amendment is necessary, however, and it is one that the courts have found satisfactory in this area, which is to require the deletion wherever possible of the names and identifying information which would invade privacy, and then to release the documents. I think that this would be a simple amendment which could be stated in permissive terms so that the courts would clearly have the power to require agencies to delete identifying information.

The seventh exemption, the investigatory files exemption, has been one of the sticky points in the statute. In this area there are two very important amendments which we support. The one in H.R. 5425 would narrow the definition of "investigatory" so that it would cover only a "specific law enforcement purpose," and even then would eliminate scientific and other information which might be included within an investigatory file. The amendment offered by H.R. 4960 takes care of one of the other problems of the current investigatory files exemp-

tion, and requires the agency withholding such a file to show that there is a genuine risk to law enforcement in order to continue to withhold it. This would permit disclosure of at least some of the dead files that are often sought under the Freedom of Information Act which may once have served a law enforcement purpose, but where there is no further law enforcement purpose to be served. There are a variety of cases cited in our statement where the courts of appeal have found that solution to be acceptable, and we, therefore, commend the amendment in H.R. 4960. We have a case which I mentioned briefly earlier which I think is an excellent example of this problem. This is the case where our client, a professor, is seeking 25- to 40-year-old investigatory documents which stopped serving their law enforcement purpose at least 25 years ago. And we feel that they could be released, and the protection of informants or others be secured by deleting their names. If the amendment in H.R. 4960 were enacted, documents of that kind would be more readily available.

I will pass over the section in H.R. 5425 which requires all information to be submitted to Congress which would otherwise be covered by the exemptions. I have discussed it briefly, and this morning I, with another ACLU witness, testified on this subject on the Senate side. This is really a matter of executive privilege, and I know the committee is very interested in it, but for the purposes of this testimony I am not sure we should go into it. I probably disagree with a number of the committee members because we do feel that the purely advisory and opinion communications within all branches of Government should, in fact, be protected from disclosure. They should not be withheld at the unreviewable discretion of the branches. The court should be permitted to come in and where there seems to be an abuse, to compel the disclosure. But, we do not support an across the board probe of the thinking processes of the executive branch by the Congress.

Mr. MOORHEAD. You mention that you have a position paper entitled "Executive Privilege, Congress and the Courts." I think the subcommittee would certainly like to have a copy of that study for insertion in other hearings of the subcommittee on that subject.

Mr. SHATTUCK. I will be glad to provide it. We have a short summary of it, too. The paper is about 70 pages long.

Leaving the exemptions and concluding the testimony by addressing myself to the administrative enforcement amendments which have been proposed in the two bills, there are a number of very important ones. The identifiable records requirement is amended by H.R. 5425 to require that documents be made available. We have had a great deal of difficulty with the identifiable records requirement. Sometimes an agency will say if your request is for files which are too voluminous they will consider that those are not identifiable, and in other instances they require you to tell them what their own internal markings on the documents are, which is a "Catch 22" situation, to say the least. The amendment in H.R. 5425 would considerably alleviate these difficulties.

The costs problems that were highlighted in the testimony last year I do not think were addressed by either of the bills, and I was disappointed. Our experience has been that persons requesting information under the statute sometimes have to pay as much as 75 cents a page, and then are charged additional fees for routine retrieval. I would hope

that an amendment could be introduced or incorporated in one of the bills saying that fees would have to be strictly limited to the out-of-pocket expenses of the Government agency.

The provisions on time and the exhaustion of administrative remedies are generally acceptable to us. We thought that they reflected a reasonable approach. We were more in agreement with the approach in H.R. 5425 than in H.R. 4960 because it seems to be stricter. To create a number of exceptions to the 10-day response requirement seems to invite abuse, and since the committee last year in its report suggested that the information offices of each agency should handle most of the requests, we feel that if the requests were regularized in that manner it would not only be reasonable to limit the agencies to 10 days, but I think we should expect that responses would be received in a few days if people are spending full-time on this matter, and routine requests processed very quickly.

Requiring the Government to answer a complaint in court in 20 days is a very important amendment in H.R. 5425. The Government will have formulated its position previously in the administrative proceeding, and there is absolutely no reason to give them 60 days to respond to an FOIA complaint. In fact, the reason that the newsmen have used this statute so little I think is perfectly exemplified by the requirement that you must wait 60 days after exhausting your administrative remedies before getting a response.

Finally, the mandatory inspection which is required by H.R. 4960, giving the court no leeway to refuse to disclose documents which are not exempt on an equitable basis, I think is excellent. We have had experience in a variety of ways with courts who even though they are convinced that no exemption applies still continue to think the public interest has been served by having the documents withheld, which is an extraordinary reading of the statute, and to force the court to take jurisdiction and to grant injunctions is therefore essential.

Finally, in one case which we also described last year, and which has recently been decided, we have had a court reach out and of its own accord decide that an exemption which had never been argued before applied, and refused to enjoin the withholding of the information. This is a tricky matter, but I think that the mandatory injunction provision would cover that. Since the burden of proof is clearly on the agency, and if the agency fails to shoulder that burden, the amendment in H.R. 4960 would quite properly prevent a court from reaching out sua sponte and deciding an exemption applied that had not been argued below.

Finally, the machinery for the congressional oversight which is provided in both of the bills is probably beyond our competence to comment on. But we support it, and I assume it reflects great deliberation by the committee as to the best way to conduct this oversight. Clearly congressional oversight is necessary, and whatever machinery is set up would hopefully be able to perform as magnificently as your committee has performed in the last 2 years to bring pressure to bear on the agencies to live up to the Freedom of Information Act.

Mr. MOORHEAD. Thank you very much, Mr. Shattuck. And in case I did not do this before, I would say that without objection your entire statement will be made a part of the record. And we appreciate your ability to summarize it so effectively and briefly.

[The statement referred to follows:]

PREPARED STATEMENT OF JOHN SHATTUCK, STAFF COUNSEL, AMERICAN CIVIL LIBERTIES UNION

My name is John Shattuck and I am Staff Counsel for the American Civil Liberties Union, a nationwide, nonpartisan organization of more than 200,000 members, on whose behalf I appear today. The resources of the ACLU are entirely devoted to advancing and defending the Bill of Rights. During its fifty-three year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment, and in recent years we have represented a wide variety of citizens requesting disclosure of information from executive agencies of the government.

The right to know how the government is discharging its duties is essential to a democratic people who would be their own governors. This is the constitutional idea underlying the Freedom of Information Act. As President Johnson commented when he signed the new law in 1966:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits . . . . 2 Weekly Compilation of Presidential Documents 895, July 11, 1966.

This Committee in its Report to the House had earlier expressed a similar viewpoint:

> A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a truism needs repeating. . . . House Report No. 1497, at 12. See also, Senate Report No. 813, at 3.

I. THE FAILURE OF THE FREEDOM OF INFORMATION ACT TO LIVE UP TO ITS CONSTITUTIONAL PREMISE

An understanding of the constitutional premise in the Freedom of Information Act is essential to defining its proper scope. This premise is too infrequently explained by courts interpreting the Act—one reason why the Act has often been so narrowly interpreted as to defeat its purpose.

The Supreme Court has long held that the First Amendment protects not only the right of citizens to speak and publish, but also the right of the public to receive information. See *Martin* v. *City of Struthers*, 319 U.S. 301, 308 (1965) (Brennan & Goldberg, JJ., concurring); *Stanley* v. *Georgia*, 394 U.S. 577, 564 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1963); see generally *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). Thus, the Act must be seen as an affirmative effort on the part of Congress to give meaningful content to the system of freedom of expression as provided by the First Amendment. See Emerson, *The System of Freedom of Expression* (1971), Chapter XVII.

Because the public interest in disclosure of government documents under the Freedom of Information Act rises to constitutional stature, Congress specifically limited the circumstances under which this interest may be governmentally restricted to the nine exemptions provided in subsection (b) of the Act. Subsection (c) also provides: "This Section [5 U.S.C. § 552] does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." The purpose of this provision is crystal clear. As the Senate Report stated:

> The purpose of this subsection is to make it clear beyond doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions. S. Rept. at 10.

The House Report contains very similar language. See House Rept. at 11.

Since the exemptions touch on First Amendment interests, they have the effect of "licensing" free speech and public debate. For this crucial reason they must be drafted by Congress and construed by the Courts as "narrow, definite and objective standards to guide the licensing authority." *Shuttleworth* v. *Birmingham*, 394 U.S. 147, 151 (1969). Moreover, they must be applied where applicable in a "uniform, consistent and nondiscriminatory" manner by federal agencies receiving requests for documents. See *Cox* v. *Louisiana*, 379 U.S. 536, 545 (1965).

Unfortunately, the Act has not worked out that way. Conflicting legislative history, as well as bureaucratic hostility and inertia, coupled with a general reluctance on the part of the judiciary to give it broad effect, has converted the statute in many respects into a "Freedom from Information Act." And all of this has happened at a time when the Act is desperately needed to counteract a general increase in government secrecy.

In testimony a year ago before this subcommittee, Sanford Rosen and I outlined the ACLU's principal concerns about the operation of the Freedom of Information Act. We gave a variety of examples from our own experience of the extreme reluctance of executive agencies to abide by its spirit, and we attempted to pinpoint the statutory loopholes which in our view tended to frustrate the public's right to know, and to dampen informed debate about issues of private as well as public importance. We expressed particular concern about certain ambiguities in the affirmative provisions of the Act, such as the definitions of "agency", agency "orders" and "statements of policy"; the lack of a mandatory judicial enforcement mechanism; and confusion about whether a person must show a particular "need" for government information before he can compel its disclosure.

We also addressed ourselves to the breadth of the nine exemptions and the imminent danger—again, in light of our litigation experience—that these exemptions would swallow up the affirmative provisions and defeat the purpose of the Act. This seemed particularly true of the national security [((b)(1)] and investigatory files [((b)(7)] exemptions. Our experiences over the last year have even more solidly confirmed this fear, as I will describe later. Finally, we also voiced our concern in our testimony last year about the growth of obstructive administrative procedures for processing requests for information under the Act. These include complicated agency request forms, exorbitant filing and reproduction fees, an unreasonable degree of specificity in identifying requested documents, refusals to separate non-exempt from exempt information, and unconscionable delays in processing initial requests and administrative appeals. In each of these areas where we felt the Act was not working properly we gave examples from cases in our own files, and we were not surprised to find that the Government Operations Committee Report last fall contained scores of similar examples of the malfunctioning of the Act.

The two bills which the subcommittee is now considering are important steps toward remedying some of these basic deficiencies. While we generally support the remedial thrust of both of the bills, each of them has particular shortcomings and strengths which I would like to try to pinpoint. In order to compare them I have found it convenient to discuss them in terms of their sometimes differing approaches to what information should be exempt from the Act and how the Act should be administered and enforced. Because I believe the exemptions are the single largest problem in the existing statute, I shall look first at the ways in which H.R. 5425 and H.R. 4960 would amend subsection (b) of the Act.

II. AMENDING THE EXEMPTIONS FROM THE ACT

The difficulty with the exemptions from the Act seems to start with a memorandum issued by the Attorney General in 1967, soon after enactment of the statute. ("Memorandum on the Public Information Section of the Administrative Procedure Act".) This memorandum analyzed the Act, and particularly its exemptions, in very restrictive terms for the edification of government agencies. It took advantage of a conflict in the legislative history and, with deference to this subcommittee, relied exclusively on a rather expansive view of the exemptions taken by the House Government Operations Committee in its Report on the bill. The House Report, however, did not reflect the view of the Congress, having been written after the Senate had acted on its bill and taking a considerably different position from the Senate Committee Report.[1]

[1] A few discerning courts have recognized that "[s]ince only the Senate report was considered by both houses of Congress, the Senate Committee's reading of the Act is a better indication of legislative intent when the two reports conflict." *See Consumers Union of the United States, Inc. v. Veterans' Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969); *Benson v. General Services Administration*, 289 F. Supp. 590, 595 (W.D. Wash. 1968), *aff'd on other grounds*, 415 F. 2d 878 (9th Cir. 1969); *Soucie v. David*, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). See also *Getman v. NLRB*, 450 F. 2d 670 (D.C. Cir. 1971).

Nevertheless, the damage was done by the Attorney General's memorandum, which has studiously been followed by most government agencies. Since no government witness had testified in favor of the Act when it was being considered in Senate and House hearings, the agencies were of course delighted to find the Attorney General giving it a restrictive interpretation.

The Attorney General's expansive interpretation of the exemptions has been transmitted not only to federal agencies who must comply with the Act, but also to courts who must resolve the conflict between disclosure and exemption. Some courts have even upheld assertions of exemption by expressly relying on the Attorney General's Memorandum. See e.g., *Benson* v. *General Services Administration*, 289 F. Supp. 590 (W.D. Wash. 1968), *affirmed on other grounds*, 415 F. 2d 878 (9th Cir. 1969); *Consumers Union of the United States* v. *Veterans Administration*, 301 F. Supp. 796, 801 (S.D.N.Y. 1969).

Let us then look at several of the more important broadly interpreted exemptions and the amendments proposed in H.R. 5425 and H.R. 4960.

(*a*) *"National security information specifically exempted by Executive order"* [§(*b*)(*1*)].

The first exemption has increasingly become the greatest deficiency in the statute. Instead of reducing the obsessive secrecy in which the Executive conducts foreign and military affairs, it has tended to enhance and legitimate that secrecy by appearing to authorize an unreviewable executive power to classify documents.

In many respects this is the fault of the courts, not of Congress. While the courts are authorized by subsection (a)(3) to conduct a thorough review of each case of non-disclosure, when the national security exemption is asserted they decline to exercise their review power. This situation was brought to a head in January of this year when the Supreme Court held in its controversial 6–3 *Mink* decision that *any* classified information is exempt from disclosure whether or not it is properly or necessarily classified, and that a court is not entitled to review the propriety of the decision to classify [*Environmental Protection Agency* v. *Mink*, — U.S. —, 41 U.S.L.W. 4201 January 23, 1973)] *Mink*, as the subcommittee knows, involved a request by 33 Congressmen for the release of classified documents concerning the anticipated environmental impact of the underground nuclear test on Amchitka Island. Despite the extraordinary importance of the documents to a proper legislative debate, and in the face of evidence of the rampant overclassification and lumping together of classified and unclassified information, the Supreme Court held that the documents could not even be inspected by a court.

I believe, however, that the *Mink* decision was implicitly an invitation to Congress to amend subsection (b)(1) to require judicial review of documents claimed to be exempt by reason of their general classification. I am pleased to see that the sponsors of H.R. 5425 and H.R. 4960 apparently share this view.

In his opinion for the majority in *Mink* Justice White rejected the argument of the respondents and the ACLU as *amicus curiae* that in order to qualify for the exemption each document would have to be classified pursuant to a *specific* order of the President and that the courts were therefore empowered to make an *in camera* inspection to review the propriety of the general classification. Justice White rejected this argument because in his view the language of subsection (b)(1) did not support it. On the other hand, he carefully pointed out that "Congress could certainly have provided that the Executive Branch adopt *new procedures*, or it could have established *its own procedures* . . ." 41 U.S.L.W. at 4204 [emphasis added].[2]

The new procedures proposed in H.R. 5425 and H.R. 4960 would have a salutary effect on the classification crisis resulting from the practices of the Executive Branch and brought to a head by the Supreme Court in *Mink*. Both bills would require *in camera* inspection of documents claimed to be exempt, as part of the court's de novo review procedure under subsection (a)(3). This inspection would apply to *all* documents, but its effect would be most pronounced on documents withheld under the (b)(1) exemption.

[2] It is our view that this language also implies, and properly so, that Congress itself has the constitutional authority to establish a classification system, and that Executive Order 11652, which authorizes the current classification system could not survive a direct congressional challenge by way of new legislation. See Dorsen and Shattuck, "Executive Privilege, the Congress and the Courts" [see p. 157].

Of the two versions of this *in camera* review amendment, the one proposed in Section 1(a)(d) of H.R. 5425 is preferable. Clarity is essential in matters of "national security" and the courts must be given a legislative standard to apply to their *in camera* inspections. A standard which requires disclosure unless "harmful to the national defense or foreign policy" (H.R. 5425) is considerably more comprehensible than one which requires *in camera* inspection of classified documents "to determine if they are being improperly withheld" (Sec. 101, H.R. 4960). Needless to say, some deference would have to be paid to a well considered and procedurally correct executive decision to classify, but the traditional reluctance of the courts to conduct *any* review of "national security" determinations would provide a built-in safeguard against judicial abuse. Indeed, the central problem is to coax the courts to play even a limited role in this area.

Expanded judicial review of claims of the (b)(1) exemption is essential to prevent political and administrative abuses of the classification system.

The political abuses are too numerous to catalogue. One particularly striking example comes from my own litigation. Professor Allen Weinstein is chairman of the American Studies Department at Smith College. For the last five years he has been researching and writing about politics in the early Cold War period. His research has led him to an intensive study of the Alger Hiss perjury-espionage case, and he has repeatedly attempted to gain access to the voluminous dead FBI files on the case to verify the position taken by several other writers that the Hiss defense was a hoax. These other writers—unabashed publicists and apologists for the FBI—have by their own admission been permitted to inspect the FBI files, although they have cited no documents in reaching their conclusions. Weinstein, however, has been denied access by the FBI, presumably because he has published a widely respected article indicating that at least for him the case still raises unresolved questions. He has now sued the FBI under the Freedom of Information Act, but has immediately run up against the national security and investigative files exemptions, even though the documents are more than twenty-five years old, are part of a closed case, and have been disclosed already to other persons. The case is now pending in the District Court here in Washington [*Weinstein* v. *Gray*, Civil Action No. 2278–72].

Administrative abuses of the classification system are a result of its sheer weight. Under Executive Order 10501, there were more than 40,000 persons in the Defense Department alone with authority to classify, while under the new Executive Order 11652, as a study by the staff of this subcommittee has shown, "the number of persons granted authority to wield 'SECRET' stamps mushrooms . . ., for every person with 'TOP SECRET' authority can designate without limitation any subordinate to use 'SECRET' stamps." CONG. REC. at E 2776 (March 21, 1972).

I would like to describe briefly one example of what I consider an administrative abuse which would not withstand scrutiny under the *in camera* inspection procedure proposed in H.R. 5425. Professors Bertram Wolfe, Lev Dobriansky and Julius Epstein (an historian, economist and international lawyer, respectively) have requested production of the so-called "Operation Keelhaul" files concerning the forced repatriation of Russian refugees after World War II. In an earlier case the documents were held to be exempt under subsection (b)(1) because they were classified, although the district court refused to inspect them. *Epstein* v. *Resor*, 421F. 2d 930 (9th Cir. 1970).

A year later the documents were cleared for declassification—presumably as a result of the lawsuit, since this subcommittee heard testimony last year that 160 million pages of World War II documents have still not been reviewed for declassification [Hearings before a Subcommittee of the House Committee on Government Operations on U.S. Government Information Policies and Practices, 92nd Cong., 2nd Sess. (1972) (daily transcript), at 1012]. Nevertheless, the documents have not been released because they are still classified by the British, who have retained a separate copy.

The professors have been told, moreover, that the British refuse "to address the question of declassification until they [have] completed their review of all their wartime documents," although there is no indication that they pose any objection to declassification based on the *contents* of the documents. [Exhibit A to Plaintiffs' Memorandum of Law in Support of their Motion for Summary Judgment, *Wolfe* v. *Froehlke*, Civil Action No. 2277–72 (D.D.C.)]. In defending its claim of exemption, the government has candidly declined even to include an assertion that disclosure would cause significant injury to our relations with

Great Britain or any other country, and rests its case entirely on the assumption that the court will not review the documents which can be withheld solely because the British have not concurred in their release. In short, these important historical documents are being withheld solely for administrative reasons, and even then, for the administrative convenience of a foreign government.

(*b*) *"Matters related solely to the internal personnel rules and practices of an agency"* [§(*b*)(*2*)].

The second exemption should have caused no problems at all, but it has. Part of the difficulty stems from a conflict in the legislative history. While the Senate Report took the position that the exemption did not cover information pertinent in any way to persons outside an agency,[3] the House Report treated it as somewhat broader in scope.[4]

Since the sole purpose of the exemption is to prevent persons outside the agency from disrupting matters which are solely internal and unrelated to the public, a broad interpretation does not seem justified. Accordingly, we welcome the amendment proposed in H.R. 5425 which would limit the exemption to "internal personnel" matters "the disclosure of which would unduly impede the functioning of [the] agency" [Sec. 2(a)].

The abuses to which the existing language has been subjected are illustrated by two ACLU cases. In one case, mentioned in our previous testimony, we are representing a journalist who is seeking to be accredited as a reporter to cover the White House. He has been denied press credentials. Seeking a statement of reasons for the denial, he was informed by the Secret Service that the information was exempt from disclosure because it would reveal "internal practices" of the Secret Service within the terms of subsection (b)(2). In this case, therefore, the exemption was used to bar discovery of information pertinent to the apparent denial of a First Amendment right, and our client was forced to go into litigation to find out why he was barred from the White House.

In another case also briefly touched upon in our testimony last year, editors of the New York University Law Review have attempted to obtain "sanitized" case studies of the well publicized disciplinary hearings at the United States Air Force Academy in order to document an article on military discipline. The Air Force refused to disclose, relying solely on the "privacy exemption" [subsection (b)(6)]. The District Court held that this exemption was inapplicable. Nevertheless, the court also held, *sua sponte*, that the records were exempt under subsection (b)(2), notwithstanding the fact that the Air Force itself had generated considerable public debate about its "Cadet Honor Code" by defending it in press conferences. The White House in November 1972, a month before the Court's decision, issued a press release announcing the completion of a presidential study of morale and discipline at the service academies. In short, the documents sought were considered to be important to persons outside the Academy, and for this reason the Air Force did not rely on the (b)(2) exemption which the court held applied. *Rose* v. *Department of the Air Force*, —— F. Supp. —— (S.D.N.Y. Dec. 29, 1972).

The district court's decision in *Rose* also raises a serious question about the power of a court to disregard the burden of proof requirement of the statute. We recommend that Congress make it crystal clear that the burden is on an agency to show that it is entitled to exemption, and that a court is therefore without jurisdiction to deny disclosure on a ground not presented by the agency. Any other interpretation is inconsistent with the fact that the exemptions are intended to be *permissive* not mandatory.

(*c*) *"Trade secrets and commercial or financial information obtained from a person and privileged or confidential"* [§(*b*)(*4*)].

The fourth exemption is amended by both bills, but the formulation in Sec. 2(b) of H.R. 5425 is the more sensible of the two.

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[3] The Senate Report at P. 8 explains: "[e]xemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like."

[4] The House Committee Report states at P. 10: "[m]atters related solely to the internal personnel rules and practices of any agency, operating rules, guidelines, and manuals of procedure for Government investigators or examiners would be all exempt from disclosure." The Attorney General's Memorandum at pp. 30–31 accepts the House interpretation without so much as a passing reference to the conflict between the two reports.

The problem with the existing exemption is that it has been claimed by agencies and sometimes interpreted by courts to apply to non-commercial and financial information which the *agency* rather than the person who provided the information claims is confidential. As we pointed out in our testimony last spring, agencies have denied disclosure of documents under subsection (b)(4) which are confidential but not commercial or financial in nature, e.g., *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 594 (D.P.R. 1967) (statements of persons given in confidence to NLRB agents in connection with the investigation of an unfair labor practice); cf. *Tobacco Institute* v. *FTC*, Civ. No. 3035-67 (D.D.C. 1968). On the other hand, agencies have also refused under this exemption to disclose commercial information even though it was not "obtained from a person" but was developed by the agency. We had a client last year, for example, who was a nonprofit educational corporation. This organization requested the Army to supply it with data about a new 35-millimeter film projector the Army had developed. Even though the Army had no commercial interest in the projector, the data was withheld for more than three months under a claim of the (b)(4) exemption. On a final administrative appeal, under threat of litigation, it was released.

Only a few courts have applied a properly restrictive interpretation to subsection (b)(4). In *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), a case brought by an ACLU General Counsel, it was held that information to be exempt had to be (1) privileged or confidential, *and* (2) commercial or financial or a trade secret, *and* (3) obtained from a person outside the agency. See also *Grumman Aircraft Corporation* v. *Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970). This is now made clear by the amendment proposed in H.R. 5425, which we support.

The amendment contained in Sec. 103(a) of H.R. 4960 seems both superfluous and confusing. Insofar as an agency has obtained information "from a person under a statute specifically conferring an express grant of confidentiality," that information should be exempt from disclosure under subsection (b)(3) of the Act. On the other hand, by permitting an agency to confer a "pledge of confidentiality" on the person supplying it, the agency is given an opportunity to claim the exemption even when the outside "person" does not require protection.

We believe that the burden of justifying any claim of confidentiality in this commercial area should be placed on the person submitting the information, and that the agency should disclose all such information unless its supplier can bear this burden. Apparently this is the practice of the Environmental Protection Agency, and it should be recommended to other departments. [See Administration of the Freedom of Information Act, Twenty-first Report by the Committee on Government Operations, 92nd Cong., 2nd Sess. (Sept. 20, 1972), at 34].

(*d*) *"Inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency"* [§ (*b*) (*5*)].

The internal memorandum exemption is one of the muddiest areas in the statute. It is unfortunate, therefore, that neither bill comes to grips with the needs to require agencies, whenever feasible, to separate fact from advice. This problem was discussed in our testimony last year, as well as in the testimony of other witnesses.

It is unnecessary to repeat the numerous examples contained in the subcommittee's earlier hearings of refusals by courts as well as agencies to limit this exemption to policy matters. While it is reasonable to exempt documents in which "facts" and "policy" are "inextricably intertwined," it is unreasonable automatically to apply the exemption to documents which contain any element of "policy" or "advice", however inconsequential.

Justice White addressed this problem in his opinion for the majority in *Mink*. In explaining why Congress had rejected an earlier version of the exemption, which was limited to internal memoranda "dealing solely with matters of law or policy," 41 U.S.L.W. at 4206, Justice White pointed out that

> . . . the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. *That decision should not be taken taken, however, to embrace an equally wooden*

exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of law, policy or opinion. 41 U.S.L.W. at 4207 [emphasis added].

The opinion went on to recommend flexibility in applying the exemption and suggested that agencies and courts wherever possible should make available to persons seeking documents under the Act "purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents." *Id.*

This is sound advice. In our view it should be embodied in an amendment to subsection (b)(5) of the Act, since experience has shown that agencies and, to a lesser extent, courts are reluctant to adopt such flexibility on their own initiative.

The amendment proposed in Sec. 101 (b) of H.R. 4960 would only make matters worse. Agencies should not be invited to withhold documents "which contain [presumably in small as well as large part] recommendations, opinions, and advice supportive of policymaking processes." This broad language is apparently contradictory of the provision in Sec. 102 of the same bill, which expressly requires an agency, where possible, to separate exempt from nonexempt material. It is this latter approach which should govern the internal memorandum exemption, as well as the other exemptions. Accordingly, Sec. 103(b) of H.R. 4960 should be deleted, and a provision similar to Sec. 102 of that bill should be added to H.R. 5425.

(c) *"Personnel and medical and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"* [§ (*b*)(6)].

The only change proposed for this exemption is contained in Sec. 2(c) of H.R. 5425, which would substitute "records" for "files". According to Chairman Moorhead the purpose of this amendment is to "close another loophole in the Act whereby releaseable information is often commingled with other types of information in a single 'file', and therefore withheld." CONG. REC. H. 1590 (March 8, 1973). This seems sensible.

In our earlier testimony, however, we proposed an additional amendment which I wish to press again. It should be made clear that personnel or medical files can be released if the private and personal material is deleted. The exemption must not be used to allow the withholding of unobjectonable material merely because it is contained in the same file as material that invades a person's privacy. In fact, as suggested in Sec. 103 of H.R. 4960, whenever exempt matter is mixed with non-exempt matter, the agency bears the burden of separating the non-exempt matter and disclosing it.

Very few agencies have adopted this practive of "sanitizing" records in order to protect personal privacy rather than merely withholding them, but the courts have generally compelled them to do so whenever possible. See, e.g., *Wellford* v. *Hardin*, 315 F. Supp. 768 (D.D.C. 1970), aff'd 444 F. 2d 21 (4th Cir. 1971) : *Grumman Aircraft Corporation* v. *Renegotiation Board, supra*; *Rose* v. *Department* of the *Air Force, supra.* The District Court in *Rose* summarized this practice as follows:

> Revelation of a set of facts absent some type of association with a person's name seems to us incapable of invading anyone's personal privacy. It is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of the sixth exemption. The Act and courts following the Act, therefore, permit deletions of exempted portions of documents but then order the remainder to be released. *Rose* v. *Department of the Air Force, supra*, Slip Op. at 4–5.

In order to commend this approach to the agencies, subsection (b)(6) of the Act should be further amended to require the deletion, where feasible, of names or other identifying characteristics from records the disclosure of which would otherwise constitute a clearly unwarranted invasion of personal privacy.

(f) *"Investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency"* [§ (*b*)(7)].

The investigatory files exemption as originally drafted suffers from two principal abuses: "investigatory" has been defined too broadly by most agencies, and a "law enforcement purpose" has been regarded as a permanent shield, even when a law enforcement proceeding has been concluded or foreclosed and no prejudice could result from disclosure.

H.R. 5425 and H.R. 4960 each addresses a different abuse. Sec. 2(d) of H.R. 5425 significantly clarifies the meaning of "investigatory" by requiring a record

withheld under this section to be for a "*specific* law enforcement purpose" [emphasis added]. Even then the record cannot be withheld if it relates to "scientific tests, reports or data," or "inspection reports which relate to health, safety [or] environmental protection," or if it is a record underlying a public policy statement or a rulemaking. These narrowing provisions would go far toward preventing a recurrence of cases where unconscionably broad agency interpretations of the exemption were not repudiated until they reached the court of appeals. E.g., *Weisberg* v. *Department of Justice*, — F. 2d—, 41 L.W. 2470 (D.C. Cir. Feb. 28, 1973) (request for spectographic analyses of bullets which killed President Kennedy); *Getman* v. *NLRB*, 450 F. 2d 670 (D.C. Cir. 1971) (request for names of union members eligible to vote in union election; list maintained by agency pursuant to its own adjudicative decision); *Wellford* v. *Hardin*, 444 F. 2d 21 (4th Cir. 1971) (request for letters of warning already sent to meat processors about possible violations of federal law).

Sec. 103(c) of H.R. 4960 is apparently aimed at curbing the other principal abuse. This amendment would require disclosure of an investigatory "record" unless there was, inter alia, "a genuine risk to enforcement proceedings." This language is consistent with the original Senate Report which pointed out that the purpose of the (b)(7) exemption was to permit the withholding of "files prepared . . . to prosecute law violators. . . . the disclosure of [which] could harm the Government's case in Court." S. Rept. at 9 [emphasis added]. Unfortunately the agencies have not taken such a narrow view of the exemption, and courts have often found it necessary to compel them to release "dead files." See, e.g., *Weisberg* v. *Department of Justice, supra*, (investigatory information concerning Kennedy assassination now more than nine years old and not held for law enforcement proceedings); *Bristol-Myers* v. *FTC*, 424 F. 2d 935 (D.C. Cir. 1970) (no further adjudicatory proceedings, contemplated); *Wellford* v. *Hardin, supra*, (no danger of "premature discovery by a defendant"); *Schapiro & Co.* v. *SEC*, 339 F. Supp. 467 (D.D.C. 1972) (disclosure of investigative information compelled six years after being compiled); *Cooney* v. *Sun Shipbuilding & Drydock Company*, 208 F. Supp. 708 (E.D.Pa. 1968) (no danger of "premature disclosure" of an agency's case).

A combination of these important amendments is essential if excessively broad interpretations of the investigatory files exemption are to be avoided. In the *Weinstein* case referred to above, for example, an entire investigatory file containing voluminous documents between 25 and 40 years old is being withheld under a blanket claim of exemption. The law enforcement purpose for which the documents were originally compiled was fully served more than twenty years ago. To the extent that the privacy of innocent persons or live informers would be invaded by release of the documents, or that live informers would refuse to cooperate further, I see no reason why the deletion of names and identifying information from the documents would not be sufficient. In any event, I believe that this case underscores the need for the amendments contained in H.R. 5425 and H.R. 4960.

(g) *Should the exemptions apply to requests for information by committees of Congress?*

H.R. 5425 would amend subsection (c) of the Act to provide that none of the exemptions shall authorize an executive agency to withhold records or information from Congress [Sec. 3]. This is an extremely important amendment which we support with one reservation.

Professor Norman Dorsen and I testified this morning on behalf of the ACLU before a joint committee considering the issue of executive privilege. Our position is contained in a paper, "Executive Privilege, the Congress and the Courts," which has been submitted for the record.

We agreed that the Executive has no inherent Constitutional power to withhold information from committees of Congress if such information is germane to a proper legislative inquiry, as defined by the Supreme Court in *Watkins* v. *United States*, 354 U.S. 178 (1957). However, we take the position that all three branches of the federal government have an implied constitutional power to protect their internal decision-making processes by withholding advisory communications. This means that judicial law clerks and legislative assistants as well as officials within the executive branch cannot be forced to reveal what "advice" they gave to their superiors or associates.

The principal justification for this narrow but important privilege is that the development of public policy will be harmed if individuals in government

cannot rely on the confidentiality of their communicated opinions. Freewheeling debate among colleagues and the presentation of iconoclastic ideas are inhibited if the prospect looms of later cross-examination. A tragic example of such inhibition was the stagnation of American policy toward China in the wake of the censorious treatment of China experts such as John Paton Davies, who courageously anticipated American Far Eastern Policy twenty years too soon, and paid dearly for their foresight. The Joe McCarthy era brings to mind many other tragic examples. To require all advice to be subject to often unfriendly scrutiny would surely dry up many sources of innovation and truth.

We have, therefore, attempted to block out as follows, the extremely broad boundaries of proper Congressional inquiry into Executive matters:

1. No executive witness summoned by a congressional committee may refuse to appear on the ground that he intends to invoke a "privilege" as to all or some of the questions that may be asked.

If an employee of the executive branch is directed by a superior not to testify he should make himself available to explain the reasons for the refusal. Congress is entitled at least to this. Any other rule—and we fear that it is the rule by which we now live—opens the door wide to unjustified and even arbitrary assertions of privilege, and to the denial to the legislative branch of information it rightfully seeks in order to carry out its constitutional responsibilities.

2. a. A witness summoned by a congressional committee could claim advice privilege only when accompanied by, and at the direction of, the Attorney General, Deputy Attorney General or Counsel to the President, who would assert that they were acting at the direction of the President personally.

b. A witness may decline to answer questions about recommendations, advice and suggestions passed on to superiors or associates for consideration in the formulation of policy. (Nor may Congress question others, including the superiors or associates of an employee, about such advice.)

c. An individual summoned may not decline to answer questions about policy decisions that he personally made or personally implemented. Whatever the title of an individual, and whether or not he is called an "advisor," he should be accountable for actions that he took in the name of the government and decisions that he made leading to action on the parts of others.

d. An individual summoned may not decline to answer questions about facts that he acquired personally while acting in an official capacity.

e. Congress may also require answers to questions about actions or advice by executive officials which it has probable cause to believe constitute criminal wrongdoing or official misconduct, such as the anti-trust settlement with ITT, as well as the Watergate events. In such situations, of course, individuals summoned before Congress are entitled to exercise their constitutional rights, including, for example, the privilege against self-incrimination.

f. Past employees of the executive branch should also be able to exercise the privilege because the possibility that advice given in confidence might be revealed after an employee left the government could also have an inhibiting effect on free interchange. If called upon to review the exercise of a privilege over advice given by a former employee, a court in accommodating the respective interests of the legislative and executive branches might well conclude that the privilege is not permanent but expires after a given period of time—for example, a set number of years after a change in administrations, or the death of the former advisor.

3. a. Documents could be withheld from Congress or a committee of Congress only on the personal signature of the President.

b. The privilege should extend not to entire documents but only to those portions of documents that embody the criteria set out above to justify an exercise of "advice privilege."

III. ADMINISTRATION AND ENFORCEMENT

The administrative and enforcement provisions contained in section 552(a) are also in need of amendment, as illustrated by the many examples of agency foot-dragging contained in the subcommittee's excellent report issued last fall. While the purpose of the existing administrative provisions of the Act is to require agencies to establish orderly procedures that are consistent with prompt and full disclosure, section 552(a) contains a variety of weaknesses and ambiguities which require amendment. Many of these problems are addressed by H.R. 4960 and H.R. 5425.

(a) *Formal requirements for requests*

The statute currently requires agencies to process requests only for "identifiable records," thus placing an initial burden on the person making the request to be specific. This seems reasonable. In practice, however, the "identifiable records" requirement has become a tool for agencies to frustrate the statute by requiring a higher degree of specificity than any member of the public could reasonably be expected to satisfy. This problem was illustrated by many of the early agency regulations. The Renegotiation Board required the applicant to supply the date, addressee, and the "title or subject matter" of the record sought or to give an explanation for the failure to specify each of these matters. 32 C.F.R. § 1480.6(b) (1970). The prescribed forms of the Justice and Commerce Departments also required very detailed specification. HEW regulations, although not as rigid, could be read to require with some inflexibility that the applicant supply specific details such as date, author, addressee, and topic. HEW, 45 C.F.R. § 5.51(c) (1970). See also HUD, 24 C.F.R. § 15-13(a) (1970); CAB, 14 C.F.R. § 310.6(b) (1970).

The identifiability requirement has even been used by agencies as a basis for denying requests for records which in their view are too "voluminous" to make available. In our Weinstein case, described above, for example, the plaintiff has specified the FBI records he seeks in great detail, and the government in its responsive pleadings has itself identified the contested documents by date, file number, and size, claiming nevertheless that they are not "identifiable" within the meaning of the statute because they would be too difficult to produce even if they were not covered by any exemption. This is apparently a common agency argument, and it is generally not abandoned until a case reaches the court of appeals. The argument is often effective, therefore, in frustrating requests. See, e.g., *Wellford* v. *Hardin, supra* (request for all letters of warning issued to meat and poultry processors over a five year period rejected by Department of Agriculture); *Getman* v. *N.L.R.B., supra* (request for names and addresses of all employees entitled to vote in approximately 35 union elections rejected by NLRB); *Bristol-Myers* v. *FTC, supra* (request for all information compiled by agency concerning certain specified medicines rejected by FTC).

In light of these abuses of the "identifiable records" requirement, the amendment proposed in section 1(b) of H.R. 5425 is important. Agencies would be ordered to process "any request for records which (A) reasonably describes such records. . . ," and the word "identifiable" would be deleted from the statute. It should be made clear in the legislative history that at a minimum an agency could not refuse to process a request which did not identify a document by its internal symbol, or its date, or its author, or its addressee, nor could an agency refuse to consider a request for documents simply because it regarded them as too voluminous to produce.

A related amendment offered by section 1(a) of H.R. 5425 would require agencies "promptly [to] publish and distribute (by sale or otherwise) copies of" the adjudicative proceedings, statements of policy and administrative manuals affecting members of the public which are not published in the *Federal Register* but are required to be released under subsection (a)(2) of the Act. These documents are currently required to be made "available for public inspection and copying," but in practice they are often withheld because agencies find it "burdensome" to make them available pursuant to isolated requests.

Another way of tightening up the formal requirements for requests which is not suggested in either of the bills would be to require agencies to establish a uniform schedule of costs for retrieval and duplication of records. Such costs currently range as high as 75 cents per page, with additional fees being charged for routine retrieval. Fees should be strictly limited to the actual and direct out-of-pocket expense to the government.

(b) *Exhausting administrative remedies.*

The only constraint under which agencies are currently placed by the statute in processing requests is that they must make records "promptly available." As the committee's report sadly demonstrates, however, many recalcitrant agencies have followed the bureaucratic maxim that "time is the best administrator."

As we pointed out in our testimony last spring, requests are often pending for months while agency records are being "located" and "reviewed." A primary reason for the delay appears to be the difficulty in getting the necessary officials to turn away from other matters and review the request. Gianella, *Agency Pro-*

cedures Implementing Freedom of Information Act: A Proposal for Uniform Regulations, 23 Ad. L. Rev. 217, 223. Another reason why an agency may be inclined to drag out matters is the hope that the passage of time will exhaust the applicant's interest in the documents that the agency is reluctant to produce. This is undoubtedly the reason why so few journalists have found the statute worth using at all.

In one case that we described last spring, we made a request by letter to the Justice Department's Internal Security Division. Two months after we requested information by letter we were informed that we had to complete the proper form. After we sent a complete form, more than two additional months elapsed before we were informed that the record we requested did not exist. In another case, involving the United States Parole Board, more than two months passed after we had made several telephone requests for a new set of parole criteria being used by the Board before we were orally informed that we would not receive the criteria. A demand letter was sent to the Board's counsel, threatening suit if we did not receive the information within twenty days. On the twentieth day, the Board's counsel by telephone informed us that he was almost certain we would be provided with a copy, but that he needed a couple of more weeks to clear release with others in the agency. Among the "reasons" given for this delay, the counsel stated that the Department of Justice was having difficulty deciding which office should handle our request, since it did not wish to concede that the Parole Board was an "agency" within the meaning of the Act.

Both H.R. 4960 and H.R. 5425 contain detailed amendments which attempt to fill the current statutory void regarding the delays so often experienced in exhausting administrative remedies. The general rule proposed by both bills is a 10-day period for agencies to respond to initial requests, and a period not exceeding 20 days for response to administrative appeals. H.R. 4960, however, is more flexible than H.R. 5425 and permits an additional period for agencies faced with complex requests.

Since many of the administrative problems in the statute result from the failure of the agencies to employ their public information offices to expedite routine requests, we tend to favor the strict approach taken by H.R. 5425. Routine requests should be answered *immediately*, and only the more complex should take as long as 10 days. Furthermore, of the five exceptions to the ten-day rule contained in H.R. 4960, the first four relate only to technical problems in producing the records. These problems are at least partially dealt with in section 1(c) of H.R. 5425, which requires agencies to make records available "as soon as practicable," after determining within the 10-day period whether they are subject to release. The fifth exception to the 10-day rule in H.R. 4960 is the only substantial one, but we feel that it is contrary to the purpose of the Act.

Accordingly, if an agency has not responded within the 10-day period, a person making a request should be deemed to have exhausted his administrative remedies, which, of course would still be no assurance that a court would find that he is entitled to the information. In any event, by being forced to follow a strict 10-day rule, the agencies will find it necessary to routinize their handling of requests under the Act and to limit the bases for their decisions on whether to release information strictly to the criteria set forth in the statute.

We also support the amendment in section 1(e) of H.R. 5425 which would require agencies to file within 20 days an answer to any complaint filed in court by a person seeking to enjoin the agency from withholding information. The current 60-day period is both unnecessary and counterproductive. It is unnecessary because by the time an agency is hauled into court, it has necessarily formulated its legal position in its letters denying the information sought on an administrative level. The 60-day period is counterproductive because it merely exacerbates the problems of delay which make the statute useless for any person in need of information in a hurry.

(c) *Mandatory injunctions*

Section 301 of H.R. 4960 would make mandatory the injunction relief which a court merely "has jurisdiction" to grant under the existing statute. This is an important amendment which we enthusiastically support.

As we pointed out in our testimony last year, there is an unfortunate absence of any language in the statute requiring the courts to order disclosure of documents unless they are specifically exempted. Because the statutory language and the legislative history both *imply* in the strongest terms that enforcement is

mandatory, the absence of any express provision must be considered a Congressional oversight. Indeed, the implication of subsection (c) could not be clearer:

> This section does not authorize withholding of information or limiting the availability of records to the public, *except as specifically stated in this section.* [Emphasis supplied.]

The Senate Report echoes this language in describing the purpose of the statute as "establish[ing] a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. . . ." Sen. Rept. No. 813, at 3. See also *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (D.C. Cir. 1969).

Unfortunately, the lack of explicit language about judicial enforcement has created a vacuum which some courts have filled by asserting an equitable discretion to deny relief even when the information sought is not exempt under the Act. In *Consumers Union of the United States* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969), for example, the court found that none of the records was exempt from disclosure, but upheld the agency in part after balancing the equities to determine whether disclosure would do "significantly greater harm than good." 301 F. Supp. at 806

A related problem resulting from the absence of a provision for mandatory injunctions like the one contained in H.R. 5425 is that a court can disregard an agency's failure to carry its burden of proof and decline to compel disclosure when it believes that the information is exempt for a reason not claimed by the agency. This is what happened to our clients in *Rose* v. *Department of the Air Force*, discussed above. In that case the privacy exemption had been claimed by the Air Force as a basis for withholding the Honor and Ethics Code case summaries sought by the plaintiffs. As we have seen, the court held that the Air Force had failed to prove the applicability of the privacy exemption, but it nevertheless refused to grant an injunction on the ground that the "personnel records" exemption never claimed by the agency was applicable.

The mandatory injunction requirement in section 301 of H.R. 4960 properly would eliminate the equitable balancing of *Consumers Union* and the judicial discretion of *Rose*, and would further strengthen the affirmative thrust of the Act. Agencies would be less inclined to persist in withholding information not clearly covered by one of the exemptions if they knew that the role of the courts was strictly limited to reviewing the grounds for administrative denials of relief.

IV. CONCLUSION

An important feature of both H.R. 5425 and H.R. 4960 is that they would create the machinery for continuous congressional oversight of the information practices of the federal government. We endorse both the Freedom of Information Commission which would be established as a permanent regulatory body under H.R. 4960, and the annual information reports which the agencies would be required to submit to Congress under section 4 of H.R. 5425. This oversight machinery would hopefully carry through with many of the tasks which this subcommittee has so admirably been performing in recent years.

In theory, the Freedom of Information Act symbolizes Congress performing its most essential role—that is, placing a check on the tremendous growth of executive power. Many wise observers have pointed out that the power of the presidency has grown during the Cold War era precisely because of the increasing secrecy with which the President has acted during this period, most notably in foreign affairs. Senator Stuart Symington, for example, recently pointed out that he has, as he put it, "slowly, reluctantly and from the unique vantage point of having been a Pentagon official and the only member of Congress to sit on both the Foreign Relations and Armed Services Committees concluded that executive branch secrecy has now developed to a point where secret military actions often first create and then dominate foreign policy responses." [Quoted in "The Pentagon Papers and the Public," Freedom of Information Center Report No. 0013 (U. Mo. July 1971).]

The Freedom of Information Act, therefore, is so important to the democratic character of our society that I can think of few problems that require greater attention from Congress. To be sure, problems of executive privilege and other forms of government secrecy cannot be cured by the Information Act alone, but the statute should be a serious and effective beginning for open government. I believe the Act is concerned very much with the First Amendment and what that means to our society. And if it means that the Congress, in order to effectuate this First Amendment interest, must take more of a role than it has before in

scaling down government secrecy, then it must take that role or it will soon find that many of its own constitutional powers have been forever swallowed up by the President. As James Madison pointed out prophetically more than two centuries ago:

> Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.

Mr. MOORHEAD. I would hope, Mr. Shattuck, that you would take a little deeper look into the Freedom of Information Commission which is proposed by Mr. Horton's bill because the more I study it the more I think it offers some opportunities for putting some flexibility into the act. For example, you mentioned that we did not attack the problem of high costs charged for search and copying. A member of the full committee, Congressman Hanrahan, came up with a proposal that if we establish the Freedom of Information Commission, that it, in effect, could establish a fee schedule. It would give us flexibility if one agency could conclusively demonstrate that its search fees were more expensive than another agency's search fees, or the documents were more difficult to photostat or something. I cannot imagine how this would come up, but it conceivably could, and this I think is one way of handling both the standardization of the search and the copying fees.

It might also be that if executive branch witnesses made a good case that because some agencies are so regionalized that to give an answer to an FOI request within the 10 days is really impossible. Maybe the Commission could be used as an escape valve there, providing that the 10-day time period must be observed unless the agency files a statement with the Commission as to the reason why it cannot. Incidentally, the role of such a commission could be restructured. It does not have to have the same construction. But, I think it could be used to overcome some of these objections, some of which may be legitimate on the part of the agencies, not many, but some of them might be.

Mr. SHATTUCK. I think you are right. Actually there is a danger in legislating essentially administrative matters. I agree with you that perhaps some of the more technical amendments that we would favor but that did not seem to be in either of the bills could be taken care of by a commission. But, the danger I think is that you really want to put the burden squarely on the agencies themselves to comply. And I think without really having given it much thought it may be difficult to set up an independent commission which can take a lot of the heat off the agencies, even though it is a commission that would clearly be responsible to the Congress. For example, I think your report of last September pointed out that one of the ways in which the act would be tremendously strengthening administratively would be to require each agency to set up its own freedom of information office, and process all complaints, all demands and requests for information through that office. That is not inconsistent with setting up a commission to be sure, but I suppose one would want to think very hard about whether a commission might be regarded by the agencies as a way for them to escape having to really think hard about the administrative problems under the act.

Mr. MOORHEAD. Well, I certainly would not want that result to happen, but your cautionary words will be taken to heart.

Mr. Gude?

Mr. GUDE. No questions, Mr. Chairman.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. I just wanted to say how much the staff appreciates this very excellent and detailed statement, Mr. Shattuck. As last year when we were working on the draft report, we found your testimony and statement of extreme value to us, and I know the same thing will apply to your statement today.

Mr. SHATTUCK. Thank you.

Mr. PHILLIPS. I was interested in your reference to the request for the National Security Study Memorandum. I do not know whether you identified it for the record or not, but that is NSSM-113, dated January 15, 1971. We share your hope that this very important memorandum will soon be made available to the subcommittee.

I have no further questions, Mr. Chairman.

Mr. MOORHEAD. Well, Mr. Shattuck, just a few quick ones. Do you think the 10-day requirement in the statute for decision as to whether information will be furnished is a reasonable time?

Mr. SHATTUCK. Yes; I think it is a reasonable time.

Mr. MOORHEAD. And what about the 20-day period for appeal? Is that a reasonable time?

Mr. SHATTUCK. Well, that might be a bit on the long side, but I guess not being an administrator I may not be entitled to complain about that. I think that the important thing, though, is what I was trying to highlight in the testimony. I favor your approach in H.R. 5425 of being really quite strict with the time. I do not see any reason why if the administrative machinery is set up—and I do not think it has been in many agencies, at least properly set up—that ordinary requests could not be processed almost immediately. And it is our experience that ordinary requests receive no expedited treatment. They take just about as long as the hard requests. There may be a few exceptional cases where you need more than 10 days, but there must be some way to resolve that rather than writing exceptions into the statute.

Mr. MOORHEAD. What is your thought about the portion of the bill that permits the courts to assess the Government for reasonable attorney fees and court costs in cases where the Government has failed to prevail?

Mr. SHATTUCK. I think that would encourage people to exercise their rights under the act. I am not sure that it would be a deterrent on the Government against withholding information, unless the fellow who was in charge of making that initial decision that was wrong somehow or other felt the pinch himself. It must be pretty easy to spend Government money in denying requests for information, but I think in general it is an excellent suggestion. I do not know whether it would work as a deterrent.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman. As usual, Mr. Shattuck, I think the American Civil Liberties Union has really done a magnificent work here in its presentation.

Do you find difficulty or any resistance on the part of people when you remind them about the Bill of Rights? Do they hate to be reminded about that?

Mr. SHATTUCK. I do not know whether they hate to be reminded, but the Gallup polls never helped us very much. Sometimes they cannot recognize them.

Mr. CORNISH. Do you think there should be administrative penalties for withholding?

Mr. SHATTUCK. I think that would be a more effective deterrent than would attorneys fees. I think that the attorney fee provision, as I said to the chairman, would encourage people to sue, perhaps spuriously, but presumably not because they obviously would not recover if they had a ridiculous case. The prospect of recovering attorneys fees might provide an incentive to use the act, but I do not think it would provide a deterrent for governmental misuse. An administrative penalty I think would be a better way to approach the deterrent problem. Again, I am just not familiar enough with how the agencies operate, and you are probably much better qualified than I am to answer that.

Mr. CORNISH. Of course, the Justice Department, you know, does not have a very good record in these decisions. As a matter of fact, I think they have lost two-thirds of their cases, and I think that one of these days OMB or somebody else is going to say, "Look, you know, too many of these cases are going to court, and you are losing them, and it is costing a lot of money." OMB does not seem to have any reluctance to express such an opinion about any other Government Agency activities, and I do not think it would be inhibited from criticizing the Justice Department on that score.

Mr. SHATTUCK. It is extraordinary that that is the track record because what I find is the most useful Government document in the whole Freedom of Information Act is the memorandum prepared by now Justice William Rehnquist cautioning agencies to think twice. And in every demand letter that I send out I stick that right at the end, and it has sometimes worked, I think, although nobody has ever cited it back to me. I think the Justice Department has not given a great leal of thought to the statute since that memorandum was written, and they may very usefully rewrite it and reissue it.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. MOORHEAD. Thank you very much, Mr. Shattuck. We are very grateful.

Mr. SHATTUCK. Thank you.

Mr. MOORHEAD. We will recess this hearing at this point until 2 o'clock this afternoon.

Thank you.

[Whereupon, at 12:35 p.m., the subcommittee recessed, to reconvene at 2 p.m., the same day.]

AFTERNOON SESSION

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

The subcommittee is very pleased to welcome back again Mr. Antonin Scalia, Chairman of the Administrative Conference of the United States.

We look forward to your testimony today, sir. You may proceed. If you desire to skip over or summarize, the entire statement will be made a part of the record.

STATEMENT OF ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY RICHARD K. BERG, EXECUTIVE SECRETARY

Mr. SCALIA. Fine. I will do the best I can to skip rather than summarize. The statement is as long as it is because I tried to cover so much, rather than because I tried to cover so much in such length.

What I can skip is the portion at the beginning, more or less establishing the qualifications of the Administrative Conference to give this sort of testimony. I think the subcommittee knows by now we have had a continuing interest in the field of public information; a large part of our activity relates to it directly or indirectly.

[Mr. Scalia's prepared statement follows:]

PREPARED STATEMENT OF ANTONIN SCALIA, CHAIRMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

I am grateful for this opportunity to testify on these proposals to amend the Freedom of Information Act. A frequent recurring theme in the 39 formal recommendations the Administrative Conference has adopted to date has been the need to open the administrative process, making it more visible, more accessible, and more receptive to the suggestions and criticisms of the interested public. In his testimony last year before this subcommittee at its hearings on the administration of the Freedom of Information Act, my predecessor, Roger C. Cramton, pointed to the recommendations which most obviously look toward these goals, notably, Recommendation No. 69–8, on eliminating exemptions from the requirements for notice and opportunity for public comment in rulemaking, and, of course, Recommendation No. 71–2, on principles and guidelines for implementation of the Freedom of Information Act.

Over the past year the Conference, as you may know, has adopted other recommendations specifically designed to help assure a full and free flow of information to the public. Recommendation No. 72–1 adopted last June, calls upon agencies to establish policies to encourage broadcast of their proceedings that involve issues of broad public interest. We had in mind, for example, hearings involving environmental issues, such as those concerning the location of nuclear power facilities. There has not yet developed, it is true, much media interest in the broadcast of agency proceedings, but advancing communications technology is greatly facilitating access to television of programs appealing to specialized or limited audiences. I firmly believe that television coverage of agency proceedings is an idea whose time will soon be at hand, and the Conference recommendation has already contributed to a more receptive attitude on the part of a number of agencies.

In our efforts to achieve openness in government we are concerned, of course, not only for the public's right to know but also for the rights of persons directly affected by the Government's action. Sometimes these interests are parallel; sometimes they conflict. For example, in our recommendation adopted last December for a comprehensive revision of the procedures governing adverse personnel actions against civil service employees (Recommendation 72–8), we proposed granting the employee the right to elect a public hearing, except in extremely rare cases when the employing agency can show good cause for keeping the hearing closed. The Civil Service Commission has recently announced that its revised rules provide for public hearings, at the election of the employee, except in a narrow category of security-type cases. In another recommendation on parole procedures (Recommendation No. 72–3) we called for making public more information regarding Board of Parole standards and policies as applied to individual cases, but with adequate protection for the prisoner's right of privacy. We also recommended that the prisoner be allowed right to counsel, ac-

cess to most of the material in his file, and a decision stating reasons for the denial of parole. Because the Board of Parole has rejected this recommendation to open its proceedings to public scrutiny, we would favor legislation requiring the Board to abide by these principles.

In our plenary session next month we will address another problem connected with Government information policies—the use of agency publicity which results in unjust injury to private persons in their businesses or reputations. This is a difficult problem, and its resolution requires the balancing of some very sensitive policy considerations. We will consider a suggested guide-line for agency publicity practices and a damage remedy for those injured by erroneous publicity. (I might add that the proposed recommendation is not aimed at cutting back in any respect on the disclosure requirements of the Freedom of Information Act.)

The Administrative Conference is, as you know, an advisory body, with authority to recommend but not to command. Unavoidably, therefore, there is a gap—occasionally a large one—between our recommendations and agency practices. Securing agency implementation of our recommendations is an increasingly significant part of our activities. In this connection we are particularly pleased to report to you the progress being made—and I would emphasize largely through the cooperative efforts of this Committee—to secure agency implementation of Conference Recommendation 71–2 on the Freedom of Information Act. Part of this Recommendation called upon agencies to reduce their fees for making copies of documents in Government files, so that they do not exceed actual cost. A number of agencies have responded by substantially lowering their charges—in some instances cutting them by more than half. I offer for the record the latest reports we have which set forth the specific reductions which have been adopted. (Attachment A.) The Department of Justice recently revised its regulations governing the production and disclosure of information, so that they follow Recommendation 71–2 almost verbatim. The Department will advise of its conclusions on the use of these procedures after an experimental period ending this June. It is their hope and ours that these procedures will prove effective and will serve as a model which most other agencies will be willing to adopt.

With the background of the Conference's experience in this field, let me turn now to the bills before you, H.R. 4960 and H.R. 5425. I will address my remarks initially to the latter of these bills, referring to differences in H.R. 4960 as I go along.

* * * * * * *

H.R. 5425 would make a number of changes in the Freedom of Information Act. They can, I think, be classified in four general categories: administrative procedures under the Act, judicial procedures in suits to enforce the Act, the substance of exemptions from the disclosure requirements, and Congress' right to require the furnishing of information to itself or its committees. The provisions relating to administrative procedures are, of course, of the greatest interest to the Conference, and it is exclusively to these procedures that our Recommendation 71–2 is directed. I will have a few comments, however, concerning certain other provisions of this proposed legislation that have a close relationship to and effect upon the administrative procedures.

PUBLICATION OF INDEX

Section 552(a)(2) of the Freedom of Information Act now requires the agencies to make available for public inspection and copying final opinions in the adjudication of cases, statements of policy, interpretations, and staff manuals and instructions affecting the public, unless such materials are published and offered for sale. That paragraph also requires each agency to maintain available for inspection and copying a "current index" of such materials issued after the effective date of the Freedom of Information Act. Section 1(a) of H.R. 5425 would require that this index be published and distributed, by sale or otherwise. Although not a point covered by our Recommendation, the basic thrust of this proposal seems reasonable. Wider distribution of indices of available materials would undoubtedly assist members of the public in making specific requests and might even ease the burden of agency personnel who process requests. Assuming that the agency is complying with the present requirement to maintain a current index, the only new burden imposed is the cost of publishing (I assume this

term is meant to be synonymous with "printing" or "reproducing" and does not refer to publication in the Federal Register) and of distributing (which latter requirement would presumably be satisfied by furnishing copies on request).

Nevertheless, with respect to some of the major agencies the bulk of a mere listing of such materials may be enormous—especially when it is considered that the time period which the index must cover begins on July 5, 1967. Ten years from now the size of such an index—and the cost of it, if there is to be a reasonable fee—will be so substantial as to impair the purpose of the amendment. It would seem desirable, therefore, to provide a cutoff date for the period with respect to which the index must be published that is different from the fixed date (July 5, 1967) from which an index must be maintained—perhaps the beginning of the preceding fiscal year. Moreover, it seems to me that it might be more desirable simply to require the agencies to provide such a printed index upon request, rather than to require publication whether or not request has been made. I suspect there are many small agencies that have never received a request to examine their indices, and with respect to which publication of the type here required would be a sheer waste of time and money. If it is merely required that agencies furnish an index upon request, I think it certain that principal libraries and other institutions resorted to for information of this sort would request and maintain copies of those indices that are indeed frequently used; while indices rarely desired will be available on request, directly from the agencies involved.

I might make two other minor points about this proposal: First, it should be understood that "current" is a relative term. The same level of currency should not be expected of a published index as of the index now maintained in the agency reading room. And the recency of published revisions for an agency that has few documents to add in the course of the year should not be expected to be the same as for one of the major regulatory agencies. Second, while the bill proposes distribution "by sale or otherwise," the committee should not overlook the fact that these materials could be published and sold today by commercial enterprises if there were a market for them. One must assume, therefore, that sale proceeds will not offset the costs to the agencies of complying with section 1(a).

CONTENT OF REQUEST

Section 1(b) of the bill would amend section 552(a)(3) to alter the description of what the request for information must consist of—instead of a "request for identifiable records" simply a request which "reasonably describes such records." This amendment has the apparent intention of implementing paragraph B(2)(b) of our Recommendation 71-2, which provides that a request should be acceptable if it "identifies a record sufficiently for the purpose of finding it." Frankly, I prefer our language, since it sets forth with specificity the criterion by which the adequacy of a description is to be measured—to wit, its capacity to enable the agency to find the document. Whereas in the language of the bill, it does not seem to me, as a matter of pure linguistics, that the effect of the phrase "reasonably describes" is necessarily anything different from the effect of the present operative term, "identifiable." Nevertheless, since the intended purpose of the change is clear (and presumably can be clarified still further in legislative history) the language of the bill may suffice. The basic purpose, as I understand it, is to require agencies to comply with categorical requests for records if it is reasonably possible to do so.

DEADLINES FOR COMPLIANCE

Section 1(c) of H.R. 5425 would implement two key provisions of our Recommendation (paragraphs B(4) and (6)) by requiring that agencies determine within ten working days whether to comply with requests for information and that they resolve appeals from denials of requests within twenty working days. However, our recommendation contained certain provisions, not carried over into H.R. 5425, to deal with situations in which the ten-day deadline may not be feasible. These include cases in which the requested records are located elsewhere, require a substantial process of search or of collection, or must be examined and valuated to determine whether they are exempt from disclosure. In such situations our Recommendation calls for allowing an additional ten working days for compliance, or even longer where special circumstances are present. As I read H.R. 5425 it deals with the problem of such unavoidable delays by distinguishing between the agency determination to comply and actual compliance. The ten-day deadline applies to the determination to comply, but the records shall be

made available as soon as practicable thereafter. Our recommendation, on the other hand, provides for actual compliance within ten days, with the exceptions noted above. I think the tacit assumption of H.R. 5425 that the agency can determine whether to comply with a request before it has located and had a chance to examine the records is unsound, and that this provision of the bill is likely to prove unworkable. The practical effect of the provision will probably be to cause agencies to deny requests where the files have not been located or examined, so as to gain the extra twenty-day appeal period in which to continue their efforts.

With respect to this subject of the procedures and deadlines governing requests for information, therefore, I much prefer and commend to your consideration the provisions of section 303 of H.R. 4960. This closely follows our Recommendation, except in the following respects which I urge to be changed: It would impose an outside limit of 40 days on compliance with or denial of the request and 30 days on final resolution of an appeal; unlike our proposal, it would not allow an agency to authorize a longer delay for *any* reason. It seems to me that this is not a matter that can be treated so categorically. There may well arise situations in which all would agree that a more extended delay was reasonable. It seems to me adequate if (as our Recommendation proposes) the agency must give specific reasons for any extension beyond the deadline—which would of course enable judicial review. If it is desired to be more restrictive than this, it would seem to me adequate to provide merely that the agency head himself must authorize such extension, without imposing an absolute limit of 30 or 40 days. I think section 303 of H.R. 4960 is also deficient in omitting that sentence of our Recommendation (contained in paragraph B(6)(c)) that would require copies of grants and denials on appeal to be collected and indexed in a public file. This is highly desirable to provide predictability for the public and to encourage consistency of agency action. Subparagraph 6(G) of section 303 of H.R. 4960 treats judicial review in a different fashion from that which we recommended—enabling it to occur, in my opinion, prematurely. Finally, my last quarrel with section 303 is subparagraph 6(H), which requires records to "be made available as soon as practicable" after determination to comply with the request. This is simply inconsistent with the earlier paragraphs which (unlike H.R. 5425) do not distinguish between agency determination to comply and actual compliance, but rather follow the Conference's format by applying the various deadlines to compliance itself.

One final point I should emphasize here. Paragraph B of our Recommendation, which includes the provisions I have discussed on the nature of requests, on time for replying to requests, and on time for disposing of appeals, was set forth by the Conference as a guideline or model for the procedures that would be appropriate to achieve the more general principles set forth in paragraph A of our Recommendation. It was recognized at the time that agencies might need some flexibility in applying this guideline, and that not every departure would be viewed as a failure to comply with our Recommendation. I do not know what suggestions, if any, the agencies may have for altering the procedural provisions of these bills to suit their particular needs and experience, but I think it is only fair to the agency members who concurred in our Recommendation to emphasize to you that flexibility was contemplated.

JUDICIAL REVIEW PROCEDURES

Section 1(d) and section 1(e) of H.R. 5425 deal with judicial proceedings to compel disclosure of agency information. Section 1(d) provides for *in camera* inspection by the court of records asserted to be exempt from disclosure. Section 1(e) provides for the Government to file an answer to a complaint under the Act within twenty days, and provides for recovery of costs and attorneys' fees from the Government by a successful plaintiff. The Conference has not done any study of the litigating experience under the Freedom of Information Act, and so I am unable to give reactions that are as informed by concrete data as I would like. I do think, however, that the absence of such data should be even more troublesome to one who enthusiastically supports these changes than to one who, like myself, is skeptical of their value.

Courts generally have the right to examine *in camera* government documents not available to the public, where that is necessary to adjudicate the cases before them. Thus, with respect to all except one of the categories of documents exempt from disclosure under section 552(b) of the Freedom of Information Act, the bill

makes no change in existing law. (This is true *unless* paragraph 1 of section 1(d) is intended to compel *in camera* inspection that the court would otherwise not consider needed. While the language might be given such an interpretation, it does not seem likely and is certainly not desirable.) The one category of exempted documents for which the provision would impose a change is the category "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy." § 552(b)(1) of the Freedom of Information Act. The Supreme Court has held that when this exemption is asserted the court cannot examine the relevant documents *in camera*—not because of any special privilege from judicial scrutiny accorded to matters that relate to national defense or foreign policy, but because as the exemption is now written such a court inquiry would have no relevance to the case. The only issue raised when the exemption is asserted is whether—*whatever* the content of the document—it has been "specifically required by Executive order to be kept secret" for defense or foreign policy reasons. [*Environmental Protection Agency* v. *Mink*, 93 S. Ct. 827 (Jan. 22, 1973)]. Paragraph 2 of section 1(d) seeks to change this by providing (though not with the utmost clarity) that the court will make a determination, not merely that the Executive has classified the document, but also that disclosure "would be harmful to the national defense or foreign policy of the United States."

It should be apparent from the foregoing description that this provision does not merely alter the scope or nature of judicial review of an asserted exemption; it changes the nature of the exemption itself, so that instead of the test of Executive classification, there is now applied the test of Executive classification *plus* harmful effect upon national defense or foreign policy. If this change is to be made, it would seem more logical to make it in section 552(b) of the Freedom of Information Act, which describes the exemptions, rather than in section 552 (a) which deals with procedures. There is one other technical deficiency in section 1(d): If its intent is to enable court review of the judgment that foreign policy or defense would be harmed by disclosure, it does not suffice to give the court the power to make such an inquiry only when the exemption of subsection 552(b)(1) is asserted. For without asserting that exemption, the agency might assert that because of Executive classification a private party would not be able to obtain the document in litigation with the agency, and therefore the entirely separate exemption of subsection 552(b)(5) would apply. As now drafted, H.R. 5425 would not allow judicial inquiry into the propriety of classification when it is asserted as a basis for that exemption.

As to the desirability of this change, I will of course defer to the Department of State and the Department of Defense concerning its effect upon foreign policy and security matters. From a purely procedural standpoint, however, one effect of the provision is clearly indefensible. Even if it is desired that the courts look behind the Executive order and inquire into the question of whether disclosure would be harmful to national defense or foreign policy, it seems highly inappropriate for the courts regularly to resolve such questions "de novo," without according any special weight to the determination of the President and the agency involved. The "de novo" review provided for in the Freedom of Information Act is reasonable enough with respect to the other exemptions, which require judgments or determinations of fact that can be as well made by a single judge as by the agency involved; but to commit to the judicial branch in all cases the original determination of what disclosure would be harmful to foreign policy or national defense seems clearly improper.

As to other procedural effects of this provision, I am frankly less concerned about its effect upon the agencies than upon the courts. I fear the prospect of over-worked Federal judges poring through piles of documents, trying to determine whether all or parts of them should be disclosed to a plaintiff whose request may be motivated by nothing more than idle curiosity (which is all that is needed to make a request under the Act). Even after screening the documents, the judge will doubtless require much more evidence in order to determine whether what he has read will in fact be harmful to foreign policy or national defense if disclosed. The recent Pentagon Papers trial indicates that assessing the propriety or impropriety of a classification is no brief and easy task.

With respect to the provision for recovery of costs and fees, I am again somewhat skeptical. That the provision will be a disincentive to agency refusals seems doubtful, because the money will come from general Government funds rather than the agency's appropriation. Even if it came from the agency's budget,

the impact on the officer making the decision not to disclose would be remote. The provision might be defended as reparation to a plaintiff whose request was wrongfully refused. But if the principle of recovery of litigating costs against the Government is sound here, it ought to be sound elsewhere, unless we are to conclude that plaintiffs under the Freedom of Information Act are a particularly deserving class of litigants, or a class that should be artificially stimulated by the provision of a bounty. Perhaps such an argument can be made, but I personally hesitate to rely upon it until I have more data about litigation that has arisen under the Act, about disputes not litigated, and about the frequency of arbitrary agency refusals to comply.

LIMITATION OF EXEMPTIONS

Section 2 of H.R. 5425 is aimed at tightening certain of the existing exemptions from the disclosure requirements of the Act. While it is perhaps a borderline case, the Conference has in the past considered the scope of the exemptions in section 552(b) a matter of substance rather than of procedure. Our Recommendation 71–2 does not deal with it other than to urge the agencies to interpret the exemptions restrictively and "with a view to providing the utmost information." However, the effect of these particular limitations to the exemptions bears closely upon a topic which the Conference currently has under active consideration—to wit, the effect of adverse agency publicity. I think it appropriate, therefore, to speak briefly to these provisions.

The present categorical exemption for "investigatory files compiled for law enforcement purposes" is restricted by the present bill in several respects: First, it would extend only to investigatory records "compiled for any *specific* law enforcement purpose," and would not include "scientific tests, reports or data" and "inspection reports of any agency which relate to health, safety, [or] environmental protection." If, as seems to me to be the case, the purpose of the investigatory files exemption is to protect a person from disclosure of erroneous and misleading information concerning law violation, it is not apparent how these limitations are in accord with that basic purpose. Erroneous information concerning law violation acquired in the course of a general investigation of compliance with statutory requirements is just as harmful as information compiled "for any specific law enforcement purpose" (if indeed the latter phrase has any distinctive content). And despite their authoritative-sounding titles, "scientific tests" and "inspection reports" are, like any investigative data, subject to being wrong.

Another limitation of the existing exemption imposed by the present bill is the elimination of protection for those investigatory records "which serve as a basis for" public policy statements or rules. Presumably the rationale behind this change is that the public's "need to know" is greater when the investigatory files pertain to agency action affecting the public. I would, first of all, dispute the premise. It seems to me that the public's need for information is in fact greater when the agency has taken no action, and issued no public statement. The very conducting of a rulemaking furnishes substantial information; inaction provides nothing. Public-interest groups are generally more concerned about why an agency has *not* taken certain action than about why it *has*. But more fundamentally, I doubt that the "basis-for-policy-statement-or-rulemaking" test is workable. Assume, for example, that an officer of the Department of Justice makes a policy statement concerning enforcement of the narcotics laws. It is presumably based on an accumulation of evidence and experience over many years. Would the bill open to public disclosure all investigatory materials involving drug-related crimes? It is, I think, simply unrealistic to regard policy statements or even rules (except those rules required to be made on an evidentiary record, see 5 U.S.C. 553(c)) as being based on a narrow and definable category of agency records.

What little is left of the investigatory records exemption after applying the limitations discussed above is finally reduced still further by the requirement that disclosure of the document sought to be protected must not be "in the public interest." This provision will be an inexhaustible source of litigation, since it gives no hint as to what the "public interest" means in this context. It is indeed a puzzlement to me what the "public interest" *could* mean in this context other than an abandonment of the basic philosophy behind the investigatory records exemption—the philosophy that the public interest (here the public interest in obtaining information) must sometimes yield to private rights (the right to a

fair adjudication before Government-inflicted sanctions are imposed). I realize, of course, that the "public interest," broadly viewed, may be deemed to include within itself the ultimately public value of protecting private rights. The phrase makes no sense, however, if given that interpretation in the present bill. It seems quite clearly intended to provide that no investigatory files exception exists when there is a public interest in disclosure of the information. Presumably the mere public interest in *knowing* (embodied within the Freedom of Information Act itself) is not enough, for otherwise the exemption is *entirely* illusory; but any further public "need" for the information will suffice. If this limitation does not completely devour the investigatory records exception, it certainly leaves only a morsel on the plate.

I think it would be a great mistake to emasculate the present exemption for investigatory records, as section 2(d) of this bill would do. In most regulatory statutes, Congress has provided specific procedures which must be followed in order to establish a law violation with fairness and accuracy; guilt is not established by the mere presence of information—even a "scientific test" or "inspection report"—within the agency files. Yet in many cases the mere public disclosure of an erroneous report showing violation of Federal law can cause as much damage to the person or industry involved as subsequent agency adjudication of violation. One thinks, for example, of an inspection report—untested, perhaps even unexamined by superiors within the agency—erroneously showing that a particular food product is contaminated. It is absurd to invest agency adjudication of law violation with extensive procedural safeguards while permitting, and indeed requiring, agencies to cause damage that may be just as severe through indiscriminate and unrestricted release of investigative material not established as correct, and perhaps even known to be erroneous. How does one obtain correction of an incorrect "Government Report" (which is the way the press will describe it) once it is released? There is no way to force the agency to an adjudication of innocence. That fact raises the possibility that in many cases the opening of investigative files may render the procedural protections attached to adjudication academic. Since publicity is in and of itself such a potent sanction, why should an agency regularly proceed through lengthy and cautious hearings to adjudicate guilt? The manpower it devotes to one prosecution might be more efficiently spent on five investigations, leaving it to publicity to impose the desired sanction. Five punishments for the price of one—even though guilt has not fairly been determined. It is in my view not desirable to establish a law enforcement system in which Government action of this character is facilitated and even encouraged.

The Conference's Committee on Rulemaking and Public Information (the same Committee in which our Recommendation for stricter compliance with the Freedom of Information Act originated) has proposed for consideration at our Plenary Session next month a recommendation that would establish careful guidelines for the agencies' own use of the potent modern weapon of publicity. The concern which prompts that proposal argues even more strongly against the substantial elimination of the investigatory file exemption wrought by the present bill. In fact if this provision is adopted, sensitive and careful safeguards of private rights sought by the Committee in a closely allied field can only be regarded as so much wasted effort.

PROVISION OF INFORMATION TO CONGRESS

Section 552(c) now states that the section "is not authority to withhold information from Congress." Section 3 of H.R. 5425 would add a new paragraph directing agencies to furnish "any information or records" to Congress or its committees upon written request. Obviously, this provision raises the policy problems associated with executive privilege that I discussed in earlier testimony before this subcommittee, relating to legislative proposals directed exclusively to that issue. I need not go over that ground again. It seems to me, however, that the Freedom of Information Act is not the appropriate place to deal with the matter of Congress' obtaining information from the Executive Branch. All agree that the Congress' powers and requirements in this field stand on a different footing from the rights and needs of the general public, and I think the present Freedom of Information Act is both explicit and adequate when it says that it is "not authority to withhold information from Congress." Accordingly, without commenting on the merits of section 3, I express the view that this subject should be handled elsewhere than in this bill.

ANNUAL REPORTS

The final provision of H.R. 5425, section 4, provides for annual reports by the agencies on their experience in administering the Freedom of Information Act. A similar requirement is contained in section 304 of H.R. 4960. I think the idea of an annual report is a good one. It is important, however, that the requirements for maintaining records not be unreasonably burdensome. The burden will of course depend to a considerable extent on the volume of requests, which will vary with each agency. I think, though, that for an agency with any significant volume of requests the fourth item required in both bills, "the number of days taken by such agency to make any determination regarding any request for records and regarding any appeal," is likely to prove unreasonable. It would be better, I believe, to permit this sort of information to be tabulated on the basis of sample periods from agency records of requests and dispositions.

H.R. 4960

Most of the provisions of H.R. 4960 are generally similar to those of H.R. 5425, and I will not repeat my previous discussion. As I have stated, section 303 of H.R. 4960 is closer than section 1(c) of H.R. 5425 to the Conference Recommendation and, with some modifications, we prefer it.

The novel feature of H.R. 4960 is the establishment of a Freedom of Information Commission, whose members would be appointed by the President, the Speaker of the House, and the President pro tempore of the Senate. The Commission would have broad authority to investigate allegations that Federal agencies are improperly withholding information requested under the Freedom of Information Act, but I confess that I do not understand the function to be served by such investigations. Is the Commission supposed to be performing some general oversight function on behalf of Congress? Is it intended to umpire disputes between Congress and the agencies? Is it intended as an administrative remedy for private citizens whose requests for information are denied? If so, is there any requirement of resort to this remedy? If there is no such requirement, why would an individual go to the Commission when a determination by the Commission in his favor would be only prima facie evidence in court? On the other hand, if its powers are more than investigatory and advisory, how can a Commission some of whose members are appointed by leaders of the Congress be reconciled with Article 2, Section 2 of the Constitution, authorizing Congress to vest appointment of inferior federal officers "in the President alone, in the Courts of Law, or in the Heads of Departments"?

Without some explanation of the theory behind the Commission I am skeptical of its value. It seems to introduce another layer of administration into a system which is already somewhat complex. Yet in the last analysis it would still be left to the courts to resolve disputes under the Act.

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Most of my comments concerning this proposed legislation—because they have been suggestions for improvements—have been critical of the existing provisions. I do not want to end on such a carping note, because as I hope this subcommittee is aware the Conference applauds and supports efforts to make the Freedom of Information Act more effective. It is a cause in which, as many of the provisions in these bills borrowed from our Recommendation indicate, we have taken an active role. It is a cause in which we very much believe.

Thank you.

(Attachment A)

REDUCTIONS IN CHARGES FOR REPRODUCTION

Nine agencies have now substantially reduced their reproduction charges as a result of the Office of Management and Budget's request for fee schedule reviews. In addition, one agency has decided to waive fees in cases where the public interest is served. The most substantial and notable reduction occurred in the Selective Service System, where reproduction rates were reduced from $1 to 25¢ per page. Agencies which reduced reproduction charges include:

Atomic Energy Commission.—With the installation of new machines, xeroxing charges have been reduced from 25¢ per page to 10¢ per page.

Federal Communications Commission.—The coin-operated machine charge has been reduced from 25¢ per page to 10¢ per page. In addition, the FCC has en-

tered into a competitively-selected contract to make copies of FCC documents available. The charge is, on the average, 12¢ per page.

Federal Power Commission.—Charges for two coin-operated copying machines in the FPC's Office of Public Information were reduced from 25¢ to 10¢ per page. Most of the agency's reproduction work is carried out under a contract. Charges for reproduction are 9¢ per page.

Federal Trade Commission.—The FTC dropped its user fee schedule and replaced it with a general policy to charge at cost. When appropriate, it will waive charges for reproduction work that is deemed to be in the public interest.

General Services Administration.—The National Archives and Records Service has conducted a review of their fees and, as a result, has issued a revised schedule of reproduction charges. The effective rate of regular-sized paper has been reduced from 20¢ to 10¢. The Business Service Centers are nearing completion of a review of their fees.

Department of Labor.—The Labor Department has reduced charges for reproduction from 30¢ per page to 20¢ per page, when copies are made by employees. The installation of self-service equipment has reduced rates to 10¢ per page when self-service reproduction is involved.

Selective Service System.—The previous charge of $1 per page has been reduced to 25¢ per page. In addition, Selective Service registrants can now request duplicate complete copies at this rate Before, registrants had to go to private concerns.

Department of State.—Xeroxing charge has been decreased from 40¢ per page to 25¢ per page.

Department of Transportation.—The copying fee has been cut in half, from 50¢ per page to 25¢ per page.

United States Information Agency.—Reproduction rates, formerly 40¢ per page, have been reduced to 20¢ per page, with a 50¢ minimum.

Department of Justice.—The reproduction rate had formerly been 50¢ for the first page and 25¢ for each page thereafter. The new rate is a flat 10¢ per page.

Mr. SCALIA. I would like to bring to your attention, however, developments in the implementation of Conference Recommendation 71-2, since my immediate predecessor, Roger Cramton, testified before you last year. That recommendation is, of course, the one on which some provisions of the bill I will testify about today are modeled.

There have been two principal developments. The first is the recent adoption by the Department of Justice of our recommendations in almost verbatim form, as part of their regulations. Needless to say, in a field such as this, the Department of Justice is a leader among the agencies, and we are hopeful that Justice's implementation of our recommendation will cause other agencies to follow along.

The other development is our success, with the help of this subcommittee, in getting agencies to comply with the portion of the recommendation urging the reduction of the fees for copying. Some of the fees at one time were really outrageously high. There is an attachment to my testimony which will show you the latest breakdown of what reductions have been made.

Let me turn now to the substance of the bills that you have before you. My testimony will pertain initially to H.R. 5425. I will make reference to any differing provisions of H.R. 4960—or many of the differing provisions, at any rate—as I proceed.

First of all, let me speak about the requirement of H.R. 5425 that would require a publication of the index which agencies are now required to keep available for public inspection. This index, now required by 552(a)(2) of the Freedom of Information Act, contains a listing of the final opinions in the adjudication of cases, statements of policy, interpretations, and staff manuals, and instructions affecting the public, which are available for public inspection at the agency. Section

1(a) of H.R. 5425 would require this index—which now does not have to be distributed, just kept in the agency reading room—would require this index to be published or distributed, by sale or otherwise.

Although this point was not covered by Conference recommendation, the thrust of the proposal seems reasonable. Wider distribution of indexes would undoubtedly assist the members of the public in obtaining information. Moreover, there is not a substantial additional burden, imposed, or there doesn't have to be a substantial additional burden imposed upon the agency, since it has to keep the index already. All that is really new in this proposal is that the agency must publish the index and make it available for distribution.

Nevertheless, with respect to some of the major agencies, the mere bulk of listing such materials could be enormous. Once again, remember that this index will contain a listing of final opinions in the adjudication of all cases, statements of policy, interpretations, staff manuals, and instructions affecting the public. That is a large body of material. Bear in mind, also, that the index in the agency office must be kept with respect to those documents dating from July 5, 1967. Now, obviously, as time goes on, the length of that index, which is already considerable, will increase, and I think 10 years from now will be so massive as to defeat the purpose of this statutory provision. It will be so expensive to obtain it, that many people will be discouraged from doing so.

It would seem desirable, therefore, to provide in this legislation a cutoff date for the period with respect to which the index must be published—a cutoff date that is different from the fixed date from which the index must be maintained at the agency offices. In other words, the published index could perhaps only have to date from the beginning of the last fiscal year or the last calendar year.

Moreover, it seems to me it might be more desirable simply to require the agencies to provide a printed index upon request, rather than to require publication whether or not a request has been made. And as I read the bill, the index must be published, the process of printing it must be undertaken, even though no request has ever been made.

Now, I suspect there are some agencies which have never had a request to examine their index and it would really seem wasteful to require them to print it up if no one is expected to ask for it. If you change the provision to require it to be printed and distributed only upon request, I am sure the major agencies would have to print it, because libraries would ask for it. But those little agencies that may never have a request for it would perhaps be spared some trouble and expense.

I make in my written testimony two other minor points about the bill, which in the interest of saving your time, I will skip in this oral presentation.

Another provision of H.R. 5425, section 1(b), would amend 552 (a)(3) to alter the description of what the request for information must consist of. The language now requires a request for "identifiable records." The revision would change that to a request which "reasonably describes" the record. As a matter of sheer linguistics, I am not sure there is any difference between the two. I much prefer the language contained in the Conference recommendation on the subject, which sets forth explicitly the criterion that is to be applied, to wit,

whether the request enables the agency to find the document. That brings out plainly and clearly just what the objective of the requirement is to be.

Section 1(c) of H.R. 5425 would implement two key features of the Conference recommendation, by requiring that agencies determine within 10 working days whether to comply with the request for information and by requiring that they resolve appeals from denials of requests within 20 working days. There are, however, several provisions in this aspect of our recommendation that are not carried over into H.R. 5425, and I think they ought to be.

I refer to the provisions that deal with the situations in which the 10-day deadline may not be feasible. It may be infeasible for a number of reasons, including the fact that a substantial search for the records is necessary, or that the records are scattered and have to be assembled, or that the records have to be examined and evaluated to determine whether they are subject to any of the exemptions under the act. In some cases, one cannot be sure that such a process will not take any more than 10 days. In those situations, our recommendation would allow an additional 10 days, and even longer when special circumstances are present.

As I read H.R. 5425, however, it deals with the problem of unavoidable delays only in one way: That is, H.R. 5425, unlike our recommendation, applies the time periods, the time deadlines—10 days and 20 days—not to the provision of the information, but to the agency's response as to whether or not it will provide the information. In other words, so long as the agency answers within 10 days "yes, we will provide the information," the time deadline would be met. Under the Conference recommendation, however, the agency would have to provide the information within 10 days.

Now, I prefer our approach because, frankly, I think it is unrealistic to think that you can give an answer to the question whether you are willing to provide the information, without having found the document and examined it. The practical effect, I think, of taking the approach of H.R. 5425 will be to cause the agencies to deny requests as a matter of course whenever they can't locate or examine the files promptly, because that will give them an extra 20 days to find and examine them during the appeal period. I am sure that is not what is intended by the provision, and it could easily be avoided.

With respect to these deadline provisions, I much prefer the treatment given by H.R. 4960. Section 303 of that bill closely follows our recommendation, except in a few respects. I do urge those respects to be altered. I won't go into the details about the way in which section 303 varies, but I think they are important. Basically, it comes down to this: Under the conference recommendation, there is no categorical time limit established, whereas, under H.R. 4960, after a period of 40 days for compliance with or denial of a request, and 30 days for final resolution of an appeal, the agency must act. I don't think this is the kind of matter where you can be that categorical. There just may be some circumstances where you need more time than that. It seems to me the matter of providing some exemptions from an absolute deadline can be handled in other ways—by requiring, for instance, that the agency give a reason for the extension beyond that period. If you

think that is not enough, by requiring that the agency head himself personally authorize additional extension. It seems to me that would suffice, rather than wielding an ax that you may regret later.

The last point I want to emphasize, with respect especially to these provisions on time deadlines—and I think I have an obligation to the Conference to do this—is that paragraph B of the Conference recommendation, which includes the provisions I have discussed, was set forth by the Conference not as an absolute but as a guideline or a model for the procedures that would be appropriate to achieve the more general principles set forth in part A of our recommendation. It was recognized when the recommendation was adopted, that agencies might need some flexibility in applying these guidelines, and that not every departure from the guidelines would be viewed as a failure to comply with our recommendation. I do not know what suggestions, if any, the agencies may have for altering the procedural provisions of these bills to suit their peculiar needs and experience. But I think it is only fair to the agency members who concurred in our recommendation to emphasize to you that our recommendation did envison flexibility.

I would like to speak briefly to the judicial review provisions contained in sections 1(d) and 1(e) of H.R. 5425. These are very important. The most important item they deal with is the exemption for materials classified by reason of military or foreign affairs. Section 1(d) provides for in camera inspection by the court of records that are asserted to be exempt from disclosure. Section 1(e) provides that the Government must file an answer to a complaint under the act within 20 days and also provides for recovery of costs and attorneys' fees from the Government by a successful plaintiff.

You should be aware of one thing with respect to the in camera provisions of this legislation. Right now there is nothing that prevents a court from examining any document in camera. As a general matter, that is the case. With respect to all except one of the categories of documents exempt from disclosure by reason of 552(b) of the act, the bill therefore makes no change in existing law. The only reason courts do not examine in camera documents as to which executive classification has been alleged, the only reason is not that they have no power to do so, but simply that the Supreme Court has held the contents of the documents to be irrelevant to the case. The Supreme Court has held that the exemption applies categorically whenever the executive has classified the documents for security reasons, whatever the contents of the documents.

Therefore, although the documents are available to the court, there is no relevance to the court's examination. This is set forth clearly in the recent case of *Environmental Protection Agency* v. *Mink*, which I cite in my written testimony.

H.R. 5425, in paragraph 2 of section 1(d), would change this by providing that the court will make a determination, not merely that the executive has classified the document, but also that disclosure would be harmful to the national defense or to the foreign policy of the United States. I think you should realize that this change is not really a change in procedure. It isn't a change in the manner by which the exemption is adjudicated. It is rather a change in the nature of the exemption itself. In other words, there is no longer an automatic

96-576—73——19

exemption under H.R. 5425 for executive classification. The exemption is in effect, changed to apply to executive classification for a good reason.

If you are going to make that kind of a change, I think it is more logical to make it not in the procedural section of the Freedom of Information Act, 552(a), but rather in 552(b), where the executive classification exemption is set forth. In other words, 552(b)(1), which now reads only as follows: "The section does not apply to matters that are (1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy," should if you wish to achieve what H.R. 5425 apparently seeks to achieve, be amended to read "specifically required for good reason by Executive order to be kept secret in the interest of national defense or foreign policy."

Mr. MOORHEAD. Just let me interrupt there.

Mr. SCALIA. Please interrupt with questions if you have them.

Mr. MOORHEAD. At one point there——

Mr. SCALIA. The point I am making now, Mr. Chairman, is that H.R. 5425 does not just make a change in the procedure by which that exemption of the Freedom of Information Act, 552(b)(1), is applied. It is much more than a change of procedure. It is a change in the substance of the exemption.

Mr. MOORHEAD. This is intended.

Mr. SCALIA. I am sure it is intended.

Mr. MOORHEAD. At some point you said something about the clarity of the language.

Mr. SCALIA. That was gratuitous, perhaps; and perhaps not terribly important. But even if you wanted to leave the change where it is placed in H.R. 5425, I think it could be done more clearly. It isn't crystal clear to me that it is intended to give the Court a new power to determine the reasonableness of the executive classification.

The provision reads as follows:

> Such in-camera investigation by the court shall be of the contents of such records in order to determine if such records, or any part thereof, cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States.

I think that that does not express as clearly as it should, to make such a substantive change, that you are in effect changing the nature of the exemption rather than the manner in which the Court goes about adjudicating it.

Mr. MOORHEAD. Quite frankly, a number of us were rather shocked by the *Mink* decision. We thought the Court's interpretation of the intent of Congress was not what Congress thought the intent of Congress was. We are endeavoring to reverse that decision, and we welcome any help you can give us on language or its location.

Mr. SCALIA. I think it would be better located elsewhere.

There is only one other point concerning the exemption that I feel strongly about. I would leave it to the Department of State or Defense to speak to what the effect of changing it will be upon foreign affairs and military interests. The one provision I do feel strongly about is that this adjudication by the Court will be de novo which does not seem to me to be in accord with the traditional judicial function in fields such as this. H.R. 5425 leaves it to the judiciary to make the ini-

tial determination, not just to adjudicate the reasonableness of Executive's determination. The bill leaves it to the courts to say as an initial matter whether our foreign affairs or military defense posture would be harmed by revealing information.

Even if you want to cut back on *Mink*, I would not advise you to cut back that far. I would not, perhaps, mind leaving it to the courts to review the Executive determination, with the usual deference that is accorded to agency decisions upon judicial review. But that is not the effect of this provision because, as you know, the provisions of 552 require de novo judicial determination of the claim of exemption. Now, de novo judicial determination is fair enough for the other exemptions that are now contained within 552(b). As you read them, you can see that they are matters that the Court can figure out as well as any agency and, in fact, better—whether something is a trade secret, whether disclosure of a personnel or medical file would invade privacy, and things of that sort. Those are traditional enough judicial determinations. But it is surely not a judicial function to determine what will or will not harm our military or foreign affairs.

If you change the section (b)(1), one exemption, I would at least recommend that you change it in such a way that that exemption is not reviewed de novo by the Court, but rather by the usual standard of "arbitrary or capricious".

I might say, by the way, that section 2(a) raises the same type of problem. That also creates a new exemption which it seems to me——

Mr. MOORHEAD. You are directing yourself towards section——

Mr. SCALIA. Section 2(a) of H.R. 5425 establishes a new limitation upon the internal personnel exemption. Right now, all the court has to determine is whether the document relates solely to the internal personnel rules and practices of an agency. That is how the current statute reads. It is easy for a court to determine that de novo. That doesn't trouble me at all.

But this bill would change the nature of that exemption, so the exemption only applies when the document is not just related to internal personnel rules and procedures, but only if its disclosure would also unduly impede the function of the agency. That is the kind of decision I am willing to have the courts review, perhaps; but I am not willing to have the courts make that determination as an original matter. They should make that determination in reviewing the agency's finding.

So what I am saying is that in making the changes in the exemptions, it seems to me you have created some new exemptions that—whatever their desirability—do not lend themselves to the de novo kind of judicial review that now is applicable to the other exemptions.

Mr. MOORHEAD. Mr. Copenhaver has some questions.

Mr. COPENHAVER. Mr. Scalia, I don't see in your statement an examination of the provision of H.R. 4960, which contains an in camera provision similar to H.R. 5425. Do you have a copy of H.R. 4960?

Mr. SCALIA. Yes.

Mr. COPENHAVER. Let me get your comment on that. If you turn to page 2, you would see on line 4:

> The court shall examine in camera such records, including records of classification under statute or Executive order, to determine if they are being improperly withheld.

Does that language give you the same degree of concern as H.R. 5425?

Mr. SCALIA. Well, I would say no.

Mr. COPENHAVER. Because, you can see the reason for that, that was to get around *Mink*, quite frankly, and to give the court——

Mr. SCALIA. I am not sure it clearly gets around *Mink*, unless you puff it up with good legislative history. If you read the language without any legislative history, you could say, well, the court merely has to look at it in camera to determine whether or not in fact it has been classified, not whether it has been classified correctly.

Mr. COPENHAVER. It is not just classification; it goes to all exemptions. It could go to the No. 5 exemption, for example. You recall the *Mink* decision went to No. 5 exemption, also.

Mr. SCALIA. But this provision is not needed for the other exemptions, because the courts have power to examine in camera. The only reason you need a new provision is because they won't examine in camera as to exemption 1, for the reason that the only thing relevant is whether it has been classified.

Mr. COPENHAVER. Not quite exact. Because I think the *Mink* case held that with regard to exemption 5, a court very frequently could decide it should not for one reason or another go behind the Government's evidence on exemption 5 matters. You see here we say, "The court shall."

Mr. SCALIA. That is something I didn't get into in my testimony because I didn't really believe you intended it. Right now, even when the courts may examine documents in camera, nobody asserts that they must. And if that is the intent of this provision, then I do have a problem with it. It seems to me that whatever the desirability of sending classified material to the courts wherever somebody who is just curious to get information wants it (which is all the Freedom of Information Act requires; curiosity is enough)—whatever the desirability of doing that when a court thinks it should be done, it seems to me clearly undesirable to compel classified information to be sent to the court when the court itself says, "I don't have to look at it. There is no reason. It has been adequately demonstrated that there is no need for it."

Mr. COPENHAVER. Right. Let me explain the rationale behind the drafting of it in that regard.

One rationale was that there is perhaps too great a tendency for the agencies to interpret the FOI Act in a conservative fashion, as well as interpreting the Executive order on classification in a conservative fashion, thereby withholding too much information from the public or classifying too much information. Thus, we have the desire to provide for an independent review.

In addition, because of the language of the *Mink* decision, and because in some cases courts seem to have some affinity for accepting Government statements as being true, we had a desire that the burden be cast upon the Government and the courts to be critical of that which an agency says.

Finally, in H.R. 4960, we went to the commission concept as a form of master. If the court felt it lacked the expertise or didn't have the time, it could refer such a matter to the commission for a review or recommendation as to whether a document is classified, or otherwise being improperly withheld.

Mr. SCALIA. I suppose, then, where we differ is in our feel for how reasonable or unreasonable the courts are being with respect to examination in camera. I think they are generally sympathetic towards the Freedom of Information Act. I think they are generally on the side of the angels in this matter. I do agree, however, with the language of the Supreme Court in the *Mink* case, which says in part:

"In some situations in camera inspection will be necessary and appropriate"—the court is referring now not to the classified area but unclassified areas as well—"but it need not be automatic. An agency should be given the opportunity by means of detailed affidavits or oral testimony to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is of course, on the agency. * * * But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information."

Thus, it certainly is the view of the Supreme Court that in camera inspection is not always necessary. I think the Supreme Court is pretty liberal in matters of this sort, and I am inclined to rely on its view as to this particular problem.

Mr. COPENHAVER. After the *Mink* decision, many of us no longer have faith in the Supreme Court's liberality with regard to administration of the FOI Act.

Mr. SCALIA. That may be. But I didn't feel from my reading of the opinion that the Court came to its conclusion. Happily, I think it was a matter of judicial restraint. Although not liking the decision they arrived at, they nevertheless felt that was the way the law read. That is certainly the case with Mr. Justice Stewart's concurrence. He makes it very clear.

Mr. COPENHAVER. One more question on this line and I will yield back.

In lieu of language as is contained in H.R. 5425, which may create a new level of what should or what should not be classified, I wonder if instead of using the language which is used there, "harmful to the national defense or foreign policy," I wonder if you said, "The Court shall review such classified documents in camera to determine whether they are classified properly in accordance with the Executive Order or law."

Mr. SCALIA. If you want to go that way, I would prefer saying "to determine that such classification is not arbitrary and capricious or an abuse of discretion."

Mr. COPENHAVER. But some of us no longer have any faith in the executive branch's ability to be nonarbitrary and noncapricious. If that is the case, hypothetically, if you were in our position, how would you do it better? If you have lost faith, how would you proceed?

Mr. SCALIA. I am not sure that there are answers to all problems, among them the problem of complete distrust of one branch of Government by another. I am not sure in that situation there is any way to make the thing work smoothly.

I also want to point out that judicial intervention in this area is not going to be easy. I think even if you put in this language, theoretically requiring the courts to make military and foreign affairs judgments, you may in fact achieve no more than a token effort toward that goal.

I wouldn't want to make such judgments as an individual judge—to say as an original matter whether particular information would endanger the national defense. To begin with, I would have to pore through all of the documents and even after I have done so, I wouldn't know whether they endanger national defense without learning a lot of other information. I presume I would have to call witnesses and what-not. The Pentagon papers trial demonstrates rather vividly the extreme difficulty of determining whether particular information harms the national defense. It is not an easy job for any judge.

Mr. COPENHAVER. I do see you have been fairly critical of the commission concept of H.R. 4960, but you see, the reason we drafted the commission concept in there was to provide an expert source, a master concept, for a court to turn to, the commission would gradually build up an expertise in this area and who could devote itself exclusively to making decisions of that nature, keeping in mind the court would still have ultimate authority.

Mr. SCALIA. Except, as I recall, the determination of that commission is only prima facie evidence.

Mr. COPENHAVER. Purposely so, because, following your logic, it is not fair for us to tie the hands of the court. In our viewpoint there are many who want to give the commission the authority to order, with the right of appeal, you see, to a court. And the drafters of H.R. 4960 thought they should take a more gradual approach. You could bypass the commission first off if you wanted to and go directly to court. Also, you could go directly to a court and it could use the commission as a master to get an advisory opinion to help it out.

Mr. SCALIA. It would be an awfully long process if you went before the commission first and then de novo before the court.

Mr. COPENHAVER. The commission must answer in 30 days, if you recall, and the court may take months and months and months.

Mr. SCALIA. I also raise briefly in my prepared statement some constitutional difficulty which I have with the commission.

In general, I am skeptical about both the desirability—and I think even more skeptical about the effectiveness—of any substantial attempt to achieve judicial intervention in this field. Even if you wanted to force the courts to make such initial determinations, I really don't see how you can do it, aside from the question of whether it is desirable or not.

Let me comment briefly on the provision for the recovery of costs and fees. It strikes me as odd—I suppose that is the word. There are, of course, a number of suits that are permitted against the United States. A suit for denial of information which one would like to know as a matter of curiosity (which is all that is required to demand information under the Freedom of Information Act) is surely not the most appealing case for allowing the plaintiff his costs.

It seems to me there ought to be some special reason to provide the cost of suit in this case and not in the others. I can think of many more appealing cases—to wit, cases in which an agency has arbitrarily, unfairly, unjustly, acted against a particular individual, and he is suing the Government to get that coercive, unjust action undone. There he must bear his own expenses. But here, the person who is merely curious and denied information is allowed costs of suit. It is highly at odds with the ordinary way of proceeding.

There may be other reasons for it than fairness. You may simply want to encourage suits—and I think you will encourage them providing a bounty. But, again, I don't have enough data on how often information is arbitrarily denied and how rarely suit is brought to know whether it is necessary to provide such a bounty. In any case, without some further justification, the provision strikes me as undesirable.

I would now like to talk about the limitation on the exemptions from the Freedom of Information Act which are contained in H.R. 5425, in section 2 of that bill.

There is presently in the Freedom of Information Act a categorical exemption of investigatory files compiled for law enforcement purposes. This particular exemption is restricted by H.R. 5425 in several respects. First of all, it would not extend to investigatory files compiled for all law enforcement purposes, but only to investigatory records compiled for any "specific" law enforcement purpose. Moreover, it would not extend to scientific tests, reports or data, and to inspection reports which relate to health, safety, or environmental protection.

I frankly do not see the reason behind these limitations. Presumably, the reason for the investigatory files exemption is to protect innocent individuals against substantial harm that can be caused by having erroneous reports circulated. It doesn't seem to me the report is likely to be any less erroneous if it has been compiled for specific law enforcement purposes rather than general, if indeed there is any difference. Nor is it any more likely to be accurate merely because it bears the impressive name of a scientific test or scientific report, or an inspection report. The possibility of error exists just the same.

Another limitation of the investigatory records exemption imposed by the present bill is the elimination of protection for those investigatory records which serve as—and I am quoting—"which serve as a basis for" policy statements or rules.

I presume that the rationale behind this is that there is a greater public need to know when the information pertains to agency action that applies to the public generally.

First of all, I would contest that hypothesis. It seems to me the need to know is greater when there has been no agency action. It is usually in those cases that the public interest groups want to get data. They say the agency should have acted; it has done nothing; why hasn't it? We want to see the investigative reports. Moreover, when the agency has acted by way of rule, there has been at least some information conveyed to the public in the course of the rulemaking. So it seems to me this focuses on precisely the areas in which the public's need to know is, if anything, lesser rather than greater.

But more important than that conceptual consideration is the fact that I do not see how the test that is set forth in this limitation of the exemption could be workable. How do you determine whether particular investigatory records have been the basis for a policy statement. Or the basis for rulemaking? Assume, for example, an officer of the Justice Department makes a policy statement concerning enforcement of the narcotics laws. It is presumably based on an accumulation of evidence and experience over many years. Would the bill open to public disclosure all investigatory materials involving drug-related crimes? It is, I think, simply unrealistic to regard policy state-

ments or even rules as being based on a narrow and definable category of agency records.

Finally, after all of these limitations to the investigatory record exemption—and there is little enough left after them—there is a further limitation imposed by this bill which cuts the exemption down to practically nothing. That is, in addition to being part of an investigatory record, it must be established that the disclosure of the document is not in the public interest.

This provision, first of all, would be an inexhaustible source of litigation. It gives no hint as to what the public interest means in this context. Indeed, I am at a loss to figure out what the public interest could mean in this context, other than an abandonment of the basic philosophy behind the investigatory records exemption—

The philosophy, to wit, that the public interest—in this case the public interest in obtaining information—must sometimes yield to private rights—in this case, the right to a fair adjudication before Government-inflicted sanctions are imposed. I realize, of course, that the public interest broadly viewed may be deemed to include within itself the ultimately public value of protecting private rights. But the phrase makes no sense if it is given that interpretation in the present bill. The phrase in the present bill seems clearly intended to mean that no investigatory files exemption exists when there is any public interest in disclosure of the information. If this does not completely devour the investigatory records exception, it certainly does not leave much on the plate.

I think it would be a great mistake to emasculate the present exemption for investigatory records to the extent that this bill does. In most regulatory statutes, Congress has provided specific procedures which must be followed in order to establish a law violation with fairness and accuracy. Guilt is not established by the mere presence of information—even a scientific test or inspection report—within the agency files. Yet in many cases the mere public disclosure of an erroneous report showing violation of Federal law can cause as much damage to the person or industry involved as subsequent agency adjudication of the violation. One thinks, for example, of an inspection report, a report untested, perhaps unexamined by superiors within the agency, that erroneously shows a particular food product to be contaminated. It is absurd, it seems to me, to invest agency adjudication of law violation with extensive procedural safeguards while permitting, and indeed requiring, as this bill will do, that agencies cause damage just as severe through indiscriminate and unrestricted release of investigative material not established as correct, and perhaps even known to be incorrect.

How, by the way, does one obtain correction of an incorrect Government report—and that is how it will be referred to in the press—"Government report says thus-and-so." How does one obtain correction of that? There is no way of forcing an agency to an adjudication of innocence. That fact raises an interesting possibility which I urge you to consider. In many cases, the opening of investigative files may render the procedural protection attached to adjudication entirely academic. Since publicity is, in and of itself, such a potent sanction, why should an agency regularly proceed through lengthy and cautious hearings to adjudicate guilt? The manpower it devotes to one prosecu-

tion might be more efficiently spent on five investigations, leaving it to publicity to impose the desired sanction. Five punishments for the price of one, even though guilt has not fairly been determined. It is in my view not desirable to establish a law enforcement system in which Government action of this character is facilitated and even encouraged.

If I may add that I feel so strongly on this point, and I think the Conference does, because we have recently been focusing on precisely this problem in another context, that is, the agency's own use of adverse publicity where the agency does not just open its records but actually goes out and presents to the press, presents to the public, information about facts that have not yet been adjudicated. It can cause enormous harm. We are looking for ways to make that process fair and to cause the agencies to be cautious and circumspect. All of those efforts will be entirely wasted if this provision is adopted because they really will be straining out a gnat when the camel has already been swallowed.

I would now like to turn to the provision of information to Congress. There is only one thing I want to say about that, because we discussed that subject thoroughly in earlier testimony. I think everyone agrees that the provision of information to Congress is an entirely different animal from the provision of the information to the public. The powers, the needs involved, are entirely different. It does not seem to me that the Freedom of Information Act is the place to treat that issue. I would rather see it addressed in a different portion of the Administrative Procedure Act. I don't think it should be included in this bill.

I think the annual reports provision contained in H.R. 5425 is a good idea, although the fourth item that is required, to wit, the number of days taken to make any agency determination, is too onerous. I think that one ought to be cut and perhaps instead allow a sample to be studied.

I turn now briefly to H.R. 4960. The provisions of that bill are generally similar to those of H.R. 5425, and I won't repeat my comments on the points that are in common. The only novel feature of H.R. 4960 is the establishment of a Freedom of Information Commission, whose members would be appointed by the President, Speaker of the House, and President pro tempore of the Senate.

The Commission would have broad authority to investigate allegations that Federal agencies are improperly withholding information. My main problem with the provisions is that I don't understand quite clearly the function to be served by such investigations. Is the Commission supposed to be performing some general oversight function on behalf of the Congress? Or is it intended to umpire disputes between the Congress and the agencies? Or is it intended as an administrative remedy for private citizens whose request for information has been denied?

If it is intended as the last of these, is there any requirement that private citizens use it? I gather from earlier discussion there, this is not meant to be. But if there isn't any requirement that a citizen go there, why should he? I don't think he would do so just to get a prima facie determination on anything.

On the other hand, if the powers of this Commission are more than investigatory and advisory, how can such a Commission, some of whose members are appointed by leaders of Congress, be reconciled with

article II, section 2, of the Constitution, authorizing Congress to vest appointment of inferior Federal officers in the President alone, in the courts of law, or in the heads of departments? There is no constitutional power for Congress itself to appoint inferior Federal officers.

But my major problem with this provision for the Commission is I don't understand the function that is intended to be served. It clearly introduces another layer into a system that is already complex and multitiered. You have an agency determination, an agency appeal, and a court of appeal, perhaps at three different levels. To insert another layer, and without clear reason, does not seem to be reasonable.

Most of my comments concerning this proposed legislation—because they have been suggestions for improvements—have been critical of the existing provisions in these bills. I do not want to end on a carping note because, as I hope the subcommittee is aware, the Conference applauds and supports efforts to make the Freedom of Information Act more effective. It is a cause in which, as many of the provisions in these bills borrowed from our recommendation indicate, we have taken an active role. It is a cause in which we very much believe.

Thank you.

Mr. MOORHEAD. Thank you, Mr. Scalia.

I am intrigued with your thought about television coverage of agency proceedings. You are thinking of cable television; would there be enough channels available so even though the audience would be relatively small, there would be sufficient interest to justify it?

Mr. SCALIA. That is the major advantage of cable, of course. You can appeal to smaller groups. The principal criticism of television generally is that it goes for the mass audience. It has to as a commercial matter. You can't deal with smaller groups. I believe a network show needs something like 8 million viewers to be a success financially, which is an awfully large number of people. This may be changed by the new lower-cost medium, and perhaps more important, by the ability to charge which cable provides. If you can charge only 1 million people a dime for a program, you have a lot of money—so that it becomes economically feasible to produce programs of much more limited interest.

Another factor, too, is the new technology for transmitting and recording proceedings. These new cameras I think some of you have already seen. If the show is to be transmitted on cable, it doesn't need the heavy equipment. You can use a backpack camera and a relatively inexperienced cameraman to shoot it.

So the Conference felt that the televising of hearings was perhaps the wave of the future. Our recommendation, I think, has already been successful in eliminating an initial antagonism on the part of the agencies. As you may know, the ABA canons relating to judicial proceedings would forbid televising, and most lawyers carry over this prejudice into the agency field. I think the fact that a responsible aggregation of lawyers, such as the Conference, has come out foursquare and said, "Let's televise agency proceedings of general interest," will have an effect on that frame of mind. It already has.

Mr. MOORHEAD. Let me also ask you again, on page 2, recommendation 72–8. Is that the kind of recommendation that would apply in the case of Ernest Fitzgerald? Was that one of the cases you were thinking about? Do you know who I am referring to?

Mr. SCALIA. Yes. I don't recall the facts of the case clearly enough. It would normally apply in any case involving a Federal employee. Not with respect to Foreign Service officers, however, because they are not under the Civil Service provisions.

Mr. MOORHEAD. He requested an open hearing before the Civil Service Commission and was denied by the Commission and took an appeal. The court sustained his right to have at his request, an open hearing. That would be in accordance with 72–8.

Mr. SCALIA. I believe it would. As I indicate, that particular recommendation has already been implemented by the Civil Service Commission, so in the future there will be a right to open hearing if the employee himself wants it.

Mr. MOORHEAD. Now, let's get back to the Freedom of Information Commission, which is not in the bill I introduced, but is in the bill Mr. Horton and others have introduced. It does seem to me that the Commission could perform certain functions very clearly, not that some of them I suggest are in the bill, but if we provided a rigid 10-day or 20-day limit in the legislation, we might provide an escape valve if you went to the Commission.

Mr. SCALIA. That might be done.

Mr. MOORHEAD. The Commission might give the flexibility that you are concerned about, or help meet your concern about the inflexibility of legislating the deadlines for responses.

Second, you are also concerned about the courts being swamped by the requirement to review documents de novo. An FOI commission, having the flexibility of manpower that would exist to a greater degree, they could have experts perform, as Mr. Copenhaver stated, the "master function," so that if ultimately the case did come up on appeal to the court, an independent body would have given its opinion and the courts could review that. We could possibly even modify de novo, if we had a Commission finding on which the court could depend, using whatever method it wanted to use to check on it.

Mr. SCALIA. If you did that, then I presume you would say de novo review would be eliminated, but instead of applying an arbitrary and capricious test to the agency, the court would apply a substantial evidence or arbitrary and capricious test to the Commission's determination?

Mr. MOORHEAD. What?

Mr. SCALIA. I think there is a real problem if you try to establish the Commission to make in effect a judicial determination. I think there may be a constitutional problem in setting up the Commission this way. If you wanted to make a judicial determination, I would think the thing to do—I hate to make the suggestion, because I am afraid it will seem like a good idea, and it doesn't seem to me a good idea. One way to go is to establish a special court. As you know, there have been several proposals recently for various kinds of special courts, environmental courts, and so forth. This field might be considered broad enough to have a special court just to rule on these matters. That would make more sense to me than this Commission.

Mr. MOORHEAD. Well, I start with two presumptions. One, there has been just one heck of a lot of arbitrary and capricious classification. Our long hearing record and the forthcoming report by this committee, I think, establishes that.

Second, the Congress has been more interested in opening up records and Government information to the public than the Executive, and after the *Mink* decision, I would say also to a degree, than the courts.

So that I would like a decisionmaking body that is more responsive to this attitude. It is not a question of power, but is more of an attitude. This country works better with more openness, rather than less.

Mr. SCALIA. Of course, especially in this area of classification, the courts haven't been given a fair trial yet, because of the way the act now reads. It seems to me this is a sensitive area and it is filled, even the proponents of this Commission would acknowledge, with many complexities and problems. It would seem to me advisable, if you want to make a change, at least to go slowly, and at first give the courts a chance to do it right. Up to now they haven't had a chance because the exemption as now written excludes them entirely. I think it is difficult to say they wouldn't do a good job, unless and until they have had an opportunity to do so.

Mr. MOORHEAD. We only had one Supreme Court decision which, as you well know under our system, will affect all of the lower courts. That one decision is not toward greater openness, but more reliance on an already stifling policy of secrecy by the executive branch.

Mr. SCALIA. My impression was that even before the decision the lower Federal courts were behaving in that fashion, on the assumption that was indeed what their function was—not to make any review of this matter if there had been classification. I may be wrong about that, but I don't think I am.

Mr. MOORHEAD. The Supreme Court had to reverse the lower court to achieve the less open situation.

Mr. McCloskey?

Mr. MCCLOSKEY. Mr. Scalia, the example that you have drawn on, the broadening of investigatory records of exemption, the narrowing of it in this proposed legislation, went to disposing of a drug investigation before the courts. What would you think if we changed that exemption to read something like this—this is subdivision b(7): "Investigatory records compiled for any specific law enforcement purpose, the disclosure of which would represent unreasonable intrusion on the privacy of individuals."

Would that be inadequate protection if we drew the exemption in that manner?

Mr. SCALIA. Well, there is a privacy exemption already. Privacy has more connotation to me of medical records, psychiatric records, and things of that sort, rather than the kind of damage you are concerned about here, to wit, imputation of the commission of a crime. That is not normally what privacy connotes.

Mr. MCCLOSKEY. Let me read the exemption from H.R. 4960.

> Investigatory records compiled for law enforcement purposes, but only to the extent production of such records would constitute a genuine risk to enforcement proceedings, a clearly unwarranted invasion of personal privacy or a threat to life.

Would those be adequate protections for the individual?

Mr. SCALIA. "Threat to life," alone is certainly not enough. Nor is the privacy exemption, as I just indicated. A genuine risk to enforcement proceedings only looks at one side of the coin. That is one effect

that I suppose disclosure of the records can have: It can harm the agency's later attempt to enforce. That wasn't what I was mainly concerned with. I was concerned with the innocence of individuals who may be unjustly accused of crimes.

Mr. McCLOSKEY. But you use that in the existing law. Exemption No. 6 covers personnel and medical files and similar files which would constitute a clearly unwarranted invasion of privacy.

All we are doing is changing the investigatory records to the same example.

Mr. SCALIA. That is right. But the reason there was a separate investigatory exemption written in was the fact it was felt that there is a totally separate value, aside from the value of privacy, that is, the right of the individual not to have governmental action cause him to be injured in his person, his property and his reputation on the basis of unjust allegations. You must remember that in this file there would be all sorts of material that had not been evaluated by anybody. Behind this exemption it is the same principle, Congressman, that urges the keeping of grand jury testimony secret: We don't want to harm innocent individuals.

Mr. McCLOSKEY. That method worked fine until grand juries began to be abused by a law enforcement agency that used them for their purposes.

Mr. SCALIA. I am not urging that this provision be abused.

Mr. McCLOSKEY. When this Congress enacted the Freedom of Information Act, it was almost in a benevolent atmosphere compared to the arrogance of this executive branch and what it claims it has as a right. You don't subscribe to Attorney General Kleindienst's view, I take it, probative of all 2.5 million of the Federal employees on any subject?

Mr. SCALIA. I have taken no position on the matter and hope not to.

Mr. McCLOSKEY. Pardon?

Mr. SCALIA. I have taken no position on the matter and hope not to. I have never subscribed to it. I can answer your question, "No, I haven't subscribed to it."

Mr. McCLOSKEY. I think that the unjust recommendations, or as to that particular section, I tend to agree, and I have written that down as you suggested.

Let me go to exemption No. 5. I want to thank you for the copy of the letter you sent to Chairman Moorhead on this subject of confidentiality of advice. The difficulty I have with your testimony, Mr. Scalia, is that when you make a point, you take an outrageous example we would agree with you on, as improper abuse of privilege. But generally, these statements are somewhat limited example in general scope.

Let me go to this exemption 5, interagency or intra-agency memoranda or letters which would not be available by law to a party other than in litigation with the agency. Former Assistant Attorney General Rehnquist said that, in effect, meant any interagency or intra-agency memorandum. In fact, he applied the present doctrine of executive privilege to these memoranda.

It seems to me what you were trying to protect—what you spelled out in your letter—was confidentiality of advice. Suppose we protect that confidentiality of advice point with language such as this: That there would be exempted from the act, interagency or intra-agency

memoranda or letters, that recommendations contained in them would be inhibited in their candor and accuracy if the party making this knew they were to be made public.

Would that protect against all possible concerns that you have? While you are thinking over that question, this was the point I brought up in your earlier testimony: That perhaps we ought not to have people in government making recommendations that they would not want to make public if known.

Mr. SCALIA. Well, you are getting right to the subject of the letter that you referred to. I tried to point out in the letter that it seems to me they are now using confidentiality just to the point——

Mr. MCCLOSKEY. But you cited as examples in your letter, man's hope for promotion, hope for favor, hope for obtaining a civilian job. Maybe those are not proper elements to permit to be claimed by a member or person who chooses to serve the public.

Mr. SCALIA. Well, there are values on the other side, as I have indicated. My only point is that there is a definite value, I think a substantial value, in encouraging forthright advice. It isn't always a shameful reason that will induce a person not to make a statement which he knows will become public.

For example, the suggestion that is off the top of his head. It seems to me you want an advisor to open up and brainstorm. If you are speaking, however, on the record, you speak with much more deliberation. I don't think that is the kind of attitude you want to encourage in the advice.

Mr. MCCLOSKEY. I grant you that all of us use swear words, we use indecent language sometimes to each other that we wouldn't want to appear in the record. But we are talking about the functioning government here, recommendations made in due course by an employee of government or an associate to another that should be candid and forthright. I can think of one single example and that is where advice is given as to the competence or integrity or personality or abilities of another individual, where all of us would insist that there be confidentiality if you are going to get candid advice or comment. But what other examples can you think of in the operations of the U.S. Government, where, in order to get candid and forthright and accurate advice, the donor of such advice would not want it made public, in order that he be uninhibited and candid and completely express his opinion?

Mr. SCALIA. I will give you an example, and freely, because it pertains to an area I know nothing about, and have no intentions of knowing anything about.

Mr. MCCLOSKEY. You are not an expert on that subject.

Mr. SCALIA. Not at all. And it is an example I think shows dual value of this confidentiality, a value to the giver of the advice and value to the institution. Let's say the Secretary of State or one of his immediate assistants has a half-baked notion to the effect, "Why in the world should we continue the support of NATO?"

Mr. MCCLOSKEY. Wait a minute. That would come under exemption 1, affecting national defense or foreign policy. That is a different exemption.

I go back to this SST question, which is the great example where the Government withheld from Congress the Garwin-reported advice.

Can you make a case that Garwin would not have given an honest, candid, scientific opinion, if he had known it might become known to somebody outside of the executive branch in the SST?

Mr. SCALIA. I would probably not select that as an example.

Mr. MCCLOSKEY. Let's get out of the national security and out of the State Department category. Let's say the FCC or SEC. Give me an example in a nondefense, nonforeign policy area where, in your judgment, candid advice might be inhibited because of the donor's concern that it might later be made public.

Mr. SCALIA. All right. In the communications field, there have been proposals which some would consider half-baked and others would just consider enlightened and avant-garde, that the radio spectrum be sold in a free marketplace, just like other properties.

I think if it became public knowledge that a high-level official in the FCC was advising the chairman, or even raised the subject, "Why don't we think about washing out all of the licenses after the next 3 years and putting the whole thing up for sale," it would have an enormous impact upon the solvency of that industry.

Mr. MCCLOSKEY. Might that not possibly be good for the industry to have a full understanding of this advice going back and forth between individuals and the regulatory authority?

Mr. SCALIA. I can't conceive that the stockholders in the industry would consider it was good for the industry, or for its effect on the price of their stock, to have public knowledge of just a brainstorming idea like that.

Mr. MCCLOSKEY. What kind of value does the Government have in keeping the value of stock up? I saw such a recommendation by somebody higher in the ITT case, to the Justice Department, that if they forced ITT to divest itself of Hartford, the stock would go down $2 billion, and that advice, of course, was secret.

But where is the public interest in preserving stock values within a given company or given industry, for example?

Mr. SCALIA. It isn't preserving stock values but preserving the industry as a healthy industry. Unfortunately, that happens to be tied considerably into the stock. I think it is irresponsible of the Government to do something unnecessarily that impairs the economic solvency of any company.

Mr. MCCLOSKEY. Is it irresponsible for the adviser to the head of FCC to give him his opinion as to what he thinks a given action should be?

Mr. SCALIA. Absolutely not.

Mr. MCCLOSKEY. Would he be inhibited if he knew it was public?

Mr. SCALIA. I think he would in a case such as that. He just wants to chat about it, just wants to brainstorm.

Mr. MCCLOSKEY. The other alternative, of course, is the public speculates on what is going on in the minds of these augmented governmental personnel. They may be just as wrong in their speculation as the advice that may be given. I am really wondering if you can make a case for the concept that advice given in the domestic area between high officials, which may or may not be accepted, and may or may not have an effect on the public, is really not in the public interest.

Mr. SCALIA. May I——

Mr. McCLOSKEY. I can assure you, any advice I might give to Jerry Ford isn't going to alert the entire Republican Party that that advice can be followed.

Mr. SCALIA. I can't really believe that you are asserting that a man speaks on the record with the same freeness that he speaks in private. You are saying he should.

Mr. McCLOSKEY. I am suggesting the possibility that any person that serves the public ought to be willing to say on the record what his views are and the nature of his advice is. As I understand your position, you are saying that in Government we ought to have the right to keep our advice private because it might not stand the light of day, or we might not give honest advice if we knew it was going to be made public.

Mr. SCALIA. It isn't a matter of giving honest advice; it is a matter of not being as willing to be as innovative or forthright as we might otherwise be. I am not saying it isn't desirable only for Government; I am saying there is no reason to apply different rules to Government than the rules that apply throughout the rest of our lives.

Mr. McCLOSKEY. That is exactly my point. Isn't there a trusteeship on the part of Government that is higher than the obligation, say, of a corporation to the public?

Mr. SCALIA. I think if you are going to draw a distinction, that is the basis on which you have to do it. It is not I who wants to treat Government differently; it is rather someone who says there should be no confidentiality. The common run of mankind has it, I think.

Mr. McCLOSKEY. Mr. Scalia, I value very much your wisdom, experience, and sincerity. I think we have a fairly sharp focus of this issue, and I wonder if you might not write a second letter giving me some examples, after you have thought of them, of proper governmental advice that might not be given if the party giving them knew that they were going to be ultimately learned by the public.

I concede the need for confidential advice in foreign policy, intelligence gathering and military affairs. I concede confidentiality in the matter of personnel advice on the evaluation of individuals. I think these hearings have progressed, all of us agree, in those areas. But I am puzzled a little because the examples you have cited in support of that opinion are all examples of personal favor or business advancement or pleasing your superior, which I am not so certain we ought to recognize as the proper basis for secrecy in Government.

That request, I think, is clear, isn't it?

Mr. SCALIA. That is such a reasonable request, I don't see how I could refuse it.

Mr. McCLOSKEY. I was impressed by your letter and I don't want to take any more time on this question, but this exemption 5, interagency memorandum, as the Attorney General at least would interpret them, would extend to everything. I think we all appreciate the purpose and advice to the court, administrative assistants' advice to congressmen and White House advice to the President, and all of these are in areas we want to protect in a reasonable way.

But when we go to all interagency memorandums and all advice that may be given, which is what we have now and as this law is inter-

preted, I would like to look into a little further, and appreciate your helping us with this.

Mr. MOORHEAD. I hate to belabor this point, but let's try something out following along Mr. McCloskey's argument.

It is my understanding, if the special assistant to the president of United States Steel gives his president advice, and then there is a lawsuit, that there is no exemption that protects the special assistant to the president from being cross-examined in court on the advice he gave the president. Isn't that correct, sir?

Mr. SCALIA. I think if that advice is germane to the lawsuit; yes, that is right. But I wasn't arguing that there has to be a constitutional privilege or constitutional right to keep advice secret under all circumstances. I was just speaking to the general desirability of confidentiality. I think it is generally thought that the inner discussions of the board of directors of a corporation, or the advice given to the chief executive officer by his immediate subordinates, should not be made public. I think that is common practice and a sound common practice.

Mr. MOORHEAD. But if it were germane to a lawsuit or if germane to a congressional investigation, there is no privilege. Am I not correct?

Mr. SCALIA. That is correct.

Mr. MOORHEAD. If that is correct for private business, is there any reason that Government should make a difference? I mean, the assistant to the president of U.S. Steel is going to feel the same kind of constraint, is he not, as the Special Assistant to the Secretary of HUD?

Mr. SCALIA. Yes. I wasn't just talking, however, about specific advice that is germane to a particular lawsuit, or evidence of a particular wrongdoing. I was really addressing my comments to a general requirement, that whether this advice is germane to any particular litigation or controversy or not, you generally would be speaking on the record. That goes a good bit further.

Mr. MOORHEAD. Your distinction is that we don't have a "freedom of information" for U.S. Steel so they don't have to reveal to the public generally.

Mr. SCALIA. That is right.

Mr. MOORHEAD. And you are saying that similarly an adviser to the Secretary of HUD, his advice shouldn't be available to the public generally. It might be required in a lawsuit, if germane, or in a congressional inquiry.

Mr. SCALIA. That is right. Indeed, there is much information that does not have to be furnished under the Freedom of Information Act which an agency would have to furnish in a lawsuit.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. I will defer questioning, Mr. Chairman. But for the record, could we clarify the fact, when you refer to recommendation 71–2, that is old recommendation 24? We have changed the numbering system. We did refer last year to recommendation 24.

Mr. SCALIA. It is the same. One of what I hope is the least significant things we have done in the past year is to renumber our past recommendations.

Mr. PHILLIPS. It is a good change.

96-576—73——20

Mr. MOORHEAD. In view of the fact you defer any questions, the Chair will recognize Mr. Kronfeld.

Mr. KRONFELD. Getting back to the classification discussion we had a little earlier, I wanted to make a comment on what the purpose of the bill was and get your reaction.

This is a totally different piece of legislation, in that it did originally require that the courts make de novo review. The original intent of Congress was that all information is public. There were certain permissive exemptions. They are not mandatory.

The problem with limiting the courts to a standard review of administrative procedures, only on the basis of whether they are arbitrary and capricous, defeats the original purpose of the act. The courts in these cases are not reviewing an agency adjudication. Really, they are reviewing what is in most cases the unilateral turndown of a request that is presumed to be releasable even if it is exempt.

I wonder if we could be defeating the purpose of the act by restricting the courts, or even directing the courts to take standard review of an administrative decision as they would in, say, an FTC matter?

Mr. SCALIA. If it was the original purpose of the act, maybe that original purpose should be reexamined. It seems to me that this is a lesser case for allowing court interference than many other situations in which we do not allow de novo review.

For instance, where you have a rulemaking that substantially affects a private person, deprives him of profits he might otherwise have, or an adjudication that imposes a fine upon him, or a penalty, depriving him of property—there we accord deference to the agency action. It would seem to me that is a much stronger case for saying we will let the court examine this de novo, than is the present situation, where all that is happening, all that has to have happened, is that a curious individual who would like to have a piece of information comes to the Government and the Government says, "I don't want to give it to you because it relates to foreign affairs." It seems to me that is a much weaker case for according no deference to the agency action.

Mr. KRONFELD. I don't want to spend too much of the committee's time on this. As an example, there may have been an adjudication in rulemaking for an FCC matter. Counsel for both sides are represented. There is an administrative judgment involved in many cases. But, in the case of information requests, I think Congress stated as a matter of policy, that information requests were very important, that provision of information was very important, even though, or maybe because, just by curiosity a person could get any information he wanted.

I don't think the question of not requiring "standing" in an information request has indicated a policy that these requests are not very important. I think, rather, it indicates a policy they are very important.

Mr. SCALIA. I agree, it is important. But I find it hard to believe the Congress thinks it is more important than other agency determinations, including some adjudications which are not formal but informal. Even there you accord very great weight to the agency decision. This doesn't strike me as a clear case for going the other way. That is all I am saying. I think we just disagree on it.

Mr. KRONFELD. Another question the Administrative Conference might want to look at itself are those provisions on classified informa-

tion, or declassification of information. There has been testimony in the Senate about the fee structure used now for searching and declassification of information that private parties have requested which has been classified by Executive order. The fees are very high because necessarily the research time and study time is quite extensive for information that may be classified.

However, under the Executive order, the President has stated as a matter of policy that it is a positive duty for the Government to declassify as much information as possible as quickly as possible.

I am wondering if you don't think requests by individuals for declassification is not a public service in that it alerts the agency to matters which might be declassified under the Executive order, and therefore there should be no fees charged for searching of records and the time spent reviewing them for declassification purposes, although a fee may be charged for copying?

Mr. SCALIA. I have not been aware of this problem. I would appreciate getting from you, after the hearing, citations of Senate testimony relating to this and I will look into it.

Mr. KRONFELD. Another thing is indexing. You mentioned the burdensome nature of this provision in the act.

Mr. SCALIA. No, it was a good idea to have an index. I am just saying, that requiring the whole thing to be published, all the way back to July 5, 1967, seems unwise. Even today, for some of the major agencies, that is a pretty big volume and in the 1980 period it is going to be a bigger one, and so forth. Moreover, most of the material in the index is going to be of antiquarian interest. I think the antiquarians can come to Washington. You are concerned in getting out to the field such material as is really of a more general interest.

Mr. KRONFELD. One of our concerns was that many of the agencies themselves don't know what they have. Large agencies with various components such as DOT, have trouble locating their own information.

Mr. SCALIA. That should not be the case because the indices should exist. The change made by the present bill is only that the agencies be required to publish them. Under the Freedom of Information Act, they have to have the indices in existence and available for public inspection right now.

Mr. KRONFELD. Which doesn't seem to be the case in many agencies.

A number of people feel regional offices or agencies do not have access to these types of indices from the Freedom of Information Act.

Mr. SCALIA. The act does not require the index to be retained in field offices. It just has to be in an office where it is maintained—I think most agencies, because of the bulk, keep it in their central office.

I am not aware any agency has failed entirely to keep an index. That is not what I believe to be one of the areas of noncompliance with the Freedom of Information Act. It is a clear provision that most agencies have lived up to. At least any I know have.

Mr. KRONFELD. We have had instances where components of the Department of Defense do not have the kind of index that we envision should be kept under the act.

Mr. SCALIA. It is not in detail.

Mr. KRONFELD. One other question on the (b)(7) exemption. The word "files" has been changed to "records" as a means of limiting the

kinds of documents that could be kept exempt by inclusion in an exempt "file"—what is your position?

Mr. SCALIA. I think that is a good idea. The Conference's position is in any case, that even where you are talking about a particular document, and find it to be within one of the exemptions, you should winnow out that portion that can be provided. So, a fortiori, we would be in favor of eliminating any language that seems to enable whole documents that do not justify an exemption to be included in it.

Mr. KRONFELD. In a number of court cases involving investigatory files, the court has said that at the point at which it looks like either the investigation is finished, prosecution is finished, or there is no attempt to proceed with any prosecution, the file should be opened, providing, of course, that deletions can be made for protection of privacy, protection of names of informers, or other matters of this nature.

Do you think that kind of language could be incorporated into the amendments to the bill to make it clear that investigatory files would not remain investigatory forever?

Mr. SCALIA. It seems to me that the main evil sought to be avoided is the publication as a Government record of something that is not accurate. I don't see how that evil is avoided by allowing it to be published later. It seems to me that same problem exists. The exemption you just mentioned to the statement with respect to files in a court criminal proceeding, whereby you can delete the names entirely—I suppose that avoids the problem.

Mr. KRONFELD. I don't think we fully considered the problem raised earlier about the erroneous investigation.

Finally, on time limits, I am wondering if you think it might be in order to legislate the Department of Justice's regulations, specifying that response would have to be made in 10 days except for stated reasons. We seem to have a problem here with the 10-day limitation, which may not be enough in certain cases.

Mr. SCALIA. Right.

Mr. KRONFELD. Some departments have argued they cannot make a determination until they pull the file and the file may be in another country. So they could not comply with the 10-day rule. Do you think it would be a good idea to clearly specify exactly what they have to do within a 10-day period or 15-day period, whatever the period is decided upon?

Mr. SCALIA. I think it would be awfully hard to frame something that you are sure would make them do everything you want them to do. The trouble is, once you set it forth explicitly, the bureaucrat in charge of it isn't going to do any more than what is strictly required. I think you are better off to have a generalized requirement. Let the agency proceed in good faith and with due dispatch to go about getting the information.

Mr. KRONFELD. That, of course, would be judicially reviewable.

Mr. SCALIA. Yes. In our proposals, we establish initial time limits and ultimately, if you want to get an extension beyond a certain period, require the giving of a reason, and the reason given is judicially reviewable. If the reasons given show the agencies have not proceeded with dispatch, in good faith, the agencies will be reversed.

Mr. KRONFELD. One final comment. Although use of such commission isn't mandatory, assuming the commission was legislative, do you

think the courts would feel that if a person went directly from the agency determination to the court, they would not have exhausted their administrative remedies? Would the courts push the people to the commission?

Mr. SCALIA. I think you can clearly avoid that, if you are worried about it, by setting forth in the act, that it is not required and shall not be necessary. I thought the bill was clear on that point as written.

Mr. KRONFELD. I think it is clear as written.

Mr. SCALIA. That didn't occur to me as a problem. If it is one, I have to go back and look at the language, but it is easily remedied by a few words, probably.

Mr. KRONFELD. Thank you.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Mr. Scalia, we have had some testimony from the agencies already on the bills this year and also during our investigative hearings last year. One thing that has really bothered me greatly in their testimony is an attitude that runs throughout virtually every statement we received, and that is Freedom of Information seems to be looked upon almost as an extracurricular activity in Government agencies.

That is, it takes time away from the operations of the agency. We have a complex fee system set up for copying, and searching, and that sort of thing. It is almost an orphan to be tended only when you have time and the inclination.

This bothers me greatly. I would like to get some expression from you, whether you feel that the provision of information to the American public is an integral part of an agency's operations.

Mr. SCALIA. I think I can state that categorically. Not only do I as an individual feel that way, but the Conference as an organization does. It has made that feeling clear by the fact that more of its recommendations deal with this general problem of providing information to the public, involving the public in the agency process, than any other single item.

As you know, 60 percent of the Conference is made up of agency people, policy level agency people, and I think at that level, at least, there is an awareness this is a very important part of our democratic process. It has a value not only to the public, but the agency itself. I think the agency does its work better with public exposure and public involvement. There is no question about it.

Mr. CORNISH. I think your testimony has been especially helpful from many points of view, but one comment you made really upset me a little bit. In reference to the recovery of reasonable attorney costs and court fees, that provision of the bill, you referred to a "class" action that could be artifically stimulated by the provision of a bounty.

Mr. SCALIA. I felt that was a little colorful, perhaps, when I wrote it.

Mr. CORNISH. You didn't mean "bounty" in the sense of a reward did you?

Mr. SCALIA. It is in a way that. That is a justification for allowing attorneys' fees. For instance, some people who are enthusiastic about the utility of the class action as a means of enabling private attorneys general to enforce laws, very much favor the provision of attorneys'

fees to the successful class action plaintiffs, as a means, avowedly, of stimulating the bringing of class action.

I think the word "bounty" was colorful, but I stand by the point it makes—to wit, that one reason for this device, and I suspect the reason some people have in mind, is to encourage these suits. I don't say that is necessarily a bad or a good reason but it is possibly the operative one. I do say if it is a good reason here, I don't see why it is not so elsewhere. It gets back to the discourse I had with Mr. Kronfeld. I think there are certain suits that are more deserving of this treatment.

Mr. CORNISH. As a matter of fact, there are other types of suits—the Equal Employment Opportunity Act, for example—where this enters into it. You know, you can make recovery there.

Mr. SCALIA. Yes, that is true.

Mr. CORNISH. You don't know of any problems involving that, do you?

Mr. SCALIA. I don't assert there are any technical problems with it, but I do think the field is somewhat distinguishable in that it was probably thought those who generally have Equal Employment Opportunity complaints will be relatively poor plaintiffs. I think that is a generalization that is probably supported in fact. I don't think a similar generalization applies here.

Mr. CORNISH. This would be discretionary on the part of the Court anyway. But I can tell you from my own personal experience in 8 years of dealing with Freedom of Information complaints, that I have had many people march through the office who could hardly afford the carfare to the office building, much less paying attorneys to exercise their legal remedies in court to obtain what they consider to be very vital information. They're not, if you will excuse me, just curiosity seekers.

Mr. SCALIA. Let me make it clear. I don't assert that everybody who uses the Freedom of Information Act is that. But I do assert that in deciding what it is good or bad for the act to contain, one must be aware that the bare minimum a person needs in order to invoke the act is idle curiosity. And it should be enough.

Mr. CORNISH. I wanted to make it clear on the record there are a number of very serious requests for information that go far beyond mere curiosity. There are people who cannot afford to press their legal remedies in cases like this.

Mr. SCALIA. That is certainly true. The Conference, and I personally, recognize that by our interest in this particular field.

May I just say about the fee provision: You will recall the conclusion of my prepared testimony on that point is simply that I hesitate to say it is good or bad until I know more about the kinds of suits that are now brought. If indeed it turns out a large number of the plaintiffs who want information and are denied it are poor plaintiffs, as they are in the other provisions you refer to, then the device would make sense here. I don't think we have that kind of data now—and as an abstract matter I don't see why this area deserves that special kind of treatment any more than another.

Mr. CORNISH. On the point Mr. McCloskey was making in regard to advice which subordinates give their superiors in Government, you seem to have some problems with this, quite obviously. Isn't it true that all advice, even if it is written, can be qualified with the proper language to indicate exactly the nature of the advice it is? In other words, if it is a brainstorming suggestion, this can be indicated in some way. If it is a revolutionary thought this can be indicated in some way. It can be described in such language that it would be clear to any person who read it, just what the nature of the advice is and how it is being presented.

Mr. SCALIA. I think so. But it takes thought and effort to do that, thought and effort which is thereby diverted from the subject at hand, perhaps. Moreover, advice is sometimes not taken as seriously when it is put forward so tentatively. I occasionally like to play the role of the devil's advocate, that is, to take a position in the discussion as forcefully as though I am entirely committed to it, whereas in fact I have my own substantial doubts. I find that often the discussion is taken more seriously and the person you are providing the advice to responds more vigorously, if you play the role of devil's advocate. And that role is utterly inconsistent with putting forth a position very tentatively. It can't be done.

Mr. PHILLIPS. If you could yield for an observation. It might be if there were such a requirement, if advice contained in interoffice or interagency memorandums were to be disclosed, this might have the effect of reducing the great mountain of paper that is moved through the executive bureaucracy. People would be less likely to write 10 or 15 memos a day, if they knew it was going to be disclosed. That might save the Government and the taxpapers many millions of dollars a year.

Mr. SCALIA. Unfortunately, it is probably only the most useful memorandums that would be suppressed. The ones you would want a record of.

Mr. MOORHEAD. Thank you, Mr. Scalia.

I don't think the subcommittee has kept up to its usual standard of hospitality. Would you present your associate?

Mr. SCALIA. I am sorry, Mr. Richard Berg, who is the executive secretary of the Administrative Conference.

Mr. MOORHEAD. We welcome you, Mr. Berg.

We want to thank you very much, Mr. Scalia, for presenting such a forthright memorandum you didn't mind putting on the public record. We appreciate it.

Mr. SCALIA. Thank you, Mr. Chairman.

Mr. MOORHEAD. When the subcommittee adjourns this afternoon, it will adjourn until 10 o'clock, Wednesday, May 16, when we meet in room 2247 to hear additional outside wtinesses on the Freedom of Information Act amendments.

The subcommittee is now adjourned.

[Whereupon at 4 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, May 16, 1973.]

THE FREEDOM OF INFORMATION ACT

WEDNESDAY, MAY 16, 1973

HOUSE OF REPRESENTATIVES,
FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 2247, Rayburn House Office Building, Hon. William S. Moorhead (chairman of the subcommittee) presiding.

Present: Representatives William S. Moorhead, and John N. Erlenborn.

Also present: William G. Phillips, staff director; Norman G. Cornish, deputy staff director; L. James Kronfeld, counsel; and William H. Copenhaver, minority professional staff, Committee on Government Operations.

Mr. MOORHEAD. The Subcommittee on Foreign Operations and Government Information will please come to order.

This morning we conclude our legislative hearings on bills to strengthen and clarify provisions of the Freedom of Information Act. Since May 2, when these hearings commenced, we have taken testimony from a broad cross section of witnesses. We have heard from a group of distinguished news media veterans who testified before this subcommittee during the original hearings on Government information in the 1950's and mid-1960's. We have received testimony from our colleagues in the House. We have heard from the Departments of Justice and Defense, albeit negatively and with little constructive suggestions as to how we can technically improve the bills before us. We received testimony from members of the working press, the American Civil Liberties Union, and the Administrative Conference of the United States. Many other interested organizations have indicated that they will file prepared statements on H.R. 5425 and H.R. 4960 for our hearing record.

Today, we will hear from both news media and legal expert points of view. Our first witness will be Mr. John T. Miller, chairman of the section of administrative law of the American Bar Association and one of the most prominent members of the Washington Bar. Mr. Miller is accompanied by Mr. Richard Noland, a member of the ABA section of administrative law and vice chairman of its committee on access to Government information.

We will also receive testimony from Mr. Ted Koop, whose long and distinguished career in the electronic news media and broadcasting

industry is well known to all of us. Mr. Koop represents the Radio-Television News Directors Association.

Finally, our cleanup witness for these hearings will be Mr. Ronald Plesser, representing the Center for the Study of Responsive Law. Mr. Plesser is one of the outstanding experts on freedom of information law in the United States, having probably litigated more such cases than any other attorney. He is also active in the Center for Press Information, a group that assists members of the news media in their freedom of information problems.

I understand you have another appointment, Mr. Miller. Is that correct?

Mr. MILLER. Yes.

STATEMENT OF JOHN T. MILLER, JR., CHAIRMAN, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION; ACCOMPANIED BY RICHARD NOLAND

Mr. MILLER. I have another hearing, and I do appreciate the opportunity to appear first this morning because of this conflict of time which I have.

My name is John T. Miller, Jr. I am a practicing attorney and chairman of the administrative law section of the American Bar Association.

With me today is Richard T. Noland, who is vice chairman of our committee on access to Government information.

We have prepared a statement, Congressman Moorhead, which we ask be copied into the record at some appropriate place. I will not try to read it all.

Mr. MOORHEAD. Without objection, the entire statement will be made a part of the record.

Mr. MILLER. You will notice when you look at the entire statement that while we are authorized to appear here on behalf of the administrative law section, in view of the brief notice period, we have not been able to clear this with the policymaking part of the ABA which is above us. However, we have been authorized by the president of the American Bar Association to appear before you.

We appreciate your invitation to appear and to testify in these hearings. The section has long been concerned with problems relating to public access to Government records, and welcomes this opportunity to present its views. Our section submitted a statement to this subcommittee last June in connection with the subcommittee hearings on the administration and operation of the Freedom of Information Act. In that statement, the section indicated that it believes that the Freedom of Information Act is serving a useful and necessary function in our society, and has generally proved to be a workable statute. The section went on to point out that the main problem with the statute today is one of enforcement, particularly at the lower levels of Government. The section also noted that, despite general compliance by most agencies, some problems have been encountered in receiving prompt replies to requests for agency records. In order to alleviate some of these problems, the section of administrative law made a number of recommendations in that statement, including certain specific proposals for amendment of the statute.

We understand that the purpose of these hearings is to consider two specific bills which have been introduced in the House of Representatives, H.R. 4960 and H.R. 5425. Our comments on several aspects of the bills are set forth in detail in the statement which we submitted today.

Basically, we have addressed the following matters:

First, we support the establishment of specific time limitations in order to assure that agencies reply promptly to requests for records. In our view, these limitations do as much as any single measure to assure effective enforcement of the Freedom of Information Act, especially at lower levels in the government.

However, we believe that there may be legitimate grounds for allowing an extension of time for an agency to respond to a request for an agency record in certain instances. Accordingly, we support the proposed time limitations set forth in H.R. 4960, and prefer this proposal to the proposal in H.R. 5425.

The provisions contained in H.R. 4960 are based upon the uniform regulation and implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States in its recommendation No. 24, which we supported in our statement last year.

Second, the Administrative Law Section agrees with the objective of proposals contained in both bills to empower the courts to review security classifications by the government. While courts are generally not equipped to deal with policy questions involving national defense and foreign policy, we believe that judicial review of security classifications to determine whether they are consistent with applicable criteria can provide a salutary check on executive action. In our statement we propose specific language designed to confer this authority upon courts.

Third, the section also believes that certain of the exemptions set forth in subsection (b) of the Freedom of Information Act should be amended in order to assure that information be made available to the maximum extent possible.

At the same time, there is certain information, such as information the disclosure of which would invade personal privacy and some information received by the government from a citizen in confidence, that the section believes normally should be protected against public disclosure. Our statement sets forth proposed amendments to several exemptions, including the second, fourth, fifth, sixth, and seventh exemptions to the Freedom of Information Act.

I might digress to attract your attention to the portions of our statement which begin at page 8. We refer first to the second exemption where it has been proposed to amend section 552(b) by inserting the words "internal personnel." We believe that at least certain types of internal guidelines should be protected against public disclosure. These internal guidelines include such sensitive matters as allowable tolerances for prosecution, negotiating techniques for contracting officers, schedules of surprise audits and inspections, and similar matters which obviously cannot be disclosed without impeding the performance of a particular agency function which they concern.

As to the fourth exemption, which we believe has been the subject of more controversy than the others, some courts have held that the fourth exemption protects only commercial and financial information that is confidential or privileged and is not applicable to other kinds of information. We believe that there are certain kinds of information which are not commercial or financial in character which should enjoy a privilege nonetheless. In my statement I mention that in certain types of investigations important information is obtained on a confidential basis which would not otherwise have been disclosed, and this may be important in the case of aircraft accident safety investigations, for example.

Further, citizens must be able in confidence to complain to their government and to provide information without fear of reprisal. I believe one example of that might be the soldier who complains to the Inspector General about some condition in the Army. The Inspector General would probably be denied access to further complaints if someone in command could obtain access to the complaint and make the identity of the soldier known, and thereby subject him to possible disciplinary action by a superior.

We have recommended a change in language which would reflect confidential information which is not simply financial or commercial in nature.

In the fifth exemption, we have suggested that it read consistently with the new proposed Federal Rules of Evidence. We have suggested language to effect this result.

The sixth exemption is one we think is proving to be unduly exclusionary. We would broaden this exemption by eliminating the word "clearly." Second, the word "files" should be changed to "records" in order to avoid the possibility that documents which ought to be disclosed would be withheld on the grounds that they are in a file which may otherwise enjoy an exemption.

The seventh exemption relates to investigatory files compiled for law enforcement purposes. Here we prefer the approach taken in H.R. 4960 over the approach taken in H.R. 5425. We have suggested that the reform be accomplished by stating specifically what investigatory records should not be made available, by using general groupings. Unless release of the document actually interferes with enforcement proceedings, for example, it should be made available.

Turning now to the more general legislative proposals, we support the proposal set forth in H.R. 4960 to establish a Freedom of Information Commission and believe that such a commission could serve a useful role as an ombudsman for complaints arising under the Freedom of Information Act. The section does not believe that it would be useful or wise to enable the Freedom of Information Commission to adjudicate individual cases, since this would simply duplicate existing procedures for judicial review under the Information Act. Consequently, we recommend that the Commission's rules be limited to setting general policies regarding release of information and acting as an ombudsman in matters relating to public access to Government information

Fifth, our statement also addresses several technical amendments proposed in H.R. 4960 and H.R. 5425. These technical matters are discussed in detail in our statement.

We will be pleased to answer any questions which the subcommittee may have.

Mr. MOORHEAD. Thank you very much, Mr. Miller.

[Mr. Miller's prepared statement follows:]

PREPARED STATEMENT OF JOHN T. MILLER, JR., CHAIRMAN, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

Mr. Chairman and Members of the Subcommitte: I appreciate your invitation to appear and testify in these hearings before the Subcommittee on Foreign Operations and Government Information of the House Committee on Government Operations on behalf of the Section of Administrative Law of the American Bar Association.[1] The Section has long been concerned with problems relating to public access to government records, and welcomes this opportunity to present its views.

The Administrative Law Section submitted a statement to this Subcommittee last June in connection with the Subcommittee's hearings on the administration and operation of the Freedom of Information Act. In that statement, the Section indicated that it believes that the Freedom of Information Act is serving a useful and necessary function in our society, and has generally proved to be a workable statute. For this reason, the Section concluded that no sweeping changes in the structure or organization of the Act were required. The Section went on to point out that the main problem with the statute today is one of enforcement, particularly at the lower levels of the government. The Section also noted that, despite general compliance by most agencies, some problems have been encountered in receiving prompt replies to requests for agency records. In order to alleviate some of these problems, the Section of Administrative Law made a number of recommendations in that statement, including certain specific proposals for amendment of the statute.

The Administrative Law Section understands that the purpose of these hearings is to consider two specific bills which have been introduced in the House of Representatives. These include H.R. 4960, introduced by Congressman Horton on February 28, 1973, and H.R. 5425, introduced by Congressman Moorhead on March 8, 1973. Without discussing either of these bills in detail, I would like to devote the remainder of my statement to certain aspects of the proposed legislation which the Administrative Law Section believes merit attention at this time.

I

First, both bills make provision for the establishment of specific time limitations intended to assure that agencies reply promptly to requests for records. (Section 303, H.R. 4960; Section 1(c) H.R. 5425). These proposals are evidently based upon the uniform regulations in implementation of the Freedom of Information Act recommended by the Administrative Conference of the United States in its Recommendation No. 24. In our statement submitted last year, the Section strongly endorsed Recommendation No. 24, and urged that agencies should conform their internal regulations governing release of information with the uniform regulations to the maximum extent practicable, on the ground that the uniform regulations "can do as much as any single measure to assure effective implementation of the Act."

The Administrative Law Section continues to believe that a set of strict time limitations for responding to requests, such as is contained in the proposed bills before this Subcommittee, is essential to effective enforcement of the Freedom of Information Act. In this connection, we believe that the proposal set forth in H.R. 4960 (Section 303), which virtually tracks the uniform regulations proposed by the Administrative Conference in Recommendation No. 24, is far preferable to the proposal set forth in H.R. 5425 (Section 1(c)). Both bills require that an agency comply with or deny a request in 10 working days. However, H.R. 5425 apparently would provide no basis for an extension of time in which to reply to a request for agency records, while H.R. 4960 sets forth several specific grounds for an extension of time. In our view, there are legitimate reasons for extending

[1] Although we are authorized to appear on behalf of the Administrative Law Section, the policy-making body of the American Bar Association has not had an opportunity to pass on the principles of the legislation here being discussed.

the time in which an agency must reply to a request, such as the need to conduct an extensive search for the records or to evaluate whether a particular record is exempt under the Information Act, and a set of time limitations should provide sufficient flexibility for extensions in such instances. Moreover, we believe that the grounds for extending the time in which to reply to a request are set forth with sufficient specificity in H.R. 4960 so as to avoid abuse of the provision. By failing to provide any grounds for obtaining an extension of time, H.R. 5425 could well tend to force the agencies to deny a request that might have been granted had more time for deliberation been allowed. Consequently, if it is determined to enact a set of time limitations, the Section recommends that the proposal set forth in H.R. 4960 be adopted.

II

A second aspect of the proposed legislation which the Administrative Law Section desires to comment upon relates to provisions concerning *in camera* inspections of documents. Both bills contain language which is apparently intended to respond to the recent decision of the Supreme Court in *Environmental Protection Agency* v. *Mink*, — U.S. —, 41 L.W. 4201 (1973). (H.R. 4960, Section 101; H.R. 5425, Section 1(d)). In that decision, the Supreme Court ruled that, under the first exemption to the Freedom of Information Act (5 U.S.C. § 552(b)(1)), a district court has no authority to inspect *in camera* a record classified in accordance with an Executive Order to separate the secret portions from the non-secret portions, and rejected "any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen."[2] The Court also held that district courts were not required, under the fifth exemption to the Act (5 U.S.C. §552(b)(5)), to inspect a record *in camera* to determine whether or not the exemption was properly claimed, but could instead rely upon affidavits, oral testimony, *etc.*, in reaching a decision. To the extent that the proposed legislation would *require* courts to examine government records *in camera* to determine whether or not they fall within a particular exemption, the Administrative Law Section opposes such proposals. In the Section's view, a court should be enabled to reach a decision with respect to whether or not a particular record has been lawfully withheld under the Freedom of Information Act in any manner that it chooses, including through the use of affidavits or oral testimony. However, the Section agrees that courts should be permitted to examine records *in camera* in their discretion.

It appears that the principal purpose of both bills is to empower the courts to determine whether or not a particular record has been properly classified in accordance with applicable criteria governing classification in order to determine whether or not it should be withheld under the first exemption to the Freedom of Information Act. Generally speaking, the Administrative Law Section believes that courts should have the authority to review security classifications in instances where an agency has acted without reasonable grounds in assigning the classification to a particular document. To be sure, the courts are not equipped to deal effectively with questions of what is desirable in the interests of national defense and foreign policy, and should be reluctant to interfere with security classifications in the absence of evidence that there is no rational justification for the classification.[3] However, we believe that, even in this limited respect, judicial review can provide a salutary check on Executive action.

One technical difficulty with the manner in which the proposed bills attempt to provide for judicial review of security classifications is that neither would amend the language of the first exemption. Since the Supreme Court held in *Environmental Protection Agency* v. *Mink*, *supra*, that, under the first exemption, the sole question was whether or not the record had been classified pursuant to an Executive Order, in our view, it would be necessary to modify the language of the first exemption in order to permit a court to determine whether a record was properly classified. In H.R. 4960, it is provided only that the court shall examine *in camera* any records being withheld under an exemption to the Freedom of Information Act, including classified records, "to determine if they are being improperly withheld." (Section 101, H.R. 4960). Because this amendment would not change the language of the first exemption, under the *Mink* decision, presumably a classified record would *still* be properly withheld under Section

[2] 42 L.W. 4205.
[3] See *Epstein* v. *Resor*, 421 F. 2d 390 (9th Cir. 1970), *cert. den.*, 398 U.S. 965 (1970).

552(b)(1) simply if it were classified pursuant to an Executive Order. The proposal in H.R. 5425 suggests more clearly that judges are expected to examine classified records in order to determine whether or not they are properly classified, but, without amendment of Section 552(b)(1), the statute could still be construed to limit the court's role simply to deciding whether the record had been classified pursuant to an Executive Order.[4] If the Subcommittee desires to overcome the decision of the Supreme Court in *Environmental Protection Agency* v. *Mink, supra,* it should revise the language of the first exemption in addition to requiring that classified records be examined *in camera* by a court so as to make it clear that courts have authority to review security classifications.

In view of the foregoing, the Administrative Law Section recommends that the following two sentences be substituted for the third sentence in 5 U.S.C. § 552(a)(3):

> "In such a case the court shall determine the matter de novo, including such in camera examination of the requested record as it finds necessary to determine if such record or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action. Such in camera examination of records which the agency claims are in the purview of subsection (b)(1) of this section is authorized whenever the court finds reasonable grounds to believe that the agency's claim is not justified."

In addition, the Section recommends that § 552(b)(1) be revised to read as follows:

> "authorized under the criteria of an Executive order to be kept secret in the interest of national defense and foreign policy."

III

A third major portion of H.R. 4960 and H.R. 5425 would revise certain of the exemptions set forth in Section 552(b) of the Freedom of Information Act. These include proposed amendments to the second, fourth, fifth, and seventh exemptions.

THE SECOND EXEMPTION

H.R. 5425 proposes to amend Section 552(b)(2) by inserting the word "internal personnel" immediately before "practices," and adding the words "and the disclosure of which would unduly impede the functioning of such agency" at the end of the exemption. (Section 2(a)). The Administrative Law Section agrees with the proposal to restrict the scope of the second exemption only to instances where information cannot be disclosed without nullifying the effectiveness of a particular agency function. Indeed, in our statement submitted to the Subcommittee last year, we noted that some courts, relying upon the Senate report for the bill subsequently enacted as the Freedom of Information Act, have held that the second exemption is limited to information pertaining to an agency's policies regarding employee vacations, lunch hour time, sick leave, parking space allocations, and similar non-sensitive matters.[5] Other courts, however, have accepted the broader reading of the second exemption found in the House report, which covers such matters as operating manuals and guidelines intended for the use of agency personnel.[6] While the Administrative Law Section does not believe that personnel information of the type described above should be withheld under the Information Act, it does believe that at least certain types of internal guidelines should be protected against public disclosure. These internal guidelines include such sensitive matters as allowable tolerances for prosecution, negotiating techniques for contracting officers, schedules of surprise audits and inspections, and similar matters which obviously cannot be disclosed without impeding the performance of the particular agency function which they concern.

In the Administrative Law Section's view, the difficulty with the proposed amendment to the second exemption set forth in H.R. 5425 is that the addition

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[4] It is noted that the standard for review of classified records in Section 1(d)(2) of H.R. 5425 ("harmful to the national defense or foreign *policy* of the United States") is inconsistent with the standard set forth in Executive Order 11652, March 10, 1972, 37 Fed Reg. 5209 ("in the interest of the national defense or foreign *relations*"). (Emphasis added).

[5] *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969); *Benson* v. *GSA,* 289 F. Supp. 590 (W.D. Wash. 1968), *aff'd on other grounds,* 415 F. 2d 878 (9th Cir. 1969).

[6] *Cuneo* v. *McNamara,* Civ. Action No. 1826–67 (D.D.C. January 14, 1972).

of the words "internal personnel" could be read to restrict unduly the scope of the exemption. In light of the Senate report discussed above, the proposed amendment could be construed to apply only to matters concerning personnel policies, and not to apply to the kinds of sensitive matters intended for the guidance of agency employees such as were described above. Accordingly, the Administrative Law Section recommends that the word "personnel" be deleted entirely from the second exemption, and that it be amended to read as follows:

> "Related solely to internal rules and practices the disclosure of which would significantly impede the performance of an important agency function."

THE FOURTH EXEMPTION

As the Section noted in its statement submitted last year, the fourth exemption has probably been the subject of most controversy of all nine exemptions, in large part because of its awkward wording. As it is presently drafted, some courts have held that the fourth exemption protects only commercial and financial information that is confidential or privileged, and is not applicable to other kinds of information.[7] However, the Administrative Law Section believes that non-commercial and non-financial information that is confidential or privileged should be afforded the same protection as commercial and financial information. In certain types of investigations, important information is often obtained on a confidential basis which would not otherwise have been disclosed. For example, in the case of aircraft accident safety investigations, information as to the cause of the accident may be obtained only on the understanding that it will be used solely for the purpose of prevention of accidents, and will not be disclosed to the public or used for any other purpose. In addition, in our view, a citizen "must be able in confidence to complain to his Government and to provide information" without fear of reprisal.[8] Accordingly, the Section recommends that the fourth exemption be amended to read as follows:

> "Trade secrets and privileged or confidential information obtained from any person."

The Section recognizes that such an exemption could be abused by indiscriminate receipt of information in confidence by agencies. However, this potentiality would similarly exist with respect to commercial and financial information received in confidence. It is intended that, regardless of whether or not there was an express or implied promise of confidentiality by the agency, the fourth exemption should be construed so as to exempt only such information as would customarily be withheld from the public and for which there is legitimate reason for non-disclosure.

THE FIFTH EXEMPTION

The Administrative Law Section has no difficulty with the proposed amendment to the fifth exemption found in H.R. 4960. That proposed amendment appears to be consistent with the law of discovery presently incorporated into the fifth exemption, and apparently is intended simply to clarify the scope of the exemption. However, since the privilege in discovery law for intra-agency memoranda would be expressly defined in the new proposed Federal Rules of Evidence, it is suggested that the proposed amendment be revised to conform with that proposed definition. (Rule 509(a)(1)(A)). Thus, the Administrative Law Section recommends that the fifth exemption be amended to read as follows:

> "Inter-agency or intra-agency memoranda or letters which contain opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions."

THE SIXTH EXEMPTION

Although neither of the bills under consideration deals with the sixth exemption, the Administrative Law Section believes that certain changes should be made in that exemption as well. First, the word "clearly" should be deleted. In the Section's view, the sixth exemption, by requiring that such information

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[7] *Consumers Union* v. *Veterans Administration, supra; Getman* v. *National Labor Relations Board*, 450 F. 2d 670 (D.C. Cir. 1971).

[8] Statement of President Lyndon B. Johnson upon signing Public Law 89-487 on July 4, 1966.

be disclosed upon request unless disclosure would constitute a "clearly unwarranted invasion of personal privacy," does not give sufficient weight to the value of personal privacy. The Section believes that deletion of the word "clearly" would provide adequate flexibility to courts to balance the interest of public disclosure against the interests of personal privacy in each case, without unduly tipping the balance in favor of disclosure.

Second, the word "files" in the sixth (as well as the seventh) exemption should be changed to "records." The word "files" is sufficiently imprecise that an agency can attempt to evade compulsory disclosure simply by placing information that would otherwise be non-exempt into personnel and medical files (or investigatory files).

THE SEVENTH EXEMPTION

Both H.R. 4960 and H.R. 5425 propose changes in the seventh exemption to the Freedom of Information Act, which relates to investigatory files compiled for law enforcement purposes. However, the Administrative Law Section believes that the approach taken in H.R. 4960 is preferable to the approach taken in H.R. 5425. In H.R. 4960, the objectives which the investigatory files exemption is intended to achieve are specifically set forth in order to assure that information is withheld only if one of those objectives would be frustrated were the information disclosed. In H.R. 5425, on the other hand, certain specific types of records are expressly excluded from the investigatory files exemption. Because many different types of information may be contained in an investigatory file for which there are legitimate reasons for non-disclosure, the Section believes that it is unwise to attempt to exclude certain types of records from the exemption under all circumstances. For example, even "scientific tests, reports, or data," (Section 2(d), H.R. 5425) contained in an investigatory file, if released prematurely, could interfere with the prosecution of an offense or result in prejudicial publicity so as to deprive an accused of his right to a fair trial. In addition, the proposal set forth in H.R. 5425 would not resolve the issue as to when the investigatory files exemption terminates, an issue that has arisen in several recent court decisions.

Accordingly, the Administrative Law Section recommends that, if the seventh exemption is to be amended, it be amended along the lines of the proposal set forth in H.R. 4960, and revised to read as follows:

> "Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures."

IV

The fourth aspect of the proposed legislation which I wish to discuss involves the proposal in H.R. 4960 to establish a Freedom of Information Commission. (Title II, H.R. 4960). We assume that the principal purposes of the Freedom of Information Commission would be to establish general policies and make recommendations regarding release of information, institute investigations into agency compliance with the Act, maintain statistics and conduct studies, and, in general, serve more or less as an ombudsman for complaints arising under the Freedom of Information Act. The Administrative Law Section supports these objectives, and, to the extent that the proposed legislation is intended to achieve them, agrees with the establishment of a Freedom of Information Commission. However, the Section does not agree that the Freedom of Information Commission should possess authority to adjudicate individual cases involving requests for specific records. In our view, there is no necessity to establish a separate procedure for obtaining records from the government independent of judicial action, and in this respect, the proposal would simply duplicate the existing procedures for judicial review under the Information Act. Apparently it is not intended that any decision of the Commission upon a particular complaint would relieve a requestor of the necessity to seek judicial review under 5 U.S.C. § 552. Even with a favorable decision from the Freedom of Information Commission, he still would be required to file a lawsuit under the Act in a federal district court, although the Commission's determination that an agency has improperly withheld records would be prima facie evidence against the agency.

96-576—73——21

The Administrative Law Section believes that a Freedom of Information Commission can serve a useful purpose as an ombudsman, and in setting general policies regarding release of information. However, we think that the Commission's role should be limited to these kinds of general functions, and that it should not adjudicate individual cases.

V

Finally, I would like to comment upon certain miscellaneous aspects of H.R. 4960 and H.R. 5425. First, the Administrative Law Section supports the proposal to amend 5 U.S.C. § 552(a)(3) set forth in Section 1(b) of H.R. 5425 regarding identification of requested records. There is some indication that the "identifiable records" provision of the Freedom of Information Act has been utilized by some agencies as a basis for denying requests for records. The proposal to revise this provision to make it clear that any request which "reasonably describes" a record is adequate for purposes of the Information Act should prevent such abuses, and is consistent with applicable court decisions. Similarly, the proposed amendment set forth in Section 104 of H.R. 4960 relating to release of documents containing exempt and non-exempt information is also a useful clarification and conforms with court decisions.

Second, H.R. 4960 proposes to amend the phrase "has jurisdiction to enjoin" in the second sentence of § 552(a)(3) to read "shall enjoin." The apparent purpose of this amendment is to make it clear that courts have no discretion to refuse to issue an injunction against withholding under the Information Act. Under the proposed amendment, presumably a court would be required to issue an injunction against withholding whenever it determined that the records sought did not fall within one of the nine exemptions set forth in the Act. In the Administrative Law Section's view, however, a court's traditional discretion in equity to determine whether or not the relief sought by the plaintiff should be granted could prove to be a useful protection against compelled disclosure in the event of an extreme case. It is impossible to draft a statute governing release of information that would cover every possible set of circumstances, and the Section believes that the courts should be left some discretion in exceptional cases, where the benefit from disclosure would be minimal but the harm would be immense, to decline to exercise their jurisdiction to order disclosure. So far as we are aware, only one or two courts have declined to issue an injunction under the Information Act on this ground to date, and there is no evidence that the courts have abused their discretion under the statute as currently worded. Indeed, several courts have held that, even as presently drafted, no discretion to refuse to enforce the statute exists. Until some evidence of abuse is demonstrated, we believe that this provision should remain as a safety valve for the exceptional case.

This concludes my statement. Thank you for inviting me.

Mr. MOORHEAD. Mr. Miller, I do have some questions.

I would like to get your judgment on the proposed changes in the time limit—not for the agency, but when the case gets to court. As I recall it, normally the Government has 60 days to file an answer to the complaint; we propose to reduce that to 20 days.

Mr. MILLER. I do not think we are prepared to oppose it, Mr. Chairman. We do not know enough about the difficulty of complying with the shorter time limit to be able to support it vigorously. You would have to rely upon whatever your studies indicated to be a possible shortening of the time. We favor the shortening of the time, I think, but we cannot say exactly how short it ought to be.

Mr. MOORHEAD. Some of the executive branch witnesses said that because of the sprawling nature of the Government that they were not in the same position as a private litigator, and that is why they should be allowed more time. We know in these cases that particularly if a newspaper or broadcast media is concerned, they have got to have the answer quick. News is such a perishable commodity.

Mr. MILLER. Yes, we realize that. Unless compelled to devote the manpower to the effort, the Government would simply take the extra time.

Mr. MOORHEAD. I am very much interested in your suggestion on the top of page 13 about the interagency or intra-agency memoranda. Do you think that we can separate the fact from opinion sufficiently so that you can say memoranda must be supplied, that memoranda cannot be withheld properly?

Mr. MILLER. I assume that many of the memoranda will be interwoven. There will be both types of material in there. Particularly where there is an adjudicatory atmosphere involved, it is possible to know whether the agency is getting the same facts, let us say, from its staff, as the facts in the public record. If they are being told one set of facts in the form of internal memoranda, then it may be that it is highly prejudicial to a person on the outside. I would suspect that many of the memoranda will be a blend of advice and facts. It will be hard to separate the two.

Mr. MOORHEAD. Now, then, would you think that portions of the memoranda could be blacked out that were opinion or recommendations, and the portion that was purely factual should be opened to the public under the law?

Mr. NOLAND. If I may respond to that, Mr. Congressman?

Mr. MOORHEAD. Yes, certainly, Mr. Noland.

Mr. NOLAND. Yes, I think that that could be done. I think we recognize that to separate factual materials from opinions and recommendations would require difficult judgments. I think, though, that to date under the Freedom of Information Act, the courts have been dealing with this question on the whole pretty effectively. I do not think they have had too many problems in distinguishing the factual portions from the opinions and recommendations. Of course, the interagency memoranda privilege has existed in discovery law for many years. I think that the courts are used to handling these questions.

I believe that one of the provisions in one of the bills does specifically authorize the court to separate the exempt portions of a particular document from the nonexempt portions. I think that that provision which we support, if enacted, would also assist the court in separating the factual portions from the opinions and recommendations.

Mr. MOORHEAD. I note that the section does endorse the concept which appears in the Horton bill, the Freedom of Information Commission. However, rather than not permitting it to function in the adjudicatory situation, I think it might actually be expanded in that direction. Maybe it is an institution that we can use, for example, where if a Government defendant cannot answer a request within the 10-day limit, perhaps the Commission could be the body to which the agency could write a letter saying, "This is why we cannot answer your request that soon." Maybe it could be the institution that would determine the proper costs for copying and search. I do not see why it cannot perform the adjudicatory function which could then be subject to appeal to the courts. It might be able to dispose of, or prevent 50 percent of the cases from going to court, and then it would be very worthwhile.

Mr. MILLER. If it would work speedily, and would avoid the need to go to court. I think our concern arises from the fear that, in the case of an intractable refusal, it would add one more step before reaching the truly effective vehicle for getting the document; namely, the court. This would slow down relief.

Mr. MOORHEAD. Well, in the bill it would not be required as a preliminary step, but really a permissive step. If the complainant wanted to use the Commission, he could exercise his option to go there.

Mr. MILLER. I think that is an excellent suggestion, Mr. Chairman. We do not read the bill at present as creating a commission that could compel disclosure. If it had that power, and the alternative method of allowing the person trying to get the document to go to the court was preserved, it might meet much of our objection.

Mr. MOORHEAD. We will look at that because part of the feeling is that the complainant does not always want to get into the expense of a court case. A commission could perhaps in effect, do some of the legal work for the complainant. He might be more likely to use that route, particularly if they were getting good service and good decisions from the commission.

Mr. MILLER. I guess the more experience one has with Federal commissions and agencies, the less one is inclined to be optimistic about their inexpensive character or their speed. The use of the commission as an alternative approach, if the commission had the powers that the court has, might be one solution.

Mr. MOORHEAD. As a lawyer, I tend to feel the way you do about courts being better ultimately than commissions, but we could name to the commission people who had some expertise in the area of security classification—the courts do not have any particular expertise in that—and it could also do some of the work of sifting through a lot of documents that maybe would tie up the courts if we rely on other language in the bill providing for the reversal of the *Mink* case.

Mr. MILLER. My recollection is that it has been contrary to tradition to provide a qualification for membership on a commission; to state that members ought to have a particular expertise. Indeed, where a qualification is mentioned, it is usually in the sense of disqualifying a person because he has a financial investment in the field being regulated, or something of that sort.

I recall the prospects anticipated for the Federal Trade Commission back at the time of President Wilson. The idea was to have a commission which would be staffed by members with a certain expertise in economics and so on. Time has failed to demonstrate a fulfillment of the original hopes. It may be, Mr. Chairman, that you would start off with the commission staff the way you have in mind. I would wonder how over time those qualifications would be maintained, unless you are very precise as to the qualification of the appointees. You are running against a long tradition of just not specifying qualifications.

Mr. MOORHEAD. There would be less financial involvement, I think, in security classification than in other fields. We might be able to succeed. We might, and I qualify it at that point.

In the bills before us there are amendments which would permit the courts to assess the Government for reasonable attorney fees and court

costs. Does the section have any position, pro or con, on that provision?

Mr. MILLER. There is nothing in the statement we have submitted today. A year ago we did support that proposal. That would still be our position today.

Mr. MOORHEAD. Coming back to the Commission; there have been suggestions made that instead of the Commission, we establish a special court—sort of along the lines of the tax court—to handle these types of cases. Would this receive better favor from the section than the commission idea?

Mr. MILLER. I do not know. That is something we would have to consider at great length. At various times in the past the bar has considered the advisability of setting up special administrative courts, for example, a labor court. Sometimes the bar has supported them. But those propositions have not gone very far. We have not studied the proposal you just mentioned. It would take us quite some time, I think, to get it through the American Bar, just to get it considered.

Mr. MOORHEAD. One section of the amendments would require each agency to file an annual report with the Congress on how it has handled freedom of information requests, and so forth, in the preceding year. Does the section have any opinion on the advisability of that?

Mr. MILLER. We have not addressed ourselves to that in our statement. But I think it would be a sensible idea, as a necessary oversight.

Mr. MOORHEAD. Finally we come to a question that seems to sort of be hot this year. H.R. 5425 would require all agencies to provide any information or records requested by the Congress or its properly authorized committees. This gets us into the question of executive privilege. Does the section have any wisdom that you would like to share with the subcommittee on this subject?

Mr. MILLER. Not at this time. On the fairly short notice we had, we were not able to get to that point. It would require considerable discussion among ourselves. If your committee would like our views, we will proceed in our normal way. We are much like Congress. We have to start at the bottom with a committee study. Possibly by the fall we could express a view if the matter is still open and before you.

Mr. MOORHEAD. Although not directly the subject of these hearings, there are some bills directly on that subject before this subcommittee. It is hard to separate them—you can't keep them in neat little compartments. We could submit to you copies of those bills and the provision in H.R. 5425. Any views you can give us, hopefully before the fall, would be helpful, even if they are qualified as only being the views of the Executive Committee of the section, or however your group may decide. This obviously is a matter that is of tremendous importance and if we can ever find a way of resolving it properly, we must do so. It goes right down to the heart of our Constitution and the three branches of Government. We have never explicitly resolved it in the past, and maybe we never can. But it would be a job that the American Bar Association is probably uniquely fitted to give good recommendations to the Congress on.

Mr. MILLER. Any hesitancy on my part does not stem from a lack of desire to express views to the Congress. The very size and depth of the problem, and its constitutional overtones, place me at the moment in a position where I cannot even tell you right now what other sections of

the American Bar have appropriate jurisdiction over such a proposal. Their views would have to be considered. Then the views of our section, as well as those of other interested sections, would be funneled up to the Board of Governors, and then to the House of Delegates. Getting into that queue is a time-consuming matter.

Mr. MOORHEAD. Counsel for the minority has a question.

Mr. COPENHAVER. Just one point on this. At Mr. Erlenborn's request, who regretfully cannot be here today, I sought to contact the president of the ABA at the time that we were holding hearings on executive privilege, inviting him to attend. He laid out the procedure that he has to follow in having a position developed for the ABA. Apparently, he is not able to speak for the ABA without having a decision, I understand, by your proper organs within the ABA, if that is correct. I assume it is?

Mr. MILLER. He is more or less like a prime minister in a cabinet, rather than a president.

Mr. COPENHAVER. Yes, and it makes a good deal of sense. The point I wanted to make though is I do believe this issue of executive privilege is even more important than the bill before us today, which is important. I do believe there are several bills before the committee, one by Mr. Erlenborn, which would provide a narrow area of executive privilege which could be claimed. Mr. Fascell has one that limits it even more.

Here is Mr. Erlenborn right now.

Mr. MOORHEAD. Mr. Erlenborn has just arrived as his name was being taken in vain.

Mr. COPENHAVER. If somehow on such a crucial and fundamental issue, the American Bar Association could study this matter even before the fall and provide a position for the committee, this would be quite helpful because you may gather that it is a constitutional matter which I think your organization should have an opportunity to speak to.

Mr. MILLER. Well, let me give you an illustration of my own experience with the American Bar.

Our section believed at one point, and we still do, that there ought to be a continuing legal education center in the Federal Government. It took us a year and a half, I think, to get that through the American Bar Association, and that is not even a constitutional issue. We have had even less luck with Congress.

Mr. COPENHAVER. Yes.

Mr. MOORHEAD. Mr. Phillips?

Mr. PHILLIPS. Just one question. Last week when Mr. Dixon, Assistant Attorney General, Office of Legal Counsel, testified before this subcommittee, he opposed the section of both bills which would authorize the award by the court of reasonable attorney fees and court costs in cases where the Government did not prevail in an FOI case.

One of the arguments he used was that lawyers would be filing FOI suits for each other. Now, this seemed to me to be rather a gratuitous slap at the legal profession, its ethical standards, and conduct. Could you respond to that type of statement for the record?

Do you feel that it is a valid criticism of this provision of the bill? Do you conceive that this could ever happen?

Mr. MILLER. You have given me two questions. First, I do not think that it is a valid criticism. Second, if it were abused, there are disciplinary measures available. That is true of all legislation which requires the bar to help in its enforcement, or in protecting citizens as to their rights.

The fact that abuses can arise is no reason for depriving citizens of their rights.

Mr. PHILLIPS. Of course, this same provision is already in two civil rights laws, the Equal Employment Opportunity Act and the Civil Rights Act of 1964.

The subcommittee is aware of no such abuses of this provision in those two laws, and they have been operating now 7 or 8 years. Are you aware of any such type of abuse in the award of attorney fees?

Mr. MILLER. No, sir.

Mr. PHILLIPS. I have no further questions, Mr. Chairman.

Mr. MOORHEAD. Mr. Cornish.

Mr. CORNISH. Yes. Thank you, Mr. Chairman.

Mr. Miller, when this legislation was originally passed in 1966, there was a feeling on the part of the chief sponsors that at some later day Congress should take a look at this legislation and possibly eliminate or narrow drastically some of the exemptions in it. This would be a good objective to aim for—that as time went on we would try to eliminate as many of the exemptions as possible and narrow them.

Do you see any exemptions in the act right now that could possibly be eliminated?

Mr. MILLER. May I have Mr. Noland speak to that, because he has devoted a little more time to the individual sections.

Mr. NOLAND. I think that probably the last two exemptions could be eliminated. To my knowledge, they are very seldom used, if ever. I think the type of information that they try to protect would be protected under other exemptions in any event.

So far as narrowing the scope of the remaining exemptions, I think that can legitimately be done at this time. We make a number of suggestions to accomplish that end.

Mr. CORNISH. Now, the example that you gave on the confidentiality of information given to the Inspector General of the Army by individual soldiers I think was not a good one, because in most cases those complaints are registered by individual soldiers, and once they are taken up with the unit commanders it is quite obvious to the unit commander who made the original complaint. So, the question of privacy there, you know, may not be as crucial as you would contend.

Mr. MILLER. It has been suggested to me that that may be a defect in the Inspector General's procedures, but we think that the point of protecting confidentiality where the Government would otherwise be deprived of information that it ought to have is still a valid point.

Mr. CORNISH. Yes. I am glad you brought that point up, because that is a very interesting one to me. I think there are two types of situations here, one where the Government solicits information with a promise of confidentiality, and then a case where it solicits information but not necessarily with an assurance of confidentiality. But once the Government has it, it applies the standard of confidentiality to it, even though it did not offer it in the first instance.

Now, do you think that those two types of information should be treated in a different way?

Mr. MILLER. The example I would use happens to be a financial or economic one, but let me use it anyway. I recall that some years ago there was an investigation under Mr. Cellar of the maritime industry, specifically the enforcement activities of the Maritime Commission. They found that over the years, something like this was going on:

A shipper who had a valid complaint would complain to the agency that he had been mistreated by a conference member; that is, the owner of the ships. The agency would simply take the complaint, send it to the owner of the ships. As I recall reading the report of the committee, somebody would be sent up to the shipper to see that he did not repeat that sort of complaint if he wanted to stay in business.

That kind of complaint might not have come in with a request that it be kept confidential. But obviously under circumstances like that, disclosure by the agency of the information destroys ready access to complaints. It ought to use the complaint simply as a quivive, and go out and look into the matter itself and undertake the onus of investigating and determining whether there is any validity to the complaint. Otherwise you just choke off the source of the information, since the agency cannot have people everywhere.

Mr. CORNISH. Well, would you agree with me that one of the criteria that should be considered would certainly be a request from the provider of the information for confidentiality, that if he makes no request for confidentiality, there might be a question as to whether this information could not be made public?

Mr. MILLER. I agree. But I am not sure all of our citizens are sophisticated enough to read either the laws or the Federal Register. We know they are not. If we are talking about ordinary people, then we cannot assume that they know that much about how to protect themselves. I am really not sure it ought to be limited just to cases where they ask for confidential treatment. I think the agency might have to exercise some judgment.

Mr. CORNISH. Now, in regard to the sixth exemption where we get into the privacy issue directly, that exemption at times has been used by Government agencies to deny the examination of files to individuals where their own particular file is involved.

And I just wonder whose privacy is being guarded, whether it is the Government's privacy or what. Certainly it is not the individual whose file is involved.

Mr. NOLAND. May I respond to that?

Mr. CORNISH. Yes.

Mr. NOLAND. I think there is no basis for doing that. It seems self-evident to me that you would not be invading personal privacy if you were releasing information to the individual concerned. If such an instance were presented to a court, I am confident that it would order disclosure.

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Kronfeld.

Mr. KRONFELD. Thank you.

In the amendment proposed in H.R. 5425, (2)(b)(2) on internal personnel rules and internal personnel practices, a clause was added at the end to protect information which would, if released, unduly

impede the functioning of an agency. We had thought at the time this was drafted that that would, in fact, protect those internal rules which were not internal personnel rules, but if released would impede an agency function such as the examples you mentioned, audit schedules or parameters for investigation.

The purpose of the amendment originally was to limit the Government's use of this section to lock up manuals, regulations, and directives which we thought should have been made available for inspection under that section in part A of the bill.

Do you feel that this clause at the end about impeding the function of the agency would not fully protect those kinds of directives which while not personal should not be released?

Mr. NOLAND. Well, no, we would support the addition of that type of qualifying language to the second exemption. In our statement we propose a very similar qualification. There is no significant difference between our proposal and yours except in style.

The one change which we propose in your amendment is deletion of the word "personnel". In our view, the use of the word "personnel" in light of the past history and wording of the exemption could be read to suggest that you are referring to personnel matters, policies like parking space allocation, vacation policy, and that sort of thing. We do not think that is what you are trying to protect here. We think that you are trying to protect all types of internal guidelines intended for the use of agency personnel where disclosure would affect the functioning of the agency.

I think we are in essential agreement with the amendment that you have proposed, except that we would recommend the deletion of the word "personnel".

Mr. KRONFELD. The section then does agree that it should be limited as much as possible to promote the disclosure of all of those directives which do, in fact, affect the public, although are not written directly for public consumption?

Mr. NOLAND. Oh, absolutely. Only those records whose release would unduly affect the functioning of the agency should be withheld.

Mr. KRONFELD. Thank you, Mr. Chairman.

Mr. MOORHEAD. Any further questions?

Mr. COPENHAVER. I have a couple, if I may, just briefly, because he has to go.

Directing my question strictly to your testimony with regard to the exemptions and the amendments to them, it would seem to me that the effort could be made to make more precise the language of the exemptions in the act. I think that is what we have been trying to do in the legislation, limiting exemption 2 to strictly internal personnel matters; exemption 4 to trade secrets and commercial and financial data. Mention has been made of the need to safeguard auditing manuals under exemption 2 or attorney-client privileges and other privileges under exemption 4. My question is, can we not better place these protections within an exemption which fittingly applies to this category of protection?

For example, with regard to the internal auditing manuals and other types of investigative matters, should they not more properly be considered within exemption 7 on investigations?

Now, admittedly it says law enforcement matters, but maybe we ought to revise exemption 7 to be sure that that type of procedure is covered within investigations?

Similarly with regard to the legal privileges which you suggest should be continued under exemption 4, should that not be more properly covered under exemption 3, which talks about other statutes which provide protection with regard to privacy matters? Should not invasion of personal privacy matters be properly covered under 6, where we get into questions of invasion of privacy, and I might allude to your example of the individual in the military personnel who goes to the inspector general? Is that not an invasion of privacy matter which we ought to cover under 6? Is not our effort, in conclusion, to try to make more precise and tighten up these exemptions without necessarily doing away with the need for protection as you suggest in your statement?

Mr. MILLER. I am sure that the committee in its wisdom will decide whether tightening up, which we would recommend, could be accomplished by putting things together in a single exemption. I would only suggest that you consider this. There is quite a bit of legislative or case history now, and one looks up that case history by reference to the sections and exemptions that have now become rather well known.

This provides a gloss on the present statute which makes it rather easy for the lawyer to learn what came before. If you now jump parts of one exemption to another, it will be awfully hard to build on what has been done before, from the point of view of researching judge's decisions and so forth. That is the only misgiving I would have offhand about following the course you are suggesting.

Mr. COPENHAVER. May I make one final comment. You have come in here and testified pretty much in favor of our legislation, therefore we look kindly upon you.

But on top of that, let me commend you for your statement today, because over the past 10 or 15 years, the American Bar Association has entered the real world, and contrary to certain other professional associations, I think that the work that you are doing in your particular section that you are involved in and the ABA in general really deserves a great deal of commendation for testifying for and working for legislation to make it effective. And I want to thank you for coming.

Mr. MILLER. I attended the meeting of the house of delegates of the American Bar Association in Cleveland in February. I believe it was announced that 30 percent of the house were there for the first time. Those inclined to think of the ABA as a group of oldtimers——

Mr. COPENHAVER. I know you are growing.

Mr. MILLER. We all get older, but we have some input from the younger part of the bar.

Mr. MOORHEAD. It is my observation that lawyers seem to be younger as each year passes.

Thank you very much, Mr. Miller and Mr. Noland. We appreciate very much your help, and we hope you will ponder that "executive privilege" situation and see if the ABA can be of help to us in this very difficult area.

Mr. MILLER. I want to thank you again for your kindness in allowing me to come out of turn.

Mr. MOORHEAD. I think the kindness is really owed to Mr. Koop and not to us.

This subcommittee would now like to hear from Mr. Theodore Koop, representing the Radio-Television News Directors Association, an organization of about 1,000 members.

Mr. Koop, as always we are delighted to see you before this subcommittee, because you have given us so much help in the past.

STATEMENT OF THEODORE KOOP, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

Mr. KOOP. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Theodore F. Koop and I am the director of the Washington office and a past president of the Radio-Television News Directors Association, and as the chairman has noted, we do have about 1,000 members throughout the country.

RTNDA welcomes this opportunity to endorse legislation designed to make more effective the Freedom of Information Act. Newsmen were delighted when that act was passed 7 years ago, but its application has been somewhat disappointing. Although it has brought into the open much Government material that should not be kept secret, imperfections have prevented it from becoming as fully operative as its advocates hoped.

Administration of the letter of the law is no more important than carrying out its spirit. Regrettably, many officials have chosen to interpret it narrowly instead of broadly as the Congress intended. In numerous instances they have managed to delay or reject proper applications for information. Reporters have complained about complicated and expensive procedures. Some have even thrown up their hands when they found their legitimate requests being blocked at every point.

Therefore, it is a happy circumstance that this subcommittee is looking into this serious matter at a time when freedom of the press and freedom of speech are under widespread challenge in the United States. Overclassification of Government documents has reached a ludicrous stage. Indeed, the executive branch has been wrapping itself in a cocoon of secrecy that has no peacetime parallel. As a result of Supreme Court decisions that newsmen must disclose confidential sources to grand juries, the flow of information about corruption and malfeasance in office is drying up, perhaps with one current exception.

The American people are not receiving all the facts to which they are entitled.

Thus congressional action in strengthening the Freedom of Information law will be a clear signal to all Government agencies that they must stop dilatory and obstructive practices. It will underline the original concept that secrecy can no longer be tolerated.

Let me comment briefly on some of the provisions of bills pending before this subcommittee, first in regard to H.R. 5425, which we generally support. One of our concerns as newsmen, of course, is promptness in obtaining information for our audiences. Hence we endorse the provisions of section 1 which would set a 10-day limit in responding to an inquiry and a 20-day limit in acting on an appeal.

We also approve of the proposal to require the courts to make a fresh examination of contested material, to determine if the records should be withheld. This is particularly important with records involving the national defense or foreign policy of the United States. The bureaucratic tendency to overclassify such documents cries out for court review. Section 1(e) would speed up court action and lighten costs for successful private appellants. The latter is a special burden on smaller communications companies.

Section 2 should be helpful because it would clarify and toughen several points in the present law. It seems to us that the new section 2(d) would be valuable by requiring agencies to submit annual reports on their actions under the law; they must disclose their disclosures—and the restrictions thereto. It should encourage agencies to develop a good record.

Some of the provisions of H.R. 4960 are similar to those of H.R. 5425. I have considerable doubt, however, about the proposal to establish a Freedom of Information Commission. Its intent—to enhance enforcement—is commendable, but I cannot help but feel that it simply adds another step and thus encumbers the appeal procedure. Unless the courts can make a showing that appeals are burdening them too heavily, I would be inclined to leave the job to them. I also have some concern lest such a Commission become too zealous and start making judgments on freedom of information matters outside this one act. It is a field in which, unfortunately, everyone seems eager to express opinions.

Finally, I like the plan outlined in H.R. 7268 for making an agency's chief information officer responsible for handling requests for records. Presumably he has a greater knowledge of journalistic problems and therefore should be more understanding of and sympathetic to applications for information. It centralizes control at the proper point.

Speaking of Government information officers, I was impressed recently by some comments of one of the more thoughtful and credible members of that group, Robert McCloskey, who has been the State Department's spokesman for nearly a decade. In a talk at the National Press Club before he left to become U.S. Ambassador to Cyprus, Mr. McCloskey said:

> It is not sufficient merely for the government to state a conviction that a free and unintimidated media is essential to a democratic society. As the government performs it must inform. Demands, assertations, pleas for credibility on faith might well in the end be vindicated and fulfilled; where they are not—because the government neither performed nor informed—the demands, assertations and pleas can end up mocking the government. The press and the public have a right to expect serious performance on the government's declarations of intent. If government is to err, it will have to do so on the side of liberality in deciding what the public has a right to know.

Those are splendid sentiments.

If that attitude can be spread throughout the Government, we shall have made great progress in keeping the American people informed. I am convinced that strengthening the Freedom of Information Act will be a major step in that direction.

Mr. MOORHEAD. Mr. Koop, in commenting on your conclusion—your quotation of Mr. McCloskey—and your statement on page 1 about carrying out the statement of the law, if we could have people in

Government carrying out the spirit we would not have to worry about these amendments that we are proposing now.

Mr. KOOP. No, they would become very minor in importance.

Mr. MOORHEAD. If there were only some way that we could persuade the people in the executive branch that, in the long run, they are going to be better off sharing information with the American people—which I am convinced they would be—we would not need amendments like this. But unfortunately, we seem to be unable to get that message through or persuade them of that, so we do have to think about amendments to the law.

I am interested in your comments on the Freedom of Information Commission. It was not my idea; it is in Mr. Horton's bill that I also cosponsored. What you say is you have some concern lest such a commission become so zealous and start making judgments on freedom of information matters outside this one act?

When I think of the commission in being too zealous, I would think it would be too zealous in spreading information, rather than the other way around.

Mr. KOOP. Hopefully in that regard, but it seems to be symptomatic that when people get their fingers into the first amendment, that they like to draw judgments of their own.

For example, in the current shield legislation being considered, opponents of that legislation point out that it does inhibit the first amendment a little, and that properly the first amendment should have no inhibitions whatsoever. And you just cannot help but wonder whether there might be a little something in this particular case along that line.

Mr. MOORHEAD. It would be my concept that there would be no requirements that anybody would be required to go to the Commission first, that they could make a choice of either the courts or the Commission as their first step, and in a little bit, where you have two courts, in effect, competing for business, why, each one gets a little more liberal with the potential complainants, and it almost stacks the case a little bit in favor of the requester of information, which is quite frankly the situation I would like to see.

Mr. KOOP. Certainly I agree with you on the latter point. But would not this actually come down to another court system? Would the Commission not soon be adopting the same procedures and techniques that a court actually does?

Mr. MOORHEAD. It could very well be. But my fundamental position is, we would be no worse off so long as we preserve the right of the complainant to go directly to the court if he so chose. But, he might find that the track record of the Commission was even more favorable to him, less expensive, they could do some of the legal work for the complainant which the courts cannot do, and they may end up with a better system.

That is really my thought on it.

Mr. KOOP. You mentioned in the discussion with the previous witness the possibility of having some members of this commission be experts in the field of Government classification. I would be inclined to disfavor such a program, because I think if they are experts in that

field, they would have become so through years of experience in classifying and not declassifying.

Mr. MOORHEAD. Well, we did have before this subcommittee in the last Congress an expert in this field who is a joy and a delight, a Mr. William Florence, who said that 99.5 percent of all documents classified should not be so, and was able to argue persuasively from a long and distinguished Pentagon background in this field. So that is the kind of person I would like to see.

Mr. KOOP. I am afraid he is the exception.

Mr. MOORHEAD. Yes.

Mr. Erlenborn?

Mr. ERLENBORN. Thank you, Mr. Chairman.

Let me follow up with the questions the chairman asked about your statement relative to the Commission. As I read H.R. 4960, it rather specifically limits the power and duties of the Commission to making judgments under section 552 of title 5 of the United States Code. So I am somewhat confused by your concern there about going outside the act and making decisions based on sections of the Constitution or other acts.

It does not appear to me that they are given that authority.

Mr. KOOP. I am not afraid of other acts because there is really nothing comparable in this field that I would expect them to get into from a legal standpoint. But, just the idea that once they are involved in freedom of information, they are human, after all, and they might well be tempted to make pronouncements.

I do not mean legal steps, because obviously they could be restrained as to what they could do legally.

Mr. ERLENBORN. Well, pronouncements? I cannot imagine the Commission would be in the position of sending out press releases as to their thoughts. Their job is to respond to complaints and issue decisions. No, I cannot imagine any commission undertaking to make a study and issue reports that are not at all authorized or directed under the legislation.

Second, sections 219 and 220 specifically refer to section 552, title 5 of the United States Code, and I do not see any authority for them to make decisions outside of that.

I notice you also say that you feel this may simply add a step and, therefore, encumber the appeal procedure. Now, I am a little confused by that, too, since they are not involved in any part of the judicial process, except if they are asked by the court of original jurisdiction, the trial court, to aid them.

Mr. KOOP. Well, as the chairman has pointed out, if this is considered an alternative step, I think that improves the situation very much.

Mr. ERLENBORN. Which I think it clearly is, and what it may be is a step where action can be forthcoming within 30 days, rather than having to go to the court with the incumbent delays.

Mr. KOOP. Yes, there is no question but what it would be faster.

Mr. ERLENBORN. One last question. On page 2 of your statement you say that as a result of Supreme Court decisions newsmen must disclose confidential sources to grand juries and the flow of information about corruption and malfeasance in office is drying up. Then paren-

thetically, outside your statement, you said except maybe one particular thing that is quite newsworthy today.

Since I feel that the importance of quantity of information is overshadowed by quality of information, I would like to test the quality of this information that you are giving us.

Do you have any empirical data to sustain your conclusion that news sources are drying up as a result of the Supreme Court decisions?

Mr. KOOP. I think the best thing I could refer you to, Mr. Erlenborn, is testimony on the shield bills before both Houses, before the subcommittees in both Judiciary Committees, and various witnesses have testified to that effect.

For instance, I happened to be sitting in the Senate Subcommittee when Paul Branzburg, who was one of the defendants in the original Supreme Court cases, was testifying that since that time he has moved to Detroit from Louisville and is doing investigative reporting there, and has definitely found that sources there are drier than they were even a few months ago. And there are similar statements in those records.

Mr. ERLENBORN. I have found that, even among the newsmen, there is a great difference of opinion as to the necessity or the advisability of a shield law. I recall reading the testimony of a newsman, quite well known, who has appeared before this committee many times. When he testified before the House Judiciary Committee on the shield law, he said that the passage of a shield law would be a greater boon to organized crime than the fifth amendment ever has been.

Would you agree there may be even a difference of opinion among your newsmen as to the shield law?

Mr. KOOP. There certainly is, and I would be surprised and amazed if newsmen were ever of the same opinion on any subject. But it goes back to tampering with the first amendment. I think that is the reason for the opposition of the other gentlemen, the gentlemen of whom you speak and others who feel that way, and I am tempted myself to take that position.

Mr. ERLENBORN. I know it is outside the scope of our inquiry today, but I have often wondered on the question of the shield law. First of all, an absolute shield law would apply to me, or to any other individual in the United States, who said that he or she intended to publish or write a paper. That would be an absolute law. If you had anything less than that, you would have the Government defining who is or who is not a newsman, and in effect licensing the news profession. It seems to me, if you have worries about the first amendment rights, those worries ought to be brought right to the fore when you discover that the Government has power to license news people.

Mr. KOOP. That is a very worrisome angle, and the only way I can see to get around it is just to leave it wide open.

Mr. ERLENBORN. If you leave it wide open, then nobody will ever have to testify before a grand jury again. They will have the shield law.

Thank you.

Mr. MOORHEAD. Mr. Phillips.

Mr. PHILLIPS. Thank you, Mr. Chairman. I want to express our appreciation for your fine statement, Mr. Koop, and underscore one point that you made at the bottom of page 3, where you reference H.R. 7268,

Mr. Moorhead's bill, which would upgrade the status of public information officers in Federal agencies.

While that bill has been referred to this subcommittee, we had not been including it in these particular hearings. But I think that the point that you make here is a very important one; you are relating the centralization of authority as provided for in that bill to a very salutary improvement in the Freedom of Information Act and in the administration of that act. I think this is an extremely important point and, of course, one of the purposes of the bill. This stems from much of the testimony that we received last year during our hearings on the administration of the act, wherein agency after agency, it was very clear that public information officers have very little to say in decisions affecting the Freedom of Information Act. Most of these decisions are made by general counsels of the agencies or by administrative assistant secretaries or undersecretaries or other high levels of the bureaucracy. The public information officer, who has the best working knowledge of what information is, and how the dissemination of it would assist both the agency program in informing the public, has been almost completely ignored in most cases.

In a few cases, for example in HEW, the public information officer was an assistant secretary and had a level of "clout," so to speak, within the bureaucracy, and that department has one of the better records in administering the act. That was one of the reasons that prompted this bill.

So we appreciate your commenting on it here, because it is thoroughly within the context of these hearings, even though the bill was introduced just recently and had not been included in this series of hearings.

Mr. KOOP. I think it could do a great deal to improve the climate of administration.

Mr. PHILLIPS. Thank you, Mr. Chairman.

Mr. MOORHEAD. Mr. Copenhaver?

Mr. COPENHAVER. No.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman.

Mr. Koop, a thought has just occurred to me for the first time with your testimony because you represent the Radio and TV News Directors Association. But most of the language in the Freedom of Information Act is really aimed at documents, files and records, and a good portion of television news is really set forth in visual terms. I would think that could create a problem.

Now, I know we have had some problems in Thailand with access to U.S. air bases there, and that is probably a good example of what I am talking about. Can you think of any special problems which television would have, for example, which would not come under the provisions of this bill where it might be useful to put in some language?

If this is occurring to you for perhaps the first time, it might be a good thing to give that some further thought and save a space in the record, if the subcommittee so desires, for an insert.

Mr. KOOP. That is a very interesting point, Mr. Cornish. It had not occurred to me because I think we have been considering this from a reporting standpoint rather than a pictorial one. We like to get pictures where we can, but certainly the first news is the factual material.

I recall one example. Some years ago the Air Force general officers were called together for a conference on public relations, and one general at the end of the session got up and said, "Well, I never believed in public relations, but I realize now that it is an important matter, and I am going home and practice it." He went back to his air base, and shortly thereafter a training plane crashed on the base, and the local newspaper—and this was not a television station, but it could apply particularly to television film—came out to get information, and the general closed the gates of the base. The paper, fortunately, called the Pentagon right away and got him overruled. But, there is one occasion where we certainly would want visual material.

I would like to explore that further if I may, Mr. Chairman, and if after talking with my colleagues, if I can find anything fruitful I will be glad to submit it further.

Mr. MOORHEAD. We would welcome that, Mr. Koop.

Mr. CORNISH. I think that is a special problem that we really have not focused on too much in relation to this bill, Mr. Chairman, and it would be very useful. And I thank you.

Mr. MOORHEAD. Mr. Kronfeld?

Mr. KRONFELD. No questions.

Mr. MOORHEAD. Any further questions?

[No response.]

Mr. Koop, again thank you very much for not only your informative but erudite and witty presentation. We appreciate it.

Mr. KOOP. Thank you, Mr. Chairman.

Mr. MOORHEAD. The subcommittee would now like to hear from Mr. Ronald Plesser. Mr. Plesser is one of the better informed attorneys on the subject of the Freedom of Information law and has probably handled more cases than anybody else in the United States. Mr. Plesser is representing the Center for the Study of Responsive Law.

Mr. Plesser, we have welcomed your help in the past and we do so particularly today.

STATEMENT OF RONALD PLESSER, CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. PLESSER. Thank you, Mr. Chairman. Thank you for inviting me to present my views on the Freedom of Information Act and the various proposed amendments to that act, H.R. 5425 and H.R. 4960, which are pending in front of this committee.

I am a staff attorney with the Center for Study of Responsive Law and have spent 100 percent of my time over the past year on the Freedom of Information Act. I have filed during that period on behalf of various clients over 15 Freedom of Information Act law suits. This is in addition to my being counsel on appeal and counsel for amicus curiae in various other cases. I have also worked with the press and various consumer type groups concerning the Freedom of Information Act. From my vantage point the act works, but just barely. I would first like to comment upon the pending legislation and then comment upon some additional suggestions.

The decisions obtained from courts have been overwhelmingly favorable to plaintiffs seeking access to information. In the period from July 4, 1967 to July 4, 1971, this subcommittee reported that 99

cases were brought in court and the Government's refusal to grant access was sustained in only 25 cases. Our experience strongly reaffirms this. We have initiated more than 25 cases, of which approximately 10 are pending. Of that number the district court has sustained the Government's withholding of information in only two cases, and one of those two is presently pending in the Court of Appeals for the District of Columbia. It is clear that when challenged, in the majority of cases the agencies have been unable to sustain their policies of secrecy. Much of what is wrong with the act is its procedural loopholes that allow Government agencies and employees of those agencies to flout it with impunity. Some of the legislation proposals before this subcommittee attempt to resolve the loopholes.

I think the most important problem that we are faced with is the time problem. I know in this committee's hearings last year and over the years that we have given horror stories about how long it has taken to get information. I think above all else, time delay has been the problem that has really stymied the operation of the Freedom of Information Act.

Just a quick example. In August 1972, we made a request of the Department of Justice for certain information concerning business review proceedings of the Antitrust Division. This procedure has always been confidential, and we wanted to structure a court challenge to that policy. There was no unique issue, and it was something that had been considered both factually and legally by the Department of Justice for a long time and they had published regulations specifically stating that this information was confidential. But, it still took us 6 months, 6 months to get a final agency denial from the Department of Jusice where there was no question that the information was identifiable, and there was no question about what their position would have been concerning disclosure.

I think that the legislative reform in H.R. 5425 goes a long way toward helping this problem. I think it is mandatory that there be a finite time period put on the agency's response period. However, there is one problem in H.R. 5425 that I would like to address, and that is it seems to me to create as law, the administrative appeal process. The administrative appeal process is not in any legislation, it is something that has been created by the agencies. An individual makes a request to a Federal agency; he is denied; he then has to go back and appeal again, and then he is denied again. Only then can he go into court. In my experience I can think of no situation where an agency's position has substantially changed on appeal. The first decision is usually the final one, and to go back to the agency again to get a "head of the agency determination" usually to us means just a further delay in time. From my experience working in the field, the Government should be given a finite period of time to respond. Perhaps 20 days, and that should be the final agency response.

An alternative to that, if the current language is kept in H.R. 5425, and the appeal period is allowed, is to allow an appeal period of 10 instead of 20 days. There is no reason for 20 days on appeal. Certainly a lot less reason than there is to have more time on the initial request. On appeal all of the files have been in one central location and theoretically somebody down on the administrative staff level has written a memorandum about it, thus making the review procedure very simple.

The head of the agency or his delegate reviews it. So, if an appeal procedure is kept we strongly think that at a minimum it should be 10 and 10 or 20 and 10, and that can be worked out. But, I think 20 days is too long on appeal, and it should be recognized that the appeal process really serves very little purpose.

I might add that the Federal Trade Commission has already adopted this suggestion in their regulations, and the first response you get from the Federal Trade Commission is the final response. If they deny you the information you do not have to go back and get an appeal. It has been about a month and a half since the program started; it takes them 5 weeks, I think, once they get used to it. There is no question that a final determination could be cut down to something like 20 days.

Another problem related to the time problem is the time it takes to get a case through court. Our experience has been that before the Government answers a complaint filed in the Federal district court, it is usually 70 to 90 days. They have 60 days under the Civil Rules of Procedure as a Federal defendant, but we find almost without exception that the Government asks for an extension of time. In a study William Dobrovir did and presented to this committee last year, it shows that it takes well over a year to take a Freedom of Information Act case through the court, which is inexcusable, especially in light of the fact that the statute specifically says that all of these cases ought to be expedited.

I think again there is no excuse for the Government to have to have 60 days to respond. All of the files have been located, all of the legal positions have been developed, and all of the facts of factual information has been developed in connection with the administrative process. And 20 days, which is the period of time allowed a civil defendant in regular civil litigation in the district courts, should also be applied to the Federal defendants in Freedom of Information Act cases.

One of the best provisions of H.R. 5425 from my point of view is the section that allows legal fees to be assessed where the Government has not prevailed in Freedom of Information Act litigation. I have an addition to propose to that. There are instances where you get some information and certain portions of the information have not been made available. The courts are very flexible and in their de novo review sometimes you get 90 percent, but you do not get everything. They might want to eliminate some personal references to particular people's names or particular statistics. Therefore, it should be substantially prevailed so that if you get 90 percent of what you want you should still be able to get legal fees. And I think that is a little unclear in the present language of the legislation.

Just to stress that point, I think your figures show that half of the cases have been brought by private industry and of course they can tax deduct their legal fees incurred in Freedom of Information Act cases.

The private citizen or citizen groups who receive no financial gain as a result of bringing the Freedom of Information Act case need to have the legal fees paid by the Government when the Government is not successful, because otherwise no one will be able to bring these cases. It costs the minimum of $1,000 to $1,500 in legal fees in the district court.

Now, so far as the cases that have been brought by private industry, and groups like mine that are funded by foundations. and in certain

instances newspapers, that the general citizenry and the newspaper reporter who is not backed by a major newspaper cannot avail himself, and when he is clearly in the right of the remedies made available by the statute. I think that the assessment of legal fees is crucial if this act is to do its job, and that is to guarantee public access to information.

One of the problems, and I think this addresses itself to the question of the commission that you were discussing before, was there is no leadership in the Federal Government on the Freedom of Information Act. The OMB has attempted to take some leadership position, as I detailed in my written statement. As this committee is well aware, the OMB in 1972, through Director Shultz, when he was then at OMB, sent out a memorandum to all agencies saying that the fees charged for copying and processing of requests should be cost related. And he set that out as a mandate to the agencies. Well, months passed, and months passed, and months passed, and regulations did not change. Finally I think someone in OMB stated to the staff of this committee that they had decided to allow the agencies to do what they wanted. OMB had pulled back from their position. The Department of Justice attempted to put some leadership in here, but they are limited because of funds, because of time and because their interest is defending their clients and not really attempting to change policy or to encourage their clients to provide more information to the public. And I think there is a definite need for some kind of a mechanism to provide the supervision. I think this committee has done a commendable job. The Senate has not done very much, and hopefully they will start doing some.

I think though that the idea of the commission will just put another administrative level on the appeal procedure. Mr. Erlenborn before was concerned about its being independent, and why will one action affect the other, and why would it put off another appeal procedure. I think it definitely will. If you go to a district court judge and say that you were denied information, and he knows of the existence of this Commission he will say, or at least have a question even if he does not say it, as to why you did not go to the commission. He would wonder why you thought you were going to have a better shot in district court than you would in that Commission?

Mr. ERLENBORN. Could I interrupt to ask a question at that point?

Mr. PLESSER. Yes.

Mr. ERLENBORN. Do you in any way see this as part of the administrative remedies available to a complainant that, under law, he must exhaust before having recourse to the courts?

Mr. PLESSER. I do not see that the statute specifically says that. I see that it will be implied by a district court judge. They hate to litigate, they hate to have cases.

Mr. ERLENBORN. I find it very difficult to reach that conclusion since the Commission has no power to order anything, and cannot give any remedy. I cannot see how it could be construed to be part of the administrative remedies. There is no authority whatsoever to order anybody to do anything.

Mr. PLESSER. Well, in the current legislation there is no authority to go to the appeal process either, and very often the agency's regulations are sometimes unclear as to whether or not you have to go to an appeal. But, we find that the judges are very concerned that you go through all of the possible steps, not only the mandatory steps.

Mr. ERLENBORN. That is good basic law.

Mr. PLESSER. Sure. And I think that in this case there will be a judge who will say how come you did not go through that step which was possible, perhaps not mandated, but why are you bothering the court. You have not yet seen what your remedies are in this commission.

Mr. ERLENBORN. As a matter of fact, you could make the request to the commission at the same time you filed your suit. Before your pleadings would be in order you would have your decision—in a 30-day period. You really cannot see this as a hangup, can you? And if it were, do you not think that one simple sentence in the act could eliminate any problem, one simple sentence saying that the utilization of this procedure shall not be required as a prerequisite to your right to file suit? Now, would not a simple statement like that wipe out any possible problem that you might envision?

Mr. PLESSER. No. I still feel that there will be a tendency—it will tend to delay the information. I think the great gains in the area of the Freedom of Information Act have been in the court cases, not in the administrative compliance.

Mr. ERLENBORN. Could it not have exactly the opposite effect in that, if a favorable decision were issued by the commission, therefore, shifting the burden to the agency, the agency might very well then make the information available rather than go into court?

Mr. PLESSER. Well, the burden is already shifted. The burden is on the agency right now to go into court and to prove the reasons. Its burden is to show that the exemption applies to the information. When we go into court we do not have to say anything other than the fact that we requested the information and were denied it. It is the agency's burden to come up with the defense and the reasons. They have the burden of showing why they did not make this information available. We do not have to make the case. I do not think we really disagree that much other than I would like to see some kind of agency that had some more affirmative power as far as directing the policy of the agencies and being able to have power to say that kind of information has to be released, and to go to an agency, maybe some kind of OMB of information, something that has some influence over the information policy of the agencies.

Mr. ERLENBORN. Would that not create the exact problem you foresee? If you give them authority, then they do become one of the administrative remedies that would necessarily be resorted to before you have the right to go to court?

Mr. PLESSER. No, I do not think so because I think maybe the kind of thing I am thinking of is structured along the line of the pending CPA bill now.

Mr. ERLENBORN. You should not bring that up.

Mr. PLESSER. I should not.

And also the idea of a kind of an ombudsman kind of thing that does not have to get involved in every case, but when he wants to get involved in a case he can get involved in a case. He can go to an agency and ask them why this kind of information was withheld and discuss it. Some unifying force in Government for an information policy, and not just another appeal level. I do not see having another appeal level is going to be effective.

Mr. ERLENBORN. If it were structured as you suggest, then it would seem to me you would not even have the right to go to the agency until you have been denied. That would then become another step. Our bill would say you could make application to the Commission at the same time you made the request for information before it had been denied. So the application can be running concurrently within the 20 and 10 days, the 30-day period of your original request for information. It seems to me this has been structured in a way to eliminate this step-after-step delay. Now you are suggesting something that would come into play only after you had been denied information and then you could go through the ombudsman. If they had any authority, that would then become another administrative remedy which would delay your ability to get into court. What we are trying to structure here is something to eliminate delays.

Mr. PLESSER. One question I have about the Commission, of course, is the one remedy that it has is to say that the information should be public, and the only way that can be used then is as prima facie evidence against the agency. Well, the agency, it seems to me, can come back with the same defenses in the district court and say, well, the Commission was wrong. The reason why we did not disclose this was because it is internal documents, and we do not think internal documents should be made public. And I do not see the great value of the Commission from a litigator's standpoint. If they decide that you are not right, that you are not entitled to the information; I cannot help but see that that is going to prejudice your case in court. And I would rather just take a shot with the district court judge and not have that intervening legal opinion, it does not have really any force of law. It is just a legal opinion that is an independent commission, and the judge can reject it or accept it. I would just as soon, from my position, be able to argue directly to the judge what my position is, have the Government argue their position, and let him decide without this independent authority also giving their opinion.

Mr. ERLENBORN. Do you see any value to the Commission as a resource of the court? In other words, if you have a recently appointed U.S. district court judge whose sole background is practicing law in Kentucky, who is faced with a determination of what is or is not in the national interest in declassifying or maintaining the classification of a document, do you want to rely on his abilities or would you like to have some resource of experts available to him who can give him some advice?

Mr. PLESSER. You mean like a bankruptcy, special matters?

Mr. ERLENBORN. Of course that is one of the duties of the Commission as seen in the bill. If the judge would so desire he may call on them for research. It may save him an awful lot of time going through voluminous documents, which is something that the judge may be very loath to do in camera.

Mr. PLESSER. Yes. We have come up against that problem a number of times. I think we get into jurisdictional problems, that if the Commission is going to serve that kind of function for the district court judge it should be in the judiciary and not an independent agency. So, perhaps the idea of setting up some special master for information, and as you know a special master in bankruptcy, perhaps that would be more acceptable to me. But, I would have to study that more.

Mr. ERLENBORN. Thank you.

Mr. PLESSER. I would like to discuss the *Mink* decision. I know that has been discussed in these hearings many, many times, and I do not have to go through the details of it. I think that the major problem in the *Mink* decision is not in-camera review as such. I think the major problem is de novo review. What the Supreme Court did in the *Mink* decision was to not allow the district court judge to have the same de novo review on matters concerning national defense and foreign policy as he had in cases entailing the other eight exemptions. All he could do, all he can do in a *Mink*-type case is determine whether or not the information was properly classified. He cannot look behind that classification to see whether or not it was properly done substantively. He can only see if it was substantively done in a procedural manner. That is the way Congress originally intended the de novo review and, of course, Justice Stewart stated that the Congress "has built into the Freedom of Information Act an exemption that provides no means to question an executive decision to stamp a document 'secret' however cynical, myopic, or even corrupt that decision might have been." He goes on to say that Congress "in enacting section 552(b) (1) chose to decree blind acceptance of executive fiat."

I think the legislation should make it clear, No. 1, that full de novo review can be applied to the first exemption. The district court judge being able to use in-camera inspection or any other tool of discovery in all of the exemptions. I think that exemption (b) (1) itself should be changed. Section (d) (2) of H.R. 5425 provides now that in-camera investigations shall be of the contents of such records in order to determine if such disclosure or any part thereof cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States. What this section does, I think, or will do, is cause a great deal of confusion if exemption (b) (1) is not changed, because you are really going to have two separate substantive tests in the legislation, one in (d) (2) section, and you will have the existing test of whether or not the matters are specifically required by Executive order to become secret in the national defense and foreign policy. And on the other hand, you are instructing the judge that he must do an in-camera review of those documents, and that when he does he has to look, he has to determine whether or not disclosure would be harmful to national defense or the foreign policy of the United States. I think the two can be worked together, but I think it would be more effective if the language of (b) (1) is amended to read as follows:

> This section does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy, and where disclosure would result in substantial harm to the national defense or foreign policy of the United States.

That way you give him the ability to have in-camera review de novo, whatever he wants to do to examine the information and you give him a clear substantive standard that he can work under.

Mr. ERLENBORN. Could I ask a question at this point?

Mr. PLESSER. Please

Mr. ERLENBORN. It seems to me that there is validity to the point you are raising here and a similar point raised by the ABA representative about amending this particular exemption in the act rela-

tive to classification. However, would not wording such as: "substantial harm to the national defense or foreign policy of the United States" as the sole standard really be substituting these few fairly undefined words, for the whole of our security classification system, or, I guess, Executive order, that is really the only basis at the present time? In other words, can we do away with all of the verbiage that is presently detailed in all of the experience we have had under the Executive order, do away with all of that and substitute just a few words and allow a judge to make a decision on the basis of these several words?

Mr. PLESSER. I do not think that will occur because I think that all you are doing here is giving a district court judge the discretion to look at the documents and determine whether or not the Executive operated within its discretion. This is even when we use the term properly, properly classified, I think, or disclosure would result in substantive harm, and I think maybe we could put in properly classified and we could put in some kind of balancing word so that the district court judge would have the same discretionary review in the information area that he has in every other aspect of the administrative procedure where there are regulations and Executive orders. What has happened as a result of the *Mink* decision is that the courts have no power, have no power to really review classification systems. Now, I am not going to speak on whether I think it is proper to legislate a classification system. I know Senator Muskie and other people in the Senate, and I know this committee has been discussing it in great detail. I do not think this would do that. I think all this would do would be to allow a district court judge to review the agency's decision and would not give him the power to set policy or determine what is not confidential. One of the problems in the *Mink* decision was that there was a lot of information I think admitted by the Government, that had nothing to do with national defense or foreign policy, that there were some documents that were just, they claimed, internal memoranda and there were some documents that were involved in foreign policy or national defense. But, the Supreme Court refused to allow the district court to look at the entire file saying that if they classified the entire file then you cannot look at it at all. That seems to me reasonable. Certainly a district court judge is competent to see if a document has absolutely nothing to do with foreign policy and national defense as against a regular internal memorandum.

Mr. ERLENBORN. Let me ask you this. In this instance, we would be giving authority to the judicial branch of the Government. But, let us say that we were drafting something that would be giving authority to the executive branch of the Government. Is there any question in your mind that if we gave such loose authority to the executive branch—allow the executive branch to make this decision as to what is substantial harm to the national defense or foreign policy of the United States—in your opinion, would that be, as it would be my opinion, a delegation of legislative authority? Is it any less so if that delegation is made to the courts rather than to the executive branch? In other words, if we are going to legislate in this area, do you not believe that we ought to spend more time than to write a classification system in about a dozen words? Should we not have legislation that

establishes a classification system and gets into all of the nuances and gives guidance to the executive and judicial branch?

Mr. PLESSER. I think that is right. I think you should have legislation. I do not see that what we are doing, what I am doing in this rewritten section does what you say as far as being an unconstitutional delegation of power, because right now there is no Federal classification system as adopted by Congress. The executive has done it completely through executive orders. With the exception I think of some cryptographic material, and I think there is one section some place that deals with communications information, but other than that there are no legislative enactments. The executive through their own power has delegated this authority to themselves, as it were. I think what this section does is allow the judicial branch a check on what the executive branch is doing. At which point in time the Congress wants to enact a comprehensive classification system, I think that might be appropriate. But, I do not see how that affects this section because all you are doing is giving the district court judge the ability to see whether or not the documents were, in fact, at least within the realm of what should be classified.

Mr. ERLENBORN. From one comment you made you would agree apparently that this language does not refer to the current classification system, as to whether a document was properly classified under that system?

Mr. PLESSER. It does not allow you—it only allows you to discover whether or not the agency went through the procedural steps in classifying the information. That is all it allows you to determine, or that is all the district court judge can provide. They can take the Manhattan telephone directory, as I read the opinion of the Supreme Court, and I think certainly Justice Stewart would agree, they could take the Manhattan telephone directory, and if they say it is classified, and if they go through their internal procedures for classification, and they stamp it "classified," and if I bring a freedom of information case for the Manhattan telephone directory, the district court judge can say, well, this has been properly classified, and I have an affidavit that it has been classified and I cannot grant you access to it.

Mr. ERLENBORN. Are we giving the same test to the court to make this determination as the executive order gives to the people in the executive branch to make the classification, or are we establishing a separate test? In other words, is this a wholly independent determination made by the court under the authority given by the section of the act, or is this a review by the court of the action of whether someone in the executive branch has properly followed or exceeded authority for classification?

Mr. PLESSER. First, just as a way of disclaiming, and I do not mean to be pulling out of this at all, but the language that I used in this exemption was just pulled in from section (d) (2) of the proposed H.R. 5425. And I assume that there is some legislative history for the reason of putting that particular language in.

Mr. ERLENBORN. My recollection is that these are not even the phrases that are in the current Executive order. So, it seems to me it would be a wholly different test.

Mr. PLESSER. Well, it is a very broad, substantive test. The Executive order attempts to put in particular areas of classification. There is a real problem, you see, in what you allow if you just allow in camera review, or if you just mandate a full de novo review allowing the district court judge to have in camera review. You have the problem that the district court judge does not know what standard is to be applied. As you said before, some guy who is practicing law some place and becomes a judge and does not know anything about classifying documents is in a poor position to judge items of national security. Judge Gesell of the D.C. Circuit, who is perhaps the most sophisticated judge in the entire Federal system, who was a senior partner at Covington & Burling for many years, had a case brought by Congressmen Moss and Reid to get the Pentagon Papers through a Freedom of Information Act case. He dismissed the action and granted a motion for summary judgment to the government saying, well, I do not know anything about classifications, I do not know if this information can be exempted or not, so I am not even going to look at it. That was 2 years before the *Mink* decision. So, you know, I think it is important to get that point out. It might pull against my position slightly, but I think that there is a necessity, an abosolute necessity to put some kind of a broad standard in there, and I think broad might be better in this case so a district court judge will have the power and he will have some kind of a standard to go in. Perhaps my language is not appropriate, but that can be changed.

Mr. ERLENBORN. Let me just press the point with one last question. If this is not the same standard as the classifier of information is to follow, then are we not faced with two standards—one where the person classifying the information, following clearly the authority given him in that Executive order, has properly classified the information and, therefore, refuses to give it to the person seeking it under the Freedom of Information Act, and then another when you go to court? You can find the executive branch properly was doing what they had authority to do, but the judge said under a different standard, that it must be made available; therefore, the person gets the information, and the agency that has acted wholly properly would have to pay the court costs and attorney fees.

Mr. PLESSER. That is precisely why I made the suggestion of taking that section 1(d)(2) and moving it into substantive exemptions because the problem that you said I think is going to exist. By putting this section in section (b), you have new guidance to the agency.

Mr. ERLENBORN. I do not think we have.

Mr. PLESSER. Oh, we do, because section (b) of the existing legislation——

Mr. ERLENBORN. Would this supersede the Executive order?

Mr. PLESSER. Well, you would put a standard under the Freedom of Information Act as to whether or not they could withhold the information.

Mr. ERLENBORN. Then we may have two conflicting standards that the classifier has to follow.

Mr. PLESSER. I think an act of Congress supersedes an Executive order, but I am not sure.

Mr. ERLENBORN. Well, it should not conflict. In other words, we should have one standard. We should have the judge review that one standard rather than in any way have two standards to follow.

Well, I think I have probably spent too much time on that point. Thank you very much.

Mr. PLESSER. Two more points that I would like to make in terms of suggestions that are not in the existing legislation. One is the problem of accountability. Now, I know this is a very touchy problem, but one of the great failures of the Freedom of Information Act has been that there has been no accountability of Federal officials who have refused to disclose information. There is a statute on the books right now, 18 U.S.C. 1905 which is a criminal statute which provides for the criminal sanctions if somebody discloses too much information. There are now in the Senate various amendments in the codification of the criminal code, one presented by Senator McClellan that would hold a Federal employee criminal liable if "in violation of his obligation as a public servant under a statute or a rule, regulation or order under such statute he knowingly discloses any information which he has acquired as a public servant."

If that is adopted, and certainly 18 U.S.C. does something now, you have a position where disclosure law is out of balance. If a Federal employee discloses too much information he is in trouble. If he does not disclose enough information, if he withholds information, nothing can happen to him. What is the natural tendency of anyone being in that position? To overwithhold or to overdisclose? I think it has to be clear that he is going to overwithhold.

I think we mentioned criminal penalties, and we can only envision criminal penalties being adopted in absolutely extreme situations where extreme physical harm has occurred to persons as a result of failure to disclose information. But, I think far more appropriate would be civil service sanctions such as termination or suspension where information has been clearly and intentionally improperly withheld. I described in my testimony a situation we had with Rudy Frank of the Office of Economic Opportunity where he was administratively punished, 30 days' suspension for disclosing certain information. And we brought a Freedom of Information Act law suit on behalf of Mr. Frank. We got access to that information and the OEO is still attempting to keep that suspension in effect and refuses all attempts by Mr. Frank to give him his money back.

Our position is that someone else at OEO, one of the people who would have that information in that situation should also be liable to 15 or 30 days' suspension of funds or salary.

The last point that I would like to make is a short discussion about the fifth exemption to the Freedom of Information Act. The fifth exemption, as you know, states that any information can be withheld if it is an interagency or intra-agency memoranda or letter. The act has been determined by a couple of courts. One which has the best description of the purpose of the act has been in *Wellford* v. *Hardin*, where it says the purpose of the Freedom of Information Act is to guarantee people's right to know how the Government is discharging its duty

to protect the public interest. The fifth exemption is to a large extent a blanket exemption that allows Federal agencies to withhold any information which it determines to be internal. If the purpose of the Freedom of Information Act is to open up Government operations to public scrutiny, then I can see no alternative but for the fifth exemption either to be severely limited or to be eliminated, but quite frankly I have been trying for a long, long time to work on language as to how we can amend the fifth, how we can limit the fifth exemption, and I have not been able to come up with an adequate solution. I think if access is to be guaranteed, the fifth exemption must be eliminated. It has been used almost every time we make an information act request. I would say clearly 75 to 80 percent of my cases deal with the fifth exemption, anything from inspection reports to civil service personnel management evaluation reports, nursing home reports, all kinds of information which has been determined to be internal. And I think that that exemption more than any other exemption has stymied the effect of the act, and I think that if the act is to really be progressive, and is to do what it is supposed to do, that that exemption must be eliminated.

Well, I think I am open to questions.

[Mr. Plesser's prepared statement follows:]

PREPARED STATEMENT OF RONALD PLESSER, CENTER FOR THE STUDY OF RESPONSIVE LAW

Mr. Chairman, distinguished members of the Subcommittee on Foreign Operations and Government Information, thank you for inviting me to present my views on the Freedom of Information Act and the various proposed amendments to that Act, H.R. 5425 and H.R. 4960, which are pending in front of this committee.

I am a staff attorney with the Center for Study of Responsive Law and have spent 100% of my time over the past year on the Freedom of Information Act. I have filed during that period on behalf of various clients over 15 Freedom of Information Act law suits. This is in addition to my being counsel on appeal and counsel for *amicus curiae* in various other cases. I have also worked with the press and various consumer type groups concerning the Freedom of Information Act. From my vantage point the Act works, but just barely. I would first like to comment upon the pending legislation and then comment upon some additional suggestions.

The decisions obtained from courts have been overwhelmingly favorable to the plaintiffs seeking access to information. In the period from July 4, 1967, to July 4, 1971, this subcommittee reported that 99 cases were brought in court and the government's refusal to grant access was sustained in only 23 cases.[1] Our experience strongly reaffirms this. We have initiated more than 25 cases, of which approximately 10 are pending. Of that number the District Court has sustained the government's withholding of information in only 2 cases, and one of those two is presently pending in the Court of Appeals for the District of Columbia. It is clear that when challenged, in the majority of cases the agencies have been unable to sustain their policies of secrecy. Much of what is wrong with the Act is its procedural loopholes that allow government agencies and employees of those agencies to flout it with impunity. Some of the legislative proposals before this subcommittee attempt to resolve the loopholes.

First, above all else, time delay and the frequent need to use agency appeal procedures make the public's right to know, as established by the Freedom of Information Act, a hollow right. If a citizen or a member of the press wants to obtain information from an agency, he must first request that information in writing. If he is lucky and has sent his request to the correct office, he might

[1] Hearings, U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4). House Subcommittee on Foreign Operations and Government Information. March 6, 7, 10, 14, and 16, 1972, p. 1338.

get a response in no less than a month. Once he has received an initial denial, he must again write the agency and appeal the denial of his information. He then must wait another month or two before he receives his final denial. Only then has he exhausted his administrative remedies and can he seek judicial relief. And despite the expedited procedures in the Act, this too may mean delay and appeals.

In August of 1972 two of my colleagues requested access to the business review procedure of the Antitrust Division of the Department of Justice. This request of August 26, 1972, was not answered until November 24, 1972, when Deputy Attorney General Ralph Erickson denied all but a small portion of their request. They were forced by agency procedure to appeal this denial to the Attorney General and they did so on December 6, 1972. They did not receive a response from the Attorney General and consequently filed suit under the Freedom of Information Act on February 21, 1973, some six months after their initial request. Finally, on April 18, 1973 they received a final denial from the Department of Justice. The information that they sought was a clearly identifiable set of records—correspondence between the Antitrust Division and companies seeking merger clearance under the antitrust laws. These have always been treated as confidential by the Antitrust Division. No unique legal argument or difficult factual evaluation was involved. There was a pre-existing policy to withhold this information from the public, but it has taken 6 months for them to receive a final denial, an assumed, technical prerequisite to a law suit. Other examples abound, and it is our best guess that it takes in most instances three to four months before an agency finally acts on a request.

In most cases, but especially with the press, it is crucial that information is timely obtained. Information is needed usually for a particular purpose, and a delay of three months before you are even denied the information often defeats the purpose of requesting the information in the first place. Agencies are all too aware of this and delay is often used as a way to discourage information requests. Even though the press was a major force behind the passage of the Freedom of Information Act, it has steadfastly refused to use it. Of the 150–200 cases that have been filed under the Act, only four have been brought by newspapers or individual reporters. The primary reason is the time it takes to get information. A story may be able to hold a week, maybe even a month, but rarely three or six months.

It is crucial that the agencies be mandated to respond within a finite period of time. Section 1(c) of H.R. 5425 provides that the agencies must make a determination within 10 days to an initial request and make a final determination 20 days after an appeal has been filed. This solves only half the problem. It has been my experience with dozens of cases that the administrative appeal process is no more than a rubber stamp. I can recall no instance where an agency decision has been substantially changed on appeal. The appeal process is not presently mandated by statute but is, with certain exceptions, current procedure in every agency. It would be appropriate for the Congress to eliminate the appeal procedure entirely and mandate that an initial agency denial is to be deemed a final determination. The agency should also be required to make that response within a finite period of time. Ten to twenty days would not in my experience be unreasonable.

Commenting on H.R. 5425, if appeals are allowed to remain an agency procedure, 20 days is an unreasonably long period of time for a response from an agency. The time allowed on appeal in no event should exceed 10 days.

Another related problem with the operation of the Freedom of Information Act is the time that it takes for an information case to proceed through the District Court. A survey presented to this subcommittee [2] of the dockets of the United States District Court for the District of Columbia conducted by William Dobrovir, a Washington attorney, indicates that the average time it takes for a case to reach a final determination in that court is 294 days. It should be noted that that figure includes the 16 days that the court took in *Mink* v. *Environmental Protection Agency*, which received accelerated treatment. In most cases, in our experience, the period it takes the court to decide a case is over one year. This occurs even though the Freedom of Information Act states that cases brought under it are to receive preference on the docket and are to be expedited in every way. A major reason for this excessive period of time is that as generally pro-

[2] House Hearings, *supra*, part 5, p. 1398.

vided by the Federal Rules of Civil Procedure, the government has 60 days to answer a complaint for all litigation where the government is the defendant. The Federal Rules allow private parties only 20 days. It has been my experience that almost without exception the government asks for additional time beyond 60 days. In many cases 70 to 90 days or more have passed before a responsive pleading is filed. The 60 days that the government has to answer is perhaps defensible in other federal litigation, but it is not in Freedom of Information litigation. When the agency has finally denied access to the information at the administrative level, it has determined what its factual and legal position is. The 60 days does no more than unnecessarily further extend the time it takes for the public's right to information to be resolved. H.R. 5425 provides that the government respond within 20 days to a complaint. The adoption of this provision is needed if the Freedom of Information Act is to be effective.

Both H.R. 4960 and H.R. 5425 provide that a successful plaintiff in a Freedom of Information action may recover reasonable attorney fees and other litigation costs in a case brought under the Act. Figures prepared by this subcommittee indicate that half of the cases that have been brought have been brought by private industry. Very few cases have been brought by individuals. The reason is cost. Even the simplest of Freedom of Information cases will incur legal expenses well in excess of $1,000. This is hardly conducive to the private individual or public interest group that needs the information but will receive no financial gain as a result of obtaining it. Successful litigants should be able to recover the cost of exerting their right to information. This is especially important because of the large number of cases that the government loses in court. If the government had to pay legal fees each time it lost a case, it would be much more careful to oppose only those cases that it had a strong chance of winning. It is proper, however, for the authority for assessing fees and costs to be in the discretion of the Federal District judge handling the action.

H.R. 5425 also states that attorney fees may be assessed where the government "has not prevailed." Since there are many cases where some information is released and some is not, that language should be changed to "has not substantially prevailed." Then even if the government may be successful in a limited part of the case, the plaintiff would still be able to receive reasonable attorney fees.

One of the major roadblocks to the effectiveness of the FOI Act has been the almost total lack of government leadership in the operation and performance of the Freedom of Information Act. Justice Department and Office of Management and Budget have done almost nothing to ensure uniform compliance with the Act. One of the major problems of citizen access to information has been the cost of access. The Department of Agriculture requested the prepayment of $85,000 in one instance and $91,840 in another for access to documents. These and other instances were too much even for the OMB, and in one of their few directives under the Freedom of Information Act, then Director of OMB, George Shultz directed on May 2, 1972, that the fees "should not be established at an excessive level for the purpose of deterring requests for copies of records." He stated that fees should not exceed the actual costs of the services provided and that all agencies report back to him no later than July 1 of that year. Months passed and in January of 1973 OMB reported to the staff of this subcommittee that it (OMB) would not enforce this earlier directive and would permit agencies to charge what they wanted. OMB had taken a lone forward step but then fell back and has allowed agencies to maintain policies which even OMB admits deter access.

The Department of Justice has established an *ad hoc* committee to review final agency denials of requests for documents. This was established in 1969 to reduce the number of frivolous and losing cases that wind up in court. The government has not been winning any greater a percentage of cases since the inception of this committee. The Committee also does not advise agencies on a formal basis of recent developments in case law. The Department of Justice in 1967 issued an Attorney General's Memorandum on agency implementation of the Act. There have been numerous court decisions since that publication, but the Department has not seen fit to revise its Memorandum and inform its clients of the current state of law under the Freedom of Information Act.

The agencies have been left to themselves without any government-wide guidance, and they have failed to comply with the letter and intent of the Act. Even when the courts have declared that certain types of information must be public in one agency, that agency or other agencies have refused to implement the policy

set forth in the court's decision. The agencies have refused to adopt as precedent the law that has been adopted by the courts. Three separate courts, one court of appeals and two separate district courts have conclusively held that administrative staffs manuals such as IRS agents' handbooks and Occupational Health and Safety Administration inspectors' manual were to be made public.[3] The Federal Trade Commission, after these cases were decided, promulgated new regulations which state that administrative staff manuals are to be kept confidential. When questioned, the Federal Trade Commission general counsel's office said that it was aware of the three cases but would not change its policy merely on that basis. This is a theme consistent throughout the government; an agency will comply only either when it serves its purposes or when it is actually facing litigation or a court decision. An even more striking example of this was the case of *Schechter* v. *Richardson*, which was brought in the District of Columbia District Court. Malvin Schechter, editor of Hospital Practice magazine, sought access to and obtained eight nursing home inspection reports from the Social Security Administration as the result of court action. The government did not appeal the case, but when Mr. Schechter approached the Social Security Administration for additional documents of an identical nature, the answer was again no, and Mr. Schechter had to go to court again.

Federal government agencies unanimously opposed the passage of the Freedom of Information Act seven years ago, and they have been successful in making the Act an almost meaningless statute. It is obvious that strong leadership must be exerted if the agencies are to comply not only with the letter but also the spirit of the Act. H.R. 4960 would establish an appointed commission to investigate cases of withholding of public records and issue findings which would be *prima facie* evidence against any agency in a later court suit. This idea certainly has merit, but it appears that one of the results might be to add an extra layer to the already lengthy appeal process. Especially in the case of the press, time is of the essence, and extending the time it takes to gain access to government information would only further weaken the already struggling Act.

In addition, the Congress must provide effective leadership in the operation of the Freedom of Information Act. This subcommittee has done a commendable job and can be credited with many of the recent gains in the area of agency compliance. It has performed a valuable oversight function.

H.R. 5425 and H.R. 4960 would require that each agency shall submit an annual report concerning its activities and performance under the Freedom of Information Act to Congress. This reporting requirement is a necessary and useful addition to the Act. However, it will only be important if the responsible committees assert some meaningful leadership and guidance in this field. The agencies have ignored the Act to a large extent and they must be made accountable to Congress for their actions.

Section 1(d) of H.R. 5425 makes an attempt to clarify Congress' intent as the result of the Supreme Court decision in *Mink* v. *Environmental Protection Agency*, 41 U.S.L.W. 4201 (decided January 1973). The Supreme Court denied Congresswoman Mink and 32 other members of Congress access to certain documents which pertained to the testing of nuclear weapons on Amchitka Island in November 1971. The government contended that certain of these files were classified for reasons of national defense and foreign policy. The District Court refused to examine the requested documents *in camera* and determine if they in fact were documents that were qualified to be classified pursuant to executive order, as required by the first exemption to the Freedom of Information Act. The District Court refused to determine whether or not there were included with or attached to the documents which may have been properly classified, documents which were not properly classified. The Court of Appeals held that in order to conduct a *de novo* review, the District Court must review *in camera* the documents claimed to be classified. The Supreme Court reversed and held that the first exemption of the Freedom of Information Act only requires that in order to exempt documents, the government merely has to prove that the documents sought were in fact classified pursuant to executive order. As long as that is done, the District Court judge cannot look any further. In his concurrence, Justice Stewart stated that Congress ". . . has built into the Freedom of Information Act an exemp-

[3] *Hawkes* v. *IRS*, 467 F. 2d 787 (6th Cir. 1972); *Stokes* v. *Hodgson*, 347 F. Supp. 371 (N.D. Ga. 1972); *Long* v. *IRS*, —— F. Supp. —— (N.D. Wash. 1972). The *Stokes* case has been recently affirmed by the Fifth Circuit Court of Appeals as *Stokes* v. *Brennan* (Decided April 3, 1973).

tion that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic or even corrupt that decision might have been." He goes on to say that Congress, "in enacting section 552(b)(1) chose . . . to decree blind acceptance of Executive fiat."

The practical effect of the *Mink* decision has been and will be in the future, if not changed by legislation, to completely eliminate from the parameter of the Freedom of Information Act any document which could remotely be considered relevant to foreign policy or national defense. All an agency has to do is have an official certify that the documents are classified pursuant to executive order. Neither the courts nor Congress can review that decision. In effect, the court has created a blanket, litigation-proof exemption to the Freedom of Information Act. This cannot have been the intention of Congress when it passed the Freedom of Information Act, and it should not be the intent of Congress now.

The principal problem of the *Mink* decision is not *in camera* inspection of documents, but *de novo* review by the District Court. I do not think that it is necessary in all cases to have *in camera* review. The language of section 1.(d) seems to indicate that at least in cases relative to the first exemption, the District Court Judge must conduct *in camera* review. That is unnecessary. What is necessary is to restore to the District Court the same *de novo* review power that it has when dealing with the other eight exemptions. The language of the statute should, however, make it clear that the District Court may use any method ordinarily available to it including *in camera* inspection in conducting its *de novo* review.

Section 1.(d)(2) of H.R. 5425 provides that "*in camera* investigation shall be of the contents of such records in order to determine if such disclosure, or any part thereof, cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States." This in effect places a substantive standard on how the District Court Judge is to treat documents claimed to be classified. Section 1.(d)(1) should be made to apply the principle of *de novo* review to all exemptions and mandate that *in camera* inspection be made where appropriate. The substantive test contained in section 1.(d)(2) should replace the exemption as it presently reads. That section should read:

> (b) This section does not apply to matters that are specifically required by Executive order to be kept secret in the interest of national defense or foreign policy and where disclosure would result in substantial harm to the national defense or foreign policy of the United States.

By structuring the amendments in this way, the District Court judge must look behind the classification process of the executive and be able on a document-by-document basis to determine whether or not a particular document should be available or should be withheld from public disclosure.

Both H.R. 5425 and H.R. 4960 set forth various changes in the substantive exemptions. Most of the amendments are codification of existing case law and while helpful are not entirely necessary. As I stated before, the courts have done a good job in interpreting the Freedom of Information Act. What has been wrong with the law has been agency non-compliance. The purpose of the Freedom of Information Act "is to guarantee the people's right to know how the government is discharging its duty to protect the public interest." *Wellford* v. *Hardin*, 444 F. 2d 21, 24 (4th Cir. 1971). The major substantive block to that policy has been the application of the fifth exemption. The fifth exemption excludes from disclosure "inter-agency or intra-agency memorandums." [*sic*] If the Act is to do what it was intended to do—open government to public scrutiny, then the fifth exemption must be eliminated from the Act. The objection to this suggestion is that government policy-makers cannot be forced to work in a fishbowl. Why not? If the public is to have a right to see what the government is doing, that right cannot be abrogated merely because an administrator states that certain documents are internal. There are legitimate reasons why certain information should not be disclosed, *e.g.*, areas where there would be a clearly unwarranted invasion of personal privacy, national security, law enforcement, and others, but the protection of documents merely because they are internal cannot be grounds for them to be secret.

The courts have uniformly held that any factual information which is not inextricably intertwined with policy-making and opinions in the deliberative process of the government must be disclosed. However, this is not always possible and material is more often than not, inextricably intertwined. Also, under the doctrine of the fifth exemption, much information is kept secret which contains the only information as to what the government is doing. The purpose of the Act

should be to make the processes of government, with certain limitations, open to the public. If this is to be accomplished, then "internal" documents cannot be kept secret. Without the Freedom of Information Act, we find out what the government has done after the policy is adopted. What is needed is the right to go behind those final agency decisions and examine what the government is doing.

The great failure of the Freedom of Information Act has been that it does not hold *federal officials accountable for not disclosing information.* As presently written, the criminal code, 18 U.S.C. § 1905, makes a federal official criminally liable if he *releases* trade secret or commercially valuable information. The new criminal code proposed by Senator McClellan, S.1 section 2–6F1, proposes to hold a federal employee criminally liable if "in violation of his obligation as a pubic servant under a statute or rule, regulation or order under such statute, he (federal employee) knowingly discloses any information which he has acquired as a public servant. . . ." There are no corresponding penalties for a federal employee if he illegally refuses to grant access to documents in violation of his obligation to a public servant under the Freedom of Information Act. The natural tendency of a federal employee faced with criminal penalties if he incorrectly withholds is to keep the requested documents or records secret. The employee who incorrectly withholds information must be held personally accountable and be liable for penalties. It would be appropriate to have sanctions such as mandatory suspension or termination of federal employment or in certain circumstances where actual harm has resulted to have criminal penalties applied.

The Office of Economic Opportunity suspended Rudy Frank, an employee of OEO, because he allegedly released confidential information concerning the salaries of teachers of a day-care center which was operated by a private corporation under contract with OEO. After Mr. Frank received notice of his suspension, I represented him in a Freedom of Information lawsuit to obtain access to the day-care documents. After suit was filed, OEO gave these "secret" documents to Mr. Frank. However, his suspension still stands and the government is opposing all attempts by him to recover his lost pay. Here they punished an employee for disclosing information which they themselves voluntarily disclosed once faced with having to defend their policy of secrecy in court. Instead of punishing Mr. Frank for disclosing what turned out to be public information, the OEO officials who suppressed these documents should be suspended or terminated.

If the government can suspend or terminate an individual for releasing information, then it must be compelled to bring similar action against an employee for not disclosing public information. Only after federal employees are held accountable for their acts under this law will the people's right to know be guaranteed.

CONCLUSION

In conclusion, I would like to just outline what I have stated: (1) legislation should provide for an agency to respond to an information request within a finite period of time with no administrative appeal procedure; (2) Congress should require the government to answer court complaints within 20 days; (3) Congress should allow the assessment of legal costs where the government has not substantially prevailed; (4) Congress should provide mechanisms for the oversight and administration of the Freedom of Information Act; (5) Congress should mandate *de novo* review in all cases including the area of national defense and foreign policy; (6) the fifth exemption to the Act should be eliminated; and (7) federal employees should be held accountable where they have incorrectly withheld information.

Mr. MOORHEAD. Thank you very much, Mr. Plesser.

Starting with your last statement about the elimination of that interagency or intra-agency memoranda, a previous witness today recommended that this exemption be limited to memoranda which contained opinions or recommendations submitted for consideration. In other words, factual memoranda—and I would amend their suggestion to say "or portions of memoranda which contain facts"—are open, and only the policy recommendations could be exempted. What do you think of that idea?

Mr. PLESSER. Well, I think that is a possible solution. One of the cases I have in court now is a case against the Civil Service Commission where we seek to get personal management evaluation reports. The Civil Service Commission goes around to other various Federal agencies and does what they call personnel management evaluation reports. These are done by professionals and these are evaluations and they contain opinions. And they are not purely factual. But, it seems clear to me that this is the kind of information that the public has a right to know. These are final opinions. They are not going to change. They might go into an agency process and somebody high up at some point in time might look at them and determine something, but the factual evaluation of that particular agency is going to stay the same, that is not going to change. That is considered a decision, an opinion, and the Government believes, they have told us that if anything can be considered internal memoranda these personnel management evaluation reports can be considered internal memoranda. And while I think your subsection is a very worthwhile one, Mr. Chairman, my problem is I think that under your suggestion those kinds of reports, or perhaps even the kinds of reports involved in the *Tennessean* v. *F.H.A.* and the *Philadelphia Inquirer* v. *F.H.A.*, which was to get FHA appraisals, which are also opinions, evaluations and not really factual, those decisions would be jeopardized also. I would like to work with the staff or with anybody to work out some language to limit the fifth exemption. But, I think that we must go into it with the idea that it is very difficult to do effectively.

Mr. MOORHEAD. As I recall, in those FHA cases, the crucial information was purely factual—it was the name of the person who conducted the appraisal?

Mr. PLESSER. That is right. That was one of the questions. It was also litigated as to the content, although the FHA had given the information before the judge actually had written the decision after the case was filed. But, the judge had dealt with the whole area in his ruling and had stated that even though these are evaluations, and not strictly factual information, they too must be made available because they were the work product of a professional.

Mr. MOORHEAD. On page 7 of your testimony, you have quoted Mr. Justice Stewart's opinion in the *Mink* case, that the Congress chose "to decree blind acceptance of executive fiat." I do not think we had that intention at the time we enacted the Freedom of Information Act. I wanted to solicit your advice as you have given it so far, to make sure that we draft language that completely and totally reverses that case. If the provisions of H.R. 5425 do not do it, then we need to have additional language in the exemption. I personally favor it, and I also favor the language that we have in the exemption over the language of Executive Order 11652, because "national security" is the term used there. I think that is a very vague concept and I just do not believe that we, the Congress, should follow the executive in choosing the language of exemption (b) (1). Let them follow our language. I believe that Mr. Erlenborn and I both agree they should be the same, but I think the decision is better made here with 535 elected Members of Congress making the decision, rather than any person—however

wise—any single person drafting language used in an Executive order. I would hope that the Executive order would be changed to conform to the statute, which has legal force and meaning.

Mr. PLESSER. I agree.

Mr. MOORHEAD. I am somewhat intrigued with the idea of the Freedom of Information Commission. I know from your testimony you are not so intrigued, particularly when you point out that if a requester of information from an agency did not choose that route, choosing to go directly to court, there would be some implication, perhaps that his case was not so strong. If per chance the subcommittee were to think this would be a good proposal, we would welcome any suggestions you would have as to language that would clarify this implication so that no inference shall be drawn by the court—that this is only an alternative route, and the failure to use it should not in any way prejudice his case.

On the question of assessment of legal fees in favor of the plaintiff, do you think that will have any discouraging effect on the Government? I am not saying it should not be included in the law. I am in favor of it, but do you really think that the bureaucrat who makes the decision to withhold information is going to care about legal fees in the ultimate court case that is going to be handled by a different department?

Mr. PLESSER. Well, one of the suggestions that I did not make here, but is one, and I do not know if it has been formally presented to this committee, but the one I had heard is that the legal fees should come out of the budget of the particular agency, and if a man is in a particular department, the Department of Agriculture or whatever, the Food and Drug Administration, and if legal fees are going to cost $5,000, I think he will think twice and the agency will think twice before they refuse the information. I agree with you, if it is out of the general coffer that would not have the same effect. I think that OMB will have some concern, and I think perhaps this will be one way to force OMB hopefully to take a more affirmative position in the Freedom of Information Act. I do not think that the main purpose of assessing legal fees is really in effect a penalty. I think it will be an effective byproduct of allowing citizens who are aggrieved from not having the burden to pay all of the legal fees themselves.

Mr. MOORHEAD. Well, I would hate to see it come out of the budget of the Food and Drug Administration, for example, if they would then not have sufficient funds left to examine a potentially dangerous drug. Counsel for the minority here suggested it could come out of the budget of OMB, and maybe that would have an effect.

Mr. Phillips?

Mr. PHILLIPS. Thank you, Mr. Chairman.

At the top of page 6, Mr. Plesser makes an extremely important point that I think ought to be emphasized. He outlines a couple of examples of cases where agencies have refused to abide by court decisions in FOIA cases. One case involves the Federal Trade Commission, where they even wrote new regulations which were contradictory to a clear decision of the court, that was not appealed, and which stands as case law. Another case involves the Social Security Administration, where the same type of situation existed, cases of denials of requests

for similar information once it had been litigated in the plaintiff's favor and they still had to go back and fight the battle all over again. We had similar situations called to our attention last year involving the Agriculture Department. Do you see any possible remedy for this type of flagrant abuse by an agency? For example, do you think it would be feasible to write into the law, perhaps, that once a point of law has been litigated involving one of the exemptions that agency should be required within 30 days to amend the regulations to reflect that court decision, assuming that it had not been appealed and it is totally adjudicated, and stands as the interpretation in the leading case involving that particular set of circumstances? Do you think this is a feasible approach to this problem?

Mr. PLESSER. I think it is feasible. I think there are some problems with it that have to be worked out. If you are talking about within the agencies, say within the *Schechter* case, the Social Security Administration would have to accept that Judge Waddy had ordered them to disclose the information. I think it was terribly irresponsible for them not to accept what the judge said. They said in the official document, "We will not acquiesce in the decision of Judge Waddy." He is a district court judge, and he has authority to determine whether or not this information should be available. If you are talking about on a Government-wide basis, some difficulty. Opinions change, one circuit might come out in a slightly different way than another circuit, thus making it difficult to have an all-inclusive rule. Right now the second circuit and the D.C. circuit differ on what the interpretation of the seventh exemption is which deals with investigatory information. Now, there may well be a case that is decided either here or in New York where that problem is resolved. But, right now there is a little bit of difference. There is a little bit of difference between the District of Columbia and the ninth circuit on whether or not the courts have equity jurisdiction in determining some of these cases. I think that rather than leaving it again up to the agency the Justice Department should give up-to-date advice to their clients. I think one of the things that has really been shocking to me is that this book, the Attorney General's memorandum on the public information section of the Administrative Procedure Act was published in 1967, before there was a single case decided under the Freedom of Information Act. There have been 6, 7 years of litigation, there have been 200 cases decided since that pamphlet was published. The law has changed considerably in many of the areas, not changed but been interpreted considerably differently than it has in this original memorandum, and the Department of Justice refuses to issue a new memorandum updating their legal opinion to their clients, the agencies. I think that it should be mandated that some agency, and this goes back to what I was talking about before, be it Justice, be it perhaps this Commission, have some kind of authority to review regulations, to review procedures and to say whether or not they are in line with existing case law. The area as far as the manual which I discussed in connection with the FTC I think is absolutely settled. There is no question that those kinds of manuals must be made publicly available, and there must be some agency in the Government that has the ability to say "yes," that is settled, and you just better change your regulations to that effect. Because

what is happening now is we have to take every single agency into court to get one precedent radiated to all of the agencies, and we should not have to do that. We should be able to have some Government agency to do that. And I think you cannot really leave it up to the individual agencies to do it themselves.

Mr. PHILLIPS. This was one of the recommendations in our committee report based on last year's hearings, that the Office of Legal Counsel, and specifically the Freedom of Information Committee review the regulations and require agencies to update them to reflect interpretations of the courts on the various exemptions. We have also encountered the same kind of difficulty. They say they do not have the proper staff to do it, and so forth. We have also pushed them to update the old 1967 Attorney General's memorandum interpreting the law. In fact, this came up last year where Mr. Erickson testified for the Justice Department. We urged him to do that. We recommended that they do that in the committee report.

We are also recommending and urging the current head of the Office of Legal Counsel, who testified last week, Mr. Dixon, to do the same thing. In fact, we have directed to him specific written questions as to why Justice has not taken this step, which we think is extremely important.

I have one other question, Mr. Chairman. On the *Mink* decision you point out some of the comments that Justice Stewart made. One other important statement that he did make in his concurring views was the fact that Congress clearly has the authority to supersede the present Executive order governing the administration of the classification system with a statute. I think that his statement is phrased in such a way as almost to indicate perhaps that is the only way that this whole problem can ultimately be resolved. I refer now to the language you have suggested here as an amendment to section 552 (b)(1), where you say "disclosure would result in substantial harm to the national defense and foreign policy of the United States." I think that that is a fairly accurate paraphrase or summary of what the existing Executive order does prescribe as varying "levels of harm" from Top Secret, Secret, and Confidential—"exceptionally grave harm," "serious harm," or "harm." That terminology is used throughout the definitions in Executive Order 11652. So, I think this language is certainly reasonable and would give the court some broad criteria on which to decide in camera in their review of classified documents to see if they are properly classified.

No further questions, Mr. Chairman.

Mr. MOORHEAD. Mr. Copenhaver?

Mr. COPENHAVER. Just a 30-second comment. I think what Mr. Erlenborn had in mind is that in light of the recommendations contained in the report that we will report out tomorrow from the committee on security classification, Congress should enact a statute in which it defines what should be classified and the oversight procedures overseeing the classification. This should be accompanied by deletion of exemption (b)(1) which only has reference to Executive orders. This still leaves (b)(3), which pertains to other statutes which authorize withholding. In the Horton bill, we give the court the right to approach classification matters de novo, and the authority to go behind classi-

fication in camera, hopefully with a master or commission to assist it in going through a large amount of documents. There is no need to build into this statute particular substantive language on the security classifications, but leave that to the separate statute which Congress enacted. It would be unworkable to give courts independent authority to determine what is or what is not classifiable information in the name of national security.

Mr. MOORHEAD. Mr. Cornish?

Mr. CORNISH. Thank you, Mr. Chairman. I have only a self-serving and gratuitous statement, and that is I agree with every single word in Mr. Plesser's conclusions, and I have no questions.

Mr. PLESSER. Thank you.

Mr. MOORHEAD. Top that if you can, Mr. Kronfeld.

Mr. KRONFELD. Just one comment, other than to say that Mr. Plesser's statement is up to its usual level of excellence. We were discussing the commission before and I was thinking as we were discussing the structure of the commission that we must make sure that it has an administrative function, for if we go too far to limit the commission it may end up falling within the Federal Advisory Commttee Act, and then we are going to have a number of different problems. I just have that caveat to add.

Mr. MOORHEAD. Well, if there are no further questions, I also want to associate myself with your excellent statement. We certainly will want to call upon you if we do need some additional assistance in the drafting of language.

Thank you very much, Mr. Plesser.

Mr. PLESSER. Thank you.

Mr. MOORHEAD. The subcommittee is now adjourned.

[Whereupon, at 12:20 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

Additional Correspondence and Other Material Relative to the Hearings

Statement of Hon. William D. Ford of Michigan

Mr. Chairman, I would like to thank you and the distinguished members of this subcommittee for the opportunity to testify on behalf of the bill, H.R. 5425, to amend the Freedom of Information Act. As a co-sponsor of this legislation, I firmly believe it is essential that it be adopted to strengthen, and thereby achieve the original intent of the Freedom of Information Act of 1967.

Our form of government is founded upon the idea of an informed citizenry to operate effectively. This committee learned last year in hearings that hundreds of requests for information by public interest groups and individuals have been refused.

The Freedom of Information Act was designed to guarantee the right of the citizenry to remain informed of what the government is doing, while at the same time allowing the government to withhold information it felt necessary for its operation.

The Executive Branch, however, through various maneuvers and bureaucratic deceit has prevented us from accomplishing what we thought we did in 1967 when we passed the original act.

The adoption of H.R. 5425, therefore, is necessary to close some of these "Executive loopholes."

It will do so by:

—Requiring agencies to "publish and distribute" their opinions made in the adjudication of cases, policy statements and interpretations adopted, and administrative staff manuals and instructions to staff that affect the public, rather than merely making them "available for public inspection and copying," as the present law provides;

—Requiring agencies to respond to requests for records which "reasonably describes such records." The present term, "identifiable records," is being used in many cases to avoid making information available.

—Requiring agencies to respond to requests under the act within ten working days after receipt of the request and within twenty working days on administrative appeals following denials to the requesting party;

—Giving the courts the authority to require the Government to pay "reasonable attorney fees and other litigation costs" of citizens who successfully litigate cases under the act;

—Requiring agencies to file answers and other responsive motions to citizens' suits under the act within 20 days after receipt instead of the 60 days normally given the Government (and through the use of delaying motions, the Government often stalls for as long as 140 days);

—Requiring disclosure of information about an agency's internal personnel rules and internal personnel practices, as long as such disclosure would not "unduly impede the functioning of such agency";

—Modifying the exemption for trade secrets by requiring that such types of information be truly privileged and confidential, as commercial and financial information already is under the act;

—Limiting permissive exemption (b)(6) to medical and personnel "records," instead of "files" as in the present law, closing another loophole allowing information to be withheld because it is placed with unreleasable information in a single file;

—Changing the word "records" to "files" in permissive exemption (b)(7) and narrowing the exemption to require that such records be compiled for a "specific law enforcement purpose, the disclosure of which is not in the public interest." The enumeration of categories of information that cannot be withheld under this exemption includes scientific tests, reports, or data, inspection reports relating to health, safety, or environmental protection and records serving as a basis for a public policy statement of an agency, officer, or employee of the United States, or which serve as a basis for rule-making by an agency;

—Clarifying the position that Congress, upon written request to an agency, be furnished all information or records by the Executive that is necessary for Congress to carry out its function;

—Requiring annual reports to Congress from each agency on its record of administration of the act; and

—Taking effect 90 days after enactment, providing adequate time for the executive agencies to promulgate necessary changes in their regulations and operational guidelines.

Mr. Chairman, if I may use a phrase from a recent political campaign, I would like to end by saying that we need this legislation enacted into law "now more than ever," and I would like to make that "perfectly clear" to the members of the Subcommittee.

Once again, Mr. Chairman, thank you for the opportunity to testify. I commend this Subcommittee for its fine work and I urge prompt action on this very important legislation.

STATEMENT OF HON. SPARK M. MATSUNAGA, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mr. Chairman and members of the Subcommittee, thank you for this opportunity to present my views in support of H.R. 5873, a bill to amend the Freedom of Information Act of 1966.

Over six years ago, Congress enacted legislation to effectuate the basic premise that, in a democracy, the people have a right to know what their government is doing. This Act, the Freedom of Information Act, is intended to help make the democratic process work more nearly as it was originally intended.

Last year, this distinguished Subcommittee found, in its extensive hearings on the administration and operation of this statute, that administrative delays and obfuscation have been a problem for the press since news is a perishable commodity. In the few cases when the press has gone to court, government secrecy usually has been overcome. In other cases, the likelihood of court action has persuaded Federal agencies to grant access to public records.

Recognizing the necessity of refining the provisions of the Freedom of Information Act to meet those problems disclosed by the Subcommittee's investigation, I introduced H.R. 5873, which is identical to H.R. 5425, introduced by the distinguished Chairman and other members of this Subcommittee. The wide bi-partisan sponsorship of this legislation by dozens of Members of the House indicates a priority of interest in, and concern for, this area of policy. Concern about government secrecy transcends partisanship, ideology, and sectional interest.

In brief, this legislation seeks a greater accountability from the Executive Branch regarding the administration of the act, an elimination of unreasonable delays in responding to information requests made under the statute, and a restatement of certain of the original intentions of Congress in enacting this law.

H.R. 5873 would require the Executive Branch to publish and distribute to the public all documents related to the administration of the statute. With this new procedure, the public would no longer be at the disadvantage of not knowing the rules with regard to obtaining documents. In addition, we would eliminate the possibility of a request being delayed or refused on the basis of some errant regulation peculiar to a particular agency.

The amendments also establish a new mechanism for better accountability. Annual reports would be required of each agency indicating their record of administration in Freedom of Information matters.

The amendments also seek to eliminate unreasonable delays in Freedom of Information requests. The Executive Branch would be required, under the proposed legislation, to respond to an initial document request within ten working days and to an appealed request within twenty working days. Under H.R.

5873, answers and other responsive motions to Freedom of Information court suits would would have to be filed within a period of twenty working days as well. While the agencies should make every effort to provide quick service to the news media on Freedom of Information requests, they should not overlook their obligation to respond effectively to the American *public* as well.

In addition to refining certain exemption provisions of the Freedom of Information Act, H.R. 5873 clarifies the original intent of Congress with regard to the interpretation of the *de novo* requirements placed on the courts in their consideration of cases brought under the law. This action is necessary in view of the Supreme Court's decision in *Mink* v. *EPA* in which I was a co-plaintiff. In that case the opinion was offered that judges may not examine *in camera* documents in dispute where the government claims secrecy by virtue of either the national defense and foreign policy exemption or the intra-agency or interagency memoranda exemption. H.R. 5873 clearly states that since the burden of proof in Freedom of Information matters is upon the government, *de novo* means that the courts must examine agency records *in camera* to determine if they should be withheld, in whole or in part, under any of the permissive exemptions of the act. With regard to the national defense/foreign policy exemption, the bill would require the court to examine classified records to determine if their restriction is proper—if, in other words, they would actually be "harmful to the national defense and foreign policy of the United States" if disclosed. This was the original intention of Congress when the Freedom of Information Act was enacted; H.R. 5873 would serve to correct the misinterpretation by the Supreme Court earlier this year.

These citizens who seek to use the Freedom of Information Act should find it an instrument which is efficient and faithful in assisting them. What H.R. 5873 seeks to do is make a proper and good law even better. It would help to extend open government in an open society to the American public. I urge its approval by this distinguished Subcommittee.

Thank you.

STATEMENT BY REPRESENTATIVE FRANK THOMPSON, JR. (DEMOCRAT, NEW JERSEY) BEFORE THE FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS

The right of the public to have access to government records is as inalienable a right as life, liberty, and the pursuit of happiness. That "right to know" is insured in H.R. 5426, amendments to the Freedom of Information Act, of which I am a cosponsor. These amendments will strengthen the operation of the Act and will rid it of loopholes which infringe on the public's "right to know". Recent inquiries into the Watergate bugging incident have produced results which have lowered the public's respect for and confidence in their elected officials. Now, more than ever, there exists a need for the Congress to take action to restore the public's trust.

The amendments propose to (1) require agencies to publish and distribute opinions made in the adjudication of cases; policy statements and interpretations adopted; and administrative staff manuals and instructions to staff affecting the public, rather than merely making them "available for public inspection and copying", as is provided in the present law. (2) The term "identifiable records" is replaced by language which will require an agency to respond to requests for records which "reasonably describe such records". This clarifies and broadens the scope of what is to be released upon request. Agencies may easily avert the wording as it now stands because the requestor cannot specifically identify the records he wishes to see. (3) Agencies are required to respond to a request within 10 working days of receipt and 20 working days upon receipt of an appeal following a denial of a request. These time limitations would do away with the stalling techniques currently employed by many agencies to avoid public inquiries. (4) An important revision of the existing law requires the government to pay "reasonable attorney fees and other litigation costs" for citizens who are successful in their appeals. This would help do away with acts designed to stall litigation and would enable the average citizen a court hearing. (5) Agencies would be required in 20 days to respond to citizen suits instead of the present 60 days, thus ensuring a speedy decision. In addition, each governmental agency would be required to submit a report on its administration of the Act in order to ensure that it meets the Act's standards.

The proposed amendments will open up the government to the people to whom it is responsible. The public is entitled to know what the government is doing and where their tax dollars are going. Secrecy in governmental operations has no place in a democracy. Secrecy is deleterious to the national defense. The withholding of information pertinent to major policy decisions makes it difficult, if not impossible, for the people to form a reasoned judgment as to the actions the government is taking. We need look no further than Vietnam for evidence. The people did not have accurate information upon which to base a judgment as to our involvement. The results have been tragic in terms of national division and disunity.

If it is dangerous, as it is, to withhold information from the public, withholding information from the Congress is doubly so dangerous. For Congress to legislate reasonably, it must have full knowledge of developments in all government agencies. Free access to information is vital to the ability to legislate. It is inconceivable that the legislative branch in a free society is not permitted access to records necessary for wise legislation. The nation is hurt far worse by this than by knowledge of some covered-up scandal. The issue does not involve partisan politics. Members from both sides of the aisle have come forth in support of our bill. The bipartisan support demonstrates the need for us to unlock the doors of secrecy which threaten to cripple our system and open them up to the people.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Reston, Va., May 9, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: We appreciate very much the invitation to testify before your Subcommittee at hearings on proposed amendments to the Freedom of Information Law. In lieu of personal appearance of a witness we are submitting this letter for the record because we are not yet prepared to offer substantive testimony on the several proposed amendments in bills H.R. 4960 and H.R. 5425 which you sent me with your letter of April 24.

To formulate the ANPA position on these proposals, we must consult with the ANPA Committee on Government Relations and our Board of Directors, all of whom have been interested for many years in the effort by your Subcommittee and others in the Congress to improve the free flow of government information to the public through the press.

Our preliminary review of the proposals indicates that some of them represent constructive improvements to the existing law, but we are immediately concerned also that the proposal in H.R. 4960 to create a full-time seven-member Freedom of Information Commission would create a needless additional expensive bureaucracy which might impede rather than assist the free flow of information.

Also we believe that we should give further consideration to the relationship between these legislative proposals and the pending proposed revision of the Federal Criminal Code.

We have asked our General Counsel to assist us in these studies, the results of which we will be happy to supply at the earliest possible moment.

Meanwhile, we express our continued appreciation to you and your associates for your constant attention to the public interest in a free flow of government information and the elimination of needless secrecy. Although the Freedom of Information Law has perhaps not lived up to all the lofty goals of its sponsors within the Congress and the Press, its mere existence has served a useful purpose.

With high esteem.

Sincerely yours,

STANFORD SMITH, *President.*

STATEMENT BY WILLIAM H. HORNBY, EXECUTIVE EDITOR, THE DENVER POST, AND CHAIRMAN, FOI COMMITTEE, AMERICAN SOCIETY OF NEWSPAPER EDITORS

"STRENGTHENING FREEDOM OF INFORMATION ACT"

Mr. Chairman: The American Society of Newspaper Editors is a nationwide professional organization of more than 800 persons holding positions as directing editors of daily newspapers throughout the United States. The Society is

vitally concerned that the Freedom of Information Act operate to enlarge and improve the flow of information about their government to all citizens. The press cannot function adequately as a channel for this flow of information between government and citizen if the FOI Act is not improved. The Act is not working well now.

At the time of the adoption of the Freedom of Information Act the Executive Branch was less than active in helping bring it about. Nevertheless President Lyndon B. Johnson stated on July 4, 1966, "I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded." The then Attorney General of the United States stated, a year later, "If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes a democracy as secrecy. . . . Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secured."

True! But despite these well-meaning words, as so cogently recognized by the Chairman of this committee, and other co-sponsors of H.R. 5425 and H.R. 4960, ". . . our investigation and hearings last year on the operation of the act during the past five years show that in too many instances the federal bureaucracy has been able to stall, distort and otherwise thwart the efforts of many citizens to obtain information or documents to which they are clearly entitled under the Freedom of Information Act."

We commend you for your efforts and make specific comments concerning these bills.

The requirement that an agency reply within ten days to a request for information would appear very reasonable and salutory. The natural defense mechanism of any bureaucracy, whether governmental or private, is stalling. It is difficult to determine whether the time limitation set forth in H.R. 4960 or H.R. 5425 is preferable.

In H.R. 4960 the exemptions enumerated under Title III, Page 12, could become standard "excuses." However, under the provisions set forth in H.R. 5425, Page 2, they could reply within ten days that they will furnish the material and notify the person that they will do so and set a date far in the future as to when they will actually furnish the materials. A careful reading of Section (5) on Page 2(5)(a) does not seem to force the production of the materials within ten days, but merely a notification of intent. What the press and the citizen needs is more information produced with speed, not legal alibis for non-performance.

The appellate time limit of twenty days for an administrative appeal and the requirement that the agency act within twenty days of receipt of appeal again appears most reasonable. It is difficult to conceive of any situation where the agency could not act within twenty days. We applaud H.R. 5425's requirement that the government answer the complaint within twenty instead of the sixty days now required by law in the event of an appeal to the court. Lawyers, whether in government or out, are notorious procrastinators. The thousands of legal minions employed by the Department of Justice can hold the necessary conferences with their agency client and answer the case within twenty days.

We feel strongly that allowing the Court to assess the United States reasonable attorneys fees and other litigation costs in the event of an unsuccessful defense of withholding information is salutory. In too many instances a citizen is deterred by the costs of attorneys fees and other expenses from going to Court to secure his rights.

It is also our conviction that all agencies should file a careful and detailed annual report with Congress on the administration of this Act so this Committee and others can regularly review the agencies' activities in this field to determine whether or not they are slipping behind a veil of secrecy.

We approve of H.R. 5425's provisions in Section 101 for a Court review *in camera* of classified records that the agency has determined must be withheld from the public. Under the present state of law there is apparent doubt in the minds of the Courts as to whether they have the right to review this material and make an independent judgment. We think this should be clarified and needless to say, we would accept the judgment of an independent judiciary much more readily than an agency's determination of its own interests.

Finally, is there a need for a commission on freedom of information? We see another level of bureaucracy and more arterial sclerosis in that proposal. Rather than a commission, we believe strong, rigid rules which can be enforced with

rapidity by the Courts is the best way to strengthen this Act. The nation's editors are solidly behind your efforts to reach that goal.

STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Mr. Chairman and members of the subcommittee, our Association is pleased to respond to your invitation that we submit a statement on the proposed Amendments to the Freedom of Information Law, and, particularly, on H.R. 5425 and H.R. 4960.

As the representative of some 230 houses which annually publish more than three-fourths of the national output of books and other educational materials, the AAP is understandably dedicated both to the maximum freedom of the press, as protected under the First Amendment, and to maximum expansion and protection of the public's right to the fullest information about its government.

This has been the unswerving position of our Association—in intervening in the Pentagon Papers case; in testifying in behalf of "shield" legislation for all public communicators (authors, as well as "newsmen"); in challenging, through our statement to a Special House Judiciary Subcommittee, the constitutionality of secrecy provisions of the proposed Uniform Federal Rules of Evidence, and in arguing, as a friend of the court, for the First Amendment right of a former CIA agent to write a book free from that agency's censorship, and emphasizing, in our brief in that case, the need for judicial review of executive classification decisions.

Our strong belief in and support for the Freedom of Information Act—which required 11 years of effort preceding its enactment—could be said to follow the reasoning of three of the four dissenting justices in the Branzburg-Caldwell-Pappas case decided by the U.S. Supreme Court in 1972. Although they wrote in a somewhat different context, they enunciated a principle entirely applicable to the bills before your Subcommittee. Justices Stewart, Brennan and Marshall stated:

> "No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information, the right to publish would be impermissibly compromised."

The act which the late President Johnson symbolically signed on July 4, 1966, was designed, we feel, to prevent government's cutting off news at its source for other than the soundest of reasons.

In view of the findings of your Subcommittee, in its report of last September on the administration of the act, that "bureaucratic foot-dragging" and under-use by the media had made the law into a "dull weapon", we would support legislation to improve its effectiveness. Any such legislation that would make the law more serviceable to writers for the daily press could not help but improve its usefulness for authors and publishers of books (we hardly need point out that many newsmen become authors).

Replying in general to the three questions posed by the Chairman when he opened these hearings on May 2:

Is the need for public access to government information as pressing today as it was in 1955? One would have replied an instant "yes" even without the events of Watergate, but such clandestine activities, it seems to us, offer a classic illustration of the constant need to focus public scrutiny on the activities of government.

Is access to government information easier today? Lacking any scientific standard of measurement—and without partisan finger-pointing—one is tempted to reply in the negative. The art of the glib government public information office, issuing reams of statements and releases that obfuscate without informing, has developed over the past two decades—to the point where today what may seem like increased availability of information actually is little more than propaganda-spreading. The task of the digging investigative journalist or author, interested in separating fact from flummery, today is, if anything, harder than ever.

What might Congress do to increase the flow of information? The two major bills before you, revising the FoI act, provide a good start, in that both appear to respond to the needs and difficulties identified in the 1972 Subcommittee Report, by clarifying the Act and making its provisions more explicit.

We generally support setting deadlines for action and response as the bills provide. We would be inclined to leave it to the spokesmen for the daily news media to comment on the specific time intervals provided: none of the requirements in the legislation would appear to us to be unreasonable, but the daily

print and electronic media, to whom time is particularly important, would be in a better position to comment on whether each time limit is reasonable or would enable an agency to be unduly dilatory in acting on requests for information.

Although the executive branch can be expected to oppose both the shortened time to answer an FoI complaint in court and the possible assessment of attorney's fees and court costs if the Government is found to be in violation of the law, we would submit that any such reaction stems from a distorted view of *whose* information is at stake. The information belongs to the public—not a separate and outside entity called Government—notwithstanding the view, stated to your Subcommittee some months ago by William Florence, that some Government officials act as if information were "born classified."

We also fully support those provisions of the bills which would require judicial review *de novo* by an *in camera* inspection of all material claimed to fall within the exemptions of the Act. These amendments are essential to overcome the interpretations by the United States Supreme Court of Congressional intent as set forth in *Mink* v. *E.P.A.* It is crucial that the Government not be allowed to satisfy its burden of proving that the materials sought are subject to one or more exemptions merely by allegations in the form of affidavits. Without the judicial review safeguard contained in the proposed bills the executive branch will be allowed unfettered discretion in determining what materials may be withheld from public scrutiny. Present events have surely highlighted the dangers of such unilateral determinations that cannot be questioned.

We heartily support the requirement for each agency to file an annual report with Congress on the administration of the FoI Act, and the requirement in these and several other bills that all agencies supply information and records to Congress on request.

We presume that the required annual reports would come under the oversight authority of this Subcommittee. (In that connection we would digress momentarily to pay tribute to the persistent and effective role that this Subcommittee has played in helping to open channels of government information ever since the FoI Act became law.)

We have considerable hesitancy, however, about the seven-member Freedom of Information Commission proposed in H.R. 4960. The creation of additional governmental bodies (empowered to meet, however rarely, behind closed doors) has little appeal and would seem to hold little promise of helping to open up government information channels, particularly in view of the aforementioned role of this Subcommittee as watchdog over the administration of the FoI Act, and in view of the proposed strengthening of administrative procedures contained in H.R. 5425. The proposed FoI Commission, it would appear, could become bogged down in politics, procedure and procrastination: a President would appear assured of a 4-to-3 majority for his party by his authority to appoint two of his three designees from the same party, along with one of the same party appointed from each House of the Congress. Furthermore, the bill states that "The commission shall initiate upon the vote of at least three of its members, an investigation . . . upon request of a private citizen, alleging improper withholding of information." Would this hold true even if four members voted to oppose such an investigation? If so, this would appear to fly in the face of majority rule. If not, it would seem to give an administration veto power over the disclosure of information which might prove embarrassing to it.

In short, we submit that the proposed FoI Commission, however well-intentioned, is neither needed nor likely to be a means of making the Act more effective. We would continue to place our reliance upon administrative procedures and remedies, the watchfulness of this Subcommittee, and, ultimately, on the courts.

CENTER FOR LAW AND SOCIAL POLICY,
Washington, D.C., May 24, 1973.

Hon. WILLIAM S. MOORHEAD,
Rayburn Office Building,
Washington, D.C.

DEAR CONGRESSMAN MOORHEAD: I am counsel to Consumers Union of United States, Inc. ("Consumers Union") and, on its behalf, I have recently been involved in litigation under the Freedom of Information Act, 5 U.S.C. § 552, (*Consumers Union* v. *Peterson*, D. D.C., Civ. No. 133–73) seeking disclosure from the Department of Commerce of a classified document known as the "Recommended

General Policy Guidelines for Third Year of the Long Term Arrangement" (the "Guidelines"). In light of my interest in secrecy in the foreign affairs area and my experience with the Freedom of Information Act, you have asked me to file a statement regarding the proposed amendments to such Act embodied in H.R. 4960 and H.R. 5425, and I am happy to comply with your request. Because of the particular relevance of my experience in the above-mentioned litigation to the problem of judicial inspection of classified materials, I will direct my comments solely to that issue.

The Guidelines are utilized by officials of the Department of Commerce in formulating textile policy and in administering the textile import quota system established under the Long-Term Arrangement Regarding International Trade in Cotton Textiles (the "LTA"). In particular they are utilized by government officials in making determinations that cotton textile imports from a foreign country are "causing or threatening to cause market disruption" within the meaning of the LTA.

In September, 1972, on behalf of Consumers Union, I requested under the Freedom of Information Act that the Department of Commerce supply me with such document. After several months of waiting, in December of 1972, my request for information was finally denied, on the grounds, *inter alia*, that disclosure was not required under 5 U.S.C. § 552(b)(1). Subsequently, in January of 1973, I instituted suit in the United States District Court for the District of Columbia on behalf of Consumers Union to compel disclosure of the Guidelines

The lawsuit was settled on May 17, and, pursuant to the settlement agreement, the Department of Commerce has declassified the Guidelines and referenced them as publicly available in its Index of Documents. A copy is attached for your information. The Guidelines had, until May 17, been classified "Confidential" under Executive Order, and, thus, had the litigation continued without settlement, it is likely that, under the Supreme Court's decision in *Environmental Protection Agency* v. *Mink*, 93 S.Ct. 827 (1973) their non-disclosure would have been upheld, without a court ever having had the opportunity to review their contents.

It is apparent upon examination of the Guidelines that their classification was questionable at best. Although the Guidelines nominally relate to matters of "foreign policy", they merely set forth in the most general terms the criteria for establishing restraint levels or negotiating bilateral agreements for cotton textile products, and there appears to be nothing contained in them which, if disclosed to the public, would conceivably damage national security or adversely affect our international relations. I believe that if a court had been permitted to review this document, it might well have found that the national security/foreign policy exemption to the Freedom of Information Act could not be properly invoked to prevent its disclosure. Unfortunately, under the *Mink* decision, if the case had gone to trial, probably no such review would have been made and an arguably frivolous classification, albeit based on Executive Order, would have effectively precluded disclosure of a document which is of significant interest to the consuming public.

I believe that provisions such as those contained in H.R. 4960 (Sec. 101) and H.R. 5425 (Secs. 1(d)(1) and (2)), which would allow judicial examination of documents claimed to be exempt, are essential to protect the public against the abuses of official secrecy. Indeed, it seems the clear message of Justice Stewart's concurring opinion in *Mink* that, if the Supreme Court has now interpreted the Congressional interest in enacting § 552(b)(1) as decreeing "blind acceptance of Executive fiat." 93 S. Ct. at 840, it is up to Congress to take positive action to insure that there is a means to question an Executive decision (which may be "cynical, myopic or even corrupt. . . .", *Id.*) to stamp a document "Secret".

There is no question, moreover, that judicial inspection of classified materials is an appropriate procedure which offers adequate protection for the Government's legitimate interest in secrecy. In the realm of executive privilege, it has long been the view of most commentators that the relatively restrictive view of the judicial role taken by the Supreme Court in *United States* v. *Reynolds*, 345 U.S. 1 (1953), was undesirable and that a more desirable approach is that adopted by the majority of the Court of Appeals in *Reynolds*, which said, in a careful opinion written by Judge Maris:

> "Nor is there any danger to the public interest in submitting the question of privilege to the decision of the courts. The judges of the United States are public officers whose responsibility under the Constitution is just as great as that of the heads of the executive departments. When Government docu-

ments are submitted to them *in camera* under a claim of privilege, the judges may be depended upon to protect with the greatest of care the public interest in preventing disclosure of matters which may fairly be characterized as privileged. And if, as the Government asserts is sometimes the case, a knowledge of background facts is necessary to enable one properly to pass on the claim of privilege those facts also may be presented to the judge *in camera*." 192 F.2d at 997–998. See *Developments in the Law—National Security Interests and Civil Liberties*, 85 Harv. L. Rev. 1101 (1972) : Hardin, *Executive Privilege in the Federal Courts*, 71 Yale L.J. 879 (1962).

In numerous cases, judges have examined evidence claimed to be privileged on national security grounds and made determinations with respect to the adequacy of the claim of privilege. *See, e.g., Cresmer* v. *United States*, 9 FRD 203 (E.D.N.Y. 1949) ; *Snyder* v. *United States*, 20 FRD 7 (E.D.N.Y. 1956) ; *United States* v. *United States District Court for Eastern District of Michigan*, 92 S. Ct. 2125 (1972) (examination of information contained in "national security" wire taps). As the Harvard Law Review puts it :

> "[J]udicial decision whether national security considerations justify nondisclosure should be based on examination of the documents themselves, as in the case when the Government claims other grounds for withholding information. Permitting the judge to rule on the basis of what he infers from the Government's description makes serious scrutiny of the Government claim unlikely." *Developments in the Law—National Security Interests and Civil Liberties*, 85 Harv. L. Rev. 1101, 1222–23 (1972).

Surely, there can be no reasonable worry that disclosure of confidential information to judicial officers will compromise the national security. Indeed, independent, judicial officers can be trusted to make a fairer evaluation of the information than involved bureaucrats interested in protecting their own positions.

If you wish any further elaboration on the comments presented in this letter, please do not hesitate to contact me, and I will be most happy to provide you with what information I can.

Very truly yours,

ELDON V. C. GREENBERG.

Enclosure.

RECOMMENDED GENERAL POLICY GUIDELINES FOR THIRD YEAR OF THE LONG TERM ARRANGEMENT

The Interagency Textile Administrative Committee recommends to the President's Cabinet Textile Advisory Committee the following general policy guidelines for administration of the rights and obligations of the United States under the Long Term Arrangement for the third year :

I. ARTICLE 3.

A. Restrained Trade.

1. *Derestraints and Renewal of Restraints.*—Article 3 restraints in a particular category should not be renewed or continued in instances (a) where total imports are not significant or (b) where the imports from all countries with ceilings have declined substantially below the combined levels of the ceilings in effect for the category, taking into account special factors, such as group ceilings, the loss of market by a single exporting country, and the state of disruption of the domestic market. Imports in a category from a particular country may be derestrained even though total imports in the category have not declined substantially where it appears that the country concerned has lost a major part of its market in the United States for these goods.

The United States should advise the exporting country when a category is derestrained that the action has been taken without prejudice to the rights of the United States to request restraint again in accordance with the provisions of Article 3.

2. *Growth on Article 3 Restraints.*—A minimum of 5 percent growth should be the general rule for all Article 3 renewal of restraints, except in highly unusual circumstances.

Some existing Article 3 restraints were renewed for the second year of restraint without growth. At the request of the exporting country the United

States should provide 5 percent growth for the remainder of the restraint year on a prorata basis.

3. *Rearrangement of Article 3 Restraints.*—The United States should make reasonable rearrangements in Article 3 restraints, including grouping of related categories, when disruption to our markets would not result.

B. Unrestrained Trade.

New Restraints.—The United States should promptly exercise its rights under Article 3 to restrain disruptive new trade. New restraints should be imposed by the United States in the framework of developing an overall solution to the problem of imports from the country concerned.

The minimum levels should be updated to reflect the values for current trade at the same foreign value amounts used to establish them initially.

Restraint should be considered in all cases where trade exceeds the minimum level for the category. However, restraint levels should be set at twice the minimum level in cases where the total of restraint levels in other categories and trade in unrestrained categories from the exporting country for the latest twelve months is less than the equivalent of four times the minimum level of a category. Restraint should be set at the minimum or in accordance with other criteria for the administration of the Long Term Arrangement in cases where this total is greater.

In the event that during the course of consultations the exporting country shows no potential for significant exports to the United States, the United States should consider adjusting the Article 3 restraint level in the light of special considerations for each exporting country.

II. BILATERAL AGREEMENTS

A. Existing Bilaterals.

Revisions in Bilateral Agreements.—The United States should grant reasonable requests for amendments to bilateral agreements with special reference to situations where Article 3 restraints for particular categories have been removed or liberalized.

Also, the United States should be prepared to request exporting countries to revise arrangements with the United States where necessary.

B. New Bilaterals.

New Bilateral Agreements.—The United States should continue to seek bilateral agreements under Article 4 with countries showing a significant potential for export of cotton textiles to the United States. The specific provisions of such agreements should be determined at the time the United States enters into consultations and should depend upon the nature of the trade and the terms of similar agreements with other countries.

III. CONTINUATION OF OTHER POLICIES

In all other respects, present policies for the administration of the Long Term Arrangement should remain in effect.

THE FEDERAL BAR ASSOCIATION,
Washington, D.C., June 27, 1973.

HON. WILLIAM S. MOORHEAD,
Chairman, Subcommittee on Foreign Operations and Freedom of Information, Committee on Government Operations, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Committee on Administrative Law and Procedure of the Federal Bar Association has been polled by mail on short notice seeking comments on the amendments to the Freedom of Information Act proposed by H.R. 5425. This letter summarizes the responses for the record of your Subcommittee's hearings on the bill.

Five members endorsed the amendments proposed by H.R. 5425 or its thrust without reservations.

Two members expressed concern about the proposed amendment to Section 552 (b) (4) for fear that information supplied to the Government in confidence might be disclosed.

One of these members drew attention to the language proposed by Mr. Wolf of the Georgetown University Law Center's Institute for Public Interest Representation that Subsection (4) be amended to exempt "trade secrets and confidential commercial information obtained from a person, where disclosure of such information would place a person at a clearly unwarranted commercial disadvantage." The same member suggested providing by statute "for the person who has provided the information rather than the Government, to play the crucial role in asserting its confidential nature in the face of a demand from the third party". Finally, the same member suggested a provision for waiver of confidentiality by the person who supplied the information.

One member opposed any provision "which would require the Government to pay reasonable attorney fees and other litigation costs of citizens bringing an action against the United States".

One member expressed the view that the proposals to require that agencies (1) "publish and distribute" rather than "maintain" "indexes, (2) respond to requests within ten days and (3) report requests and dispositions would be burdensome, expensive and counterproductive.

One member reports: "I personally approve H.R. 5425, but I would omit the exception under § 552(b)(8), because the information regarding financial institutions should be widely disseminated to the public, in view of the public's financial stake in all our financial institutions. There are now too many justified complaints that big investors and big depositors are privy to information not available to small investors and depositors."

An out-of-town member suggested that final opinions of agencies should be available in any office where the agency transacts business, and that attorneys for the agencies be required to attach copies of unreported decisions where they are cited as authority.

Finally, one member expressed concern that the exemption for inter-agency or intra-agency memoranda in Section 552(b)(5) is not broad enough to prevent "probing the mental processes of the head of an agency". He suggested that this exemption be amended "with a view to redefining its scope in terms of the function of the documents sought to be protected, rather than on the basis of the highly abstract questions as to whether or not certain portions of it are, or are not, 'facts' ".

Finally, one member questions the wisdom of the general exemption for "inter-agency or intra-agency memorandums or letters" provided by Section 552(b)(5). While the purpose is to encourage candor in communications and recommendations within or between the various agencies, staff proposals may be more careful if they are subject to disclosure, and "far-out" options can always be labeled as such. Candor need not necessarily suffer if we become accustomed to conducting the public busines in public. The foregoing, of course, does not apply to communications made privileged or confidential by statute or by common law such as communications between attorney and client, work product of government attorneys and the like.

We hope that these informed comments will be helpful. In the short time available to us it is not feasible to develop a consensus or total committee "position" on the subject of this legislation which obviously has so many ramifications. Hence, this is not a report of the committee as a whole, and manifestly it does not purport to state or imply a Federal Bar Association position.

Respectfully,

STUART H. JOHNSON, Jr.,
Chairman for Freedom of Information Act.

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D.C., June 6, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to your letter of March 16, 1973, requesting a report and comments on H.R. 5425, which contains miscellaneous amendments to the Freedom of Information Act, 5 U.S.C. 552.

The Department does not recommend enactment of the bill.

The amendments would (1) require agencies to publish and distribute the index maintained under the present law for public information and copying; (2) change the "identifiable records" requirement to a requirement that the person making the request "reasonably describe such records"; (3) impose specific time limitations on agencies for responding to requests for records and appeals; (4) make it clear that Congress intended that courts would examine agency records in camera to determine their exempt status; (5) require the Government to file responsive pleadings in court cases under the Act within 20 days; (6) permit the court to assess court costs and attorney's fees against the United States; (7) make changes in the language of certain exemptions from required disclosure in the Act; (8) provide that Congress be furnished all information or records requested in writing from agencies; and (9) require each Federal agency to make an annual report to Congress on its administration of the Act.

A discussion of the various amendments in H.R. 5425 is set out in an attachment hereto.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

JOSEPH R. WRIGHT, Jr.,
Assistant Secretary for Administration.

DISCUSSION OF THE VARIOUS AMENDMENTS IN H.R. 5425

We believe the amendment which would require agencies to publish the index required to be maintained by the Act for public inspection and copying would impose a time-consuming and unnecessary burden on Federal agencies. Many of the indexes maintained by agencies under this requirement are in the form of card catalogs or other forms in which changes are incorporated day by day. These indexes, under present law, are readily available for inspection by the public, and members of the public who desire copies of any part thereof may obtain such copies by paying a fee therefor in accordance with a fee schedule prescribed by the Department. There would not be sufficient interest on the part of the public for copies of the indexes to warrant the high cost of publishing all the indexes and keeping such publications current.

There is no need to change the requirement that requests be for "identifiable records" since the Attorney General has already interpreted this provision as requiring only a reasonably specific description of the records sought. See page 24 of the Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act.

With respect to the amendment imposing time limitations on agencies for responding to requests for records and appeals, agencies of this Department have always given priority to requests for information and have complied with the requests as quickly as possible. No useful purpose would be served by setting up specific time limitations for complying with requests for information. We believe it is more important to make a correct decision than one based on an uninformed judgment by reason of meeting a specific time limitation.

With respect to the amendment providing for in camera inspection of records by Courts to determine their exempt status, we believe the public interest would be better served by the criteria for in camera inspection by courts set out in the Supreme Court's decision in the case of *EPA* v. *Mink*, 410 U.S. _____, decided on January 22, 1973. We would therefore recommend against enactment of this amendment.

We do not feel that 20 days would be an adequate period of time for the United States to prepare and file its response in Freedom of Information Act litigation cases. Further, the need for a provision permitting the court to assess court costs and attorneys' fees in such cases has not been demonstrated. Under existing provisions of law, 28 U.S.C. 2412, a judgment for costs, but not including fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, by any court having jurisdiction of such action. We believe these existing provisions of law are adequate and do not feel any departure therefrom is warranted with respect to suits under the Freedom of Information Act.

We are not aware of all the reasons for the proposed amendments changing the language of the exemptions, but the experience of this Department has been that

the present language of the exemptions, interpreted in the light of the Attorney General's Memorandum and applicable court decisions, has provided a workable framework for carrying out the requirements of the Act, which strikes a delicate balance between the general right of the public to disclosure on the one hand and the national welfare and individual privacy on the other. We would therefore recommend that the present language of the exemptions not be changed at this time.

With respect to the amendment providing that Congress be furnished all information or records requested in writing from agencies, this Department would defer to the Department of Justice on its merits.

With respect to the amendment which would require each agency to make an annual report to Congress on its administration of the Freedom of Information Act, we believe some clarification is necessary as to what is meant by the language which provides that such report should set out "the number of requests made" under the Freedom of Information Act. In the fall of 1971, the House Subcommittee on Foreign Operations and Government Information sent a questionnaire to all agencies asking for statistics on the number of requests for information which had been received by each agency. Since the questionnaire did not define what the Subcommittee considered to be a request under the Freedom of Information Act, there was a wide disperity among the agencies as to what they considered requests for records under the Act. Because of this, some agencies reported requests in the thousands while other agencies limited their reports of requests to those of more than a routine nature. Mr. Moorhead, Chairman of the Subcommittee, in the hearings which were held in the Spring of 1972, expressed concern with this disparity in the reports of the agencies and stated that there should be some ground rules on what should be considered requests. The Department's chief witness at the hearings, Mr. Charles Bucy, who was then Assistant General Counsel of this Department and is now retired, expressed the hope that the committee would come up with some standard or guideline which would be helpful to all agencies in preparing reports on the Act. The Department was therefore disappointed when neither the committee's report on the Administration of the Act, H. Rept. 92-1419, nor the bills which have been introduced by committee members and other members of the House and Senate contained guidelines or standards in this respect. We therefore recommend that, if the committee intends to report favorably on this amendment, consideration be given to the development of such guidelines which will result in some uniformity of treatment of statistics by the various agencies.

DEPARTMENT OF DEFENSE,
OFFICE OF GENERAL COUNSEL,
Washington, D.C., May 7, 1973.

HON. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your request for the views of the Department of Defense on H.R. 5425, 93d Congress, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

The purpose of the bill is to impose on executive branch agencies additional administrative requirements that will insure the processing of Freedom of Information Act requests within fixed time periods and will clarify or limit the basis on which records may be considered exempt from disclosure under the Act. To facilitate understanding of the position of the Department of Defense on this bill, there follows a description of each proposed significant modification of section 552 of title 5, United States Code, along with the Department's specific reaction to that proposed modification.

First, the bill would amend section 552(a)(2) to require that each agency publish and distribute, by sale or otherwise, copies of a current index of any matter issued, adopted, or promulgated after July 4, 1967, which is in the nature of a final opinion in the adjudication of a case, a statement of policy or interpretation of a policy adopted by the agency and not published in the *Federal Register*, or administrative staff manuals and instructions to staff that affect the public. This publication and distribution would be in lieu of the present practice of making such indexes available for public inspection and copying.

Although the Department of Defense has no objection in principle to this change, we question whether there is sufficient interest in indexes of this kind among members of the public to justify their routine publication and distribution. Their availability under current law for inspection and copying seems more consistent with the level of public interest.

Where that level of interest is higher, agencies, of course, are not precluded from publishing and distributing such indexes as a more responsive and convenient method of insuring public access. A requirement to routinely do so, however, will impose a significant burden on the agencies that would be difficult to justify for most such indexes which are primarily of internal agency interest.

Second, the bill, by amending section 552(a)(3), would substitute for the requirement that requests be confined to "identifiable records" a new criterion that requesters "reasonably describe" the records they seek. Since the Department of Defense, through its implementing regulations, has interpreted "identifiable records" as those which can be located with a reasonable amount of effort, we see no need for the proposed modification which presumably has much the same effect.

Third, the bill would require by adding a new paragraph to section 552(a) that each agency determine within 10 working days after the receipt of the request for records whether it will comply with the request and promptly notify the requester of that determination. In addition, appeals from initial refusals to provide requested records must, by the terms of the new pragraph, be made *by the requester* within 20 working days of the date of notification of the initial denial, and a final determination with respect to such an appeal must be made *by the agency* within 20 working days after the receipt of an appeal. If an agency fails to comply with the time limitations for these determinations, the requester is deemed to have exhausted his administrative remedies with respect to any such request. After a favorable determination on a request, agencies are obliged to make records available as soon as practicable.

The time limitations imposed on the agencies by these changes are totally impracticable in a large organization with multiple facilities, such as the Department of Defense. The millions of records in the custody of the Department of Defense are stored in a multitude of worldwide locations, where records requested under the Freedom of Information Act are interspersed in common files with other records. Requested records are, therefore, difficult to retrieve and evaluate for releasability, and obviously no determination can be made and conveyed to the requester pending that retrieval. The Administrative Conference of the United States, in its evaluation of administrative problems under the Freedom of Information Act, recognized this serious problem. It carefully prescribed in Recommendation No. 24, circumstances under which an agency may, within a 10-day period for an initial request and a 20-day period for an appeal, advise the requester of reasons for delay and of the anticipated date on which a determination to release or withhold will be made.

The reasons available under Recommendation No. 24 for failure to make a substantive determination within the prescribed time limits cover the vast majority of situations in which delay by an agency is likely or inevitable. We, therefore, recommend that the bill be modified to incorporate the more realistic and workable "Principles and Guidelines for Implementation of the Freedom of Information Act" contained in Recommendation No. 24, as they relate to the time for replying to requests for records if statutory time limitations are considered necessary. Failure to adopt such a modification would, if the bill were enacted into law, result in a serious disruption of the work of any agency which conscientiously attempts to meet the unrealistic time limitations proposed. Moreover, the net effect of unrealistic time limitations for agency processing of requests will probably be a great increase in litigation. It is unlikely, in our view, that a requester will be better served by an earlier opportunity for litigation which shifts the burden to a court for evaluation of his request than by a more reasonable time period for an agency evaluation that may well result in an administrative determination to release the requested record.

Lack of agency experience with time limitations for answering Freedom of Information Act requests, however, makes questionable any statutory requirement. Some of the reasons for excusable delay listed in Administrative Conference Recommendation No. 24 may prove to be justified, whereas other reasons not recognized in that Recommendation may prove compelling. We, therefore, agree with the American Bar Association position that the agencies should be

given a reasonable opportunity to effect such requirements by regulations which can be modified readily to reflect the lessons of experience. Consistent with that approach, a revision of the Department of Defense Freedom of Information Directive is currently being coordinated with the military departments and other components of the Department of Defense. This revision incorporates the substance of Recommendation No. 24, along with additional changes that are responsive to recommendations of this Subcommittee and others in Congress.

The proposed requirement that a requester must file an appeal from the initial denial of a record by an agency within 20 days of receipt of notice of the denial is undoubtedly intended to facilitate timely agency processing of such requests. Although we agree that appeals should be filed promptly while the issues are fresh and relevant files are readily available, it is unclear that failure by the requester to meet the time limit will prevent him from initiating an entirely new request for the same record which an agency would be required to reprocess. In other words, we doubt the effectiveness of the proposed language as a realistic limitation on requesters. If the intent is to bar a requester from making any further efforts to secure a denied record when he has failed to appeal the denial within 20 days, a provision to this effect should be added to the bill. The Department of Defense, however, does not favor such a restriction on citizens, as it could prove particularly troublesome to those without the resources to hire legal counsel.

Fourth, the bill, by amending the third sentence of section 552(a)(3), would expressly incorporate a requirement that courts in hearing complaints to force the release of agency records examine the contents of the withheld records in-camera to determine whether an agency has sustained its burden of demonstrating that the record falls within one of the exemptions of the Freedom of Information Act. More specifically, it would also add a requirement that any record withheld under 5 U.S.C. 552(b)(1) in the interest of national defense or foreign policy of the United States be investigated in-camera by the court for the purpose of determining whether it properly falls within the criteria of that exemption.

The Department of Defense opposes this proposal to prescribe the methods by which the courts can evaluate an agency's determination that a requested record comes within one of the express exemptions of the Act. If the judge is satisfied by affidavits, depositions, or testimony, that a requested record is exempt, he should not be required to examine that record in-camera. Such a procedure has been described by at least one Federal District Court judge (Gerhard A. Gesell) as "entirely foreign to our traditions," because the papers placed in the hands of the judge for his private *ex parte* inspection are excluded from the eyes of the litigants (*Moss* v. *Laird*, D.D.C., Civil Action No. 1254–71, Dec. 7, 1971). Moreover, there is considerable doubt that the experience and background of a judge is adequate to evaluate the impact of a record on the national defense or foreign policy of the United States, even if he is given detailed *ex parte* background briefings closed to those seeking the record. Responsibility for protection of executive branch records is a Presidential responsibility. Executive Order 11652 has carefully set forth the bases for security classification of documents for the protection of records from public disclosure when their revelation would be contrary to the interest of the national defense or foreign relations of the United States. The terms of this Executive Order must be carefully complied with by each agency, so that the proper role of the courts is to insure, as indicated in *Environmental Protection Agency* v. *Mink* (93 S. Ct. 827 (1973)), that the document has been designated for such protection in accordance with the provisions of that Executive Order.

In other kinds of litigation the courts have long recognized the right of agency heads to decline to produce classified or other privileged information sought through the discovery process when its continued protection is deemed essential by the head of the agency. His determination is evidenced by the filing of a suitable affidavit (see *Reynolds* v. *United States*, 345 U.S. 1 (1953)). In our view, this is the proper posture for the courts to assume and is generally consistent with operating responsibilities of the Department of Defense.

Fifth, the bill would require the United States to file an answer to any complaint filed under the Freedom of Information Act within 20 days after service upon the United States Attorney of the pleading in which such complaint is made. Apparently, the intent is to require the answer to be filed within 20 *calendar* days since no exclusion of Saturdays, Sundays, and holidays (as expressly provided in other sections of the bill dealing with time limitations), is men-

tioned in this section. In addition, reasonable attorney fees and other litigation costs may be charged against the United States by the court in any case in which the requester prevails in his effort to obtain release of a record.

The Department of Defense strongly opposes the proposed requirement for filing an answer within 20 days of the receipt of the complaint. Such a time limitation is totally impracticable in a large department where such suits may be filed anywhere in the United States and where delivery time for mail and other inevitable administrative processing often will prevent knowledgeable, responsible officials within this department from even being aware that the suit has been filed before the passage of 20 calendar days. Moreover, even in those cases in which an answer can be filed with the court within the time limit, this will mean a higher priority for all Freedom of Information cases than for any other type of case. We do not believe that there is justification for discriminatorily favorable treatment for every Freedom of Information case. Such priority attention for these cases will severely disrupt the orderly administrative processing of other litigation that may be more significant to the public, the Congress, or the Department of Defense.

Under the current provisions of section 552(a)(3), courts have authority to give precedence on the docket over all other cases to those Freedom of Information Act requests which merit such favored consideration. Hearing and trial of such cases is authorized at the earliest practicable date and they are to be expedited in every way, except as to causes of action the court considers of greater importance. This appears to offer all of the authority necessary for prompt judicial attention to Freedom of Information litigation that merits such treatment, and has the great advantage of flexibility that permits the exercise of judgment by the court on difficult issues of relative priorities.

Moreover, the requirement in the bill that the answer be filed within 20 days of the receipt of the complaint does not insure any more expeditious hearing and trial than is authorized under current law. It simply makes unlikely sufficient opportunity for the preparation of a careful and thoroughly considered answer. Thus, more of the burden falls on the court to develop and evaluate all of the information and arguments that should properly be considered in agency evaluation of the issues raised.

Authority in the court to assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in Freedom of Information cases in which the requester prevails is objectionable to the extent it promotes unnecessary litigation. The already over-burdened court system should not be further hampered by Freedom of Information cases brought by citizens encouraged to gamble on litigation with the hope that its costs will be assessed against the United States. The discipline of paying these costs which prevails under the current practice tends to insure that only requesters with a substantial public or private interest will initiate litigation. The proliferation of public interest law firms and other sources of legal assistance to private citizens without private resources necessary to bring litigation has gone a long way toward guaranteeing a "day in court" to those with legitimate disagreements with the agencies on Freedom of Information Act interpretations relative to documents of general public interest.

Moreover, it has been clearly demonstrated that almost all litigants under the Freedom of Information Act seek the records for purposes of private exploitation which frequently is profitable. On the other hand, agency resistance to production of records is sometimes pursuant to a supposed legal obligation to protect private interests under an express or implied understanding with the agency. Trade secrets come to mind as an obvious example. In such cases, no broad public interest in the records is likely to exist. Consequently, the expenditure of public funds to secure release of the records through court action would be difficult to justify, even though the agency misinterpreted its obligation under the law. Therefore, we would hope that if such an amendment is adopted, that the legislative history emphasize a Congressional desire that the courts not exercise their discretionary authority to award costs to the successful complainant in this kind of case.

Sixth, Section 2 of the bill contains several substantive modifications of subsection (b) of section 552, title 5, United States Code, which sets forth the exceptions to the general requirement for the public availabiliy of all agency records. The first of these proposed modifications would limit subsection 552(b)(2) to records relating solely to the "internal personnel practices" of an agency

and thereby presumably exclude from the exemption records concerning other internal practices. The Department of Defense objects to this because there are certain "internal practices" not involving personnel that should be exempted from the public disclosure requirement.

Internal practices include practices such as the techniques for auditing Government contracts contained in a document known as the *Defense Contract Audit Manual*. The sole function of this *Manual* is to furnish guidance to Defense Contract Audit Agency auditors on how to conduct effective audits of Government contractors' records. While the *Manual* is thus related solely to the Defense Contract Audit Agency's "internal personnel rules and practices" for carrying out their auditing functions, it could not be properly described as a record relating solely to "internal personnel practices" under the proposed amendment. Yet, its disclosure would seriously harm and unduly impede the Defense Contract Audit Agency's functioning in the interests of the taxpayer. Similarly, various publications concerning negotiating and bargaining techniques, bargaining limitations and positions, or inspection schedules and methods, may not qualify as records "related solely to the internal personnel practices" of the Department of Defense. Nevertheless, their continued protection from public disclosure is essential in many cases to fulfilling the agency's responsibilities for the public's business.

We believe that the proposed limitation on the use of this exemption to those records "the disclosure of which would unduly impede the functioning of such agency" would be sufficient to protect against any abuse of an exemption to protect both "internal personnel rules and other internal practices." There is no need for such language however, since the courts in fact apply such a factor in this type of case. If, therefore, any change is made in 5 U.S.C. 552(b)(2) it should be one to clarify the right of agencies to protect records "related solely to the internal practices" that are followed to insure the proper functioning of the agency.

Seventh, the proposed modification of subsection (b)(4), section 552, appears to be editorial and accurately reflects the interpretation which the Department of Defense has made of this exemption insofar as it applies to commercial, financial, and trade secret records. We believe, however, that the exemption, as presently worded, and particularly as it would be worded under the proposed modification, does not constitute authority to fulfill the expressed congressional intent of permiting all citizens to communicate with their government in confidence. The legislative history of P.L. 89–487 supports the view that Congress intended to include within this exemption the traditional evidentiary privileges such as priest-penitent, doctor-patient, lawyer-client, etc., and to permit a citizen to provide directly to federal agencies information in confidence about any matter of legitimate official concern. The use of the terms "trade secrets" and "commercial or financial information" implies a limitation on the kinds of subjects which are guaranteed this confidentiality. It would, for example, be difficult to imagine circumstances in which the doctor-patient privileges would fall within the normal interpretation of those terms.

Similarly, there is information which will be conveyed to the agency only in confidence, even by its own employees. Some agency operations, accident investigations, and other matters of proper concern to the agency, not necessarily involving "commercial or financial information" or "Trade secrets," may benefit from confidential communication from private citizens or employees. Much of this information, however, is probably not protectible as part of a law enforcement investigation record. Yet, few would argue that such communications should be discouraged by the inability to assure confidentiality. Consequently, we recommend that the exemption be expanded by the addition of a phrase "and other information received by the agency in confidence for the purpose of fulfilling an official responsibility."

Eighth, the proposed amendment of section 552(b)(6) would make it clear that protection for personnel, medical, and similar "files," applies only to personnel, medical, and similar "records" in those files, and not to other kinds of records that may be in such files. This is consistent with the interpretation the Department of Defense has always given to this exemption; we, therefore, see no need for the amendment.

Ninth, the suggested revision of subsection (b)(7) of 5 U.S.C. 552 is not an improvement in either the clarity or effect of that exemption. The insertion of the word "specific" before the term "law enforcement purposes" does little, if anything, to define or limit the intended scope of the exemption. Presumably, any investigation for a law enforcement purpose must have some specific objective in

mind. We are left with the question of how specific a "specific purpose" must be. If the intent is to limit the exemption to situations in which the investigation is intended to culminate in a decision whether to commence an administrative or judicial action against an individual, corporation, or other organization, then further clarification of the language is necessary.

However, we would not be in favor of such a change because it would further limit the flexibility now available to the agencies which require some discretion in determining which matters should be protected under the investigatory file exemption.

More importantly, the Department of Defense strongly objects to the proposed addition of subsection (b)(7)(B) that would remove the investigatory record exemption from scientific tests, reports, or data; from inspection reports which relate to health, safety, and environmental protection; and from all investigatory records which serve as a basis for an agency's public policy statements or rulemaking. Although no definition of "scientific" is given, we would have considerable concern under this modified language about the authority to protect from public disclosure various laboratory tests, polygraph reports, and similar records which may have been developed for the purpose of determining whether law enforcement action is justified. Release of this material to "any person" could unfairly and unnecessarily damage the reputation of the subject of an investigation and would provide nothing of legitimate concern to anyone other than the subject of the investigation and the agency performing it.

Similarly, inspection reports conducted by agencies for the purpose of law enforcement actions related to health, safety, and environmental protection should not be generally available to the public, particularly when the result of such a report does not justify a contemplated punitive law enforcement action. These reports, especially when read out of context, and without benefit of the entire background of the investigation, could be unfair to the subject of the investigation and mislead the public.

The requirement that investigatory records which serve as a basis for public policy statements or rulemaking by an agency be made available to the public has considerable appeal, but seems misplaced in this context. We would agree that that agency should be prepared to reveal the basis for a public policy statement or rulemaking no matter what its source may be. We do not believe, however, that all investigatory file records should necessarily be made available to the public when they constitute some basis for a public policy statement or rulemaking by the agency if a self-sufficient rationale for such action is disseminated by the agency. If, for example, an investigation of a conflict of interest situation concerning a government employee leads to the determination by the agency that it must strengthen its regulation governing conflicts of interest or must issue a public policy statement concerning power conduct by its employees, we do not believe that this justifies a revelation of all of the records in the investigatory file concerning the particular employee whose conflict of interest situation may have stimulated the action. We, therefore, recommend that any provision deemed necessary to require an agency to reveal the basis for its public policy statement or rulemaking be inserted in section 553 of title 5 U.S.C. or in section 552(a)(1)(D).

Tenth, the provision in Section 3 of the bill that agencies shall furnish information to Congress and its committees upon written request is consistent with the current policy established by President Nixon in his memorandum of March 24, 1969, to the Heads of Executive Departments and Agencies, and by the Statement by the President dated March 12, 1973. To the extent the proposed Section 3 is intended to modify the procedures set forth by the President, and based on his Constitutional prerogatives and responsibilities, it would, of course, be ineffective.

Eleventh, Section 4 of the bill would require each agency to maintain complete statistics on the number of requests for records made to the agency under the Freedom of Information Act, the number and reasons for refusals to provide requested records, the number of appeals from such initial refusals, the number of days taken by agencies to answer initial requests and appeals of denials, and the number of complaints received from citizens about agency compliance with the Act. This information, along with a copy of any rule made by each agency implementing the Freedom of Information Act, and other information regarding efforts to administer section 552, are to be submitted on or before March 1 of each calendar year to the Committee on Government Operations, House of Representatives, and to the Committee on Government Operations, United States Senate.

The Department of Defense believes that a requirement to keep accurate statistics on all requests for records made to this Department would be virtually impossible, and to the extent we could comply, useless, if not misleading. It must be assumed that any request for a record is made under the Freedom of Information Act. Otherwise, we would be obliged to try to distinguish among requests on the basis of whether it contained some specific reference to the Act, or attempt to determine by some other means on what basis the request was made.

Of the thousands of requests made to the Department of Defense each year for copies of records, the vast majority are satisfied without any Freedom of Information Act issue being considered. It is only in a relatively small percentage of cases that any serious issue arises on whether the information should not be provided because a significant and legitimate governmental purpose requires withholding and because an exemption of the Act authorizes withholding. It has been, and remains, our position that monitoring these exceptional circumstances provides a better picture of the Department's compliance with the letter and spirit of the Freedom of Information Act, and consequently, we believe that statistics on these exceptional cases are most likely to prove meaningful to the Congress.

At a time at which we are attempting to decrease the amount of unnecessary paper work and record-keeping, we strongly urge that any statutory requirement for record-keeping by the agencies on Freedom of Information Act requests be limited to those cases in which a record has been refused initially or on appeal. If the proposed subsection (d)(1) were deleted and subsection (d)(4) were modified to require computation of processing time only when requests for records are refused, these particular objections would be mitigated. A preferable alternative, however, would be a formal request from interested Congressional committees that statistics on Freedom of Information cases be maintained and submitted to them periodically. Modification in the requirement could be made far more readily than a statutory change, and this would encourage flexible response to a continuing evaluation of the utility of the data.

Twelfth, if extensive changes in the Freedom of Information Act, such as those proposed in this bill are enacted, we believe, on the basis of past experience, that ninety days does not offer enough time for worldwide agency implementation. Consequently, we recommend that Section 5 be modified to extend the effective date to the "one hundred and eightieth day after the date of enactment."

Although the tenor of this report has been largely negative, we believe that continuing efforts by Congress to study the provisions of the Freedom of Information Act are highly desirable as a means of responding to growing experience with its operation. There are numerous other aspects of the administration of the Freedom of Information Act which we believe could be improved. and we stand ready to assist the Committee in offering whatever information on our experience and problems with the Act that it may request. We are constrained to add, however, that much of H.R. 5425 would not promote such improvements.

The Office of Management and Budget advises that from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

J. FRED BUZHARDT.

FEDERAL MARITIME COMMISSION,
Washington, D.C., June 15, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Federal Maritime Commission with respect to H.R. 535 and H.R. 5425, bills to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Inasmuch as H.R. 535 appears to be superseded by H.R. 5425, our comments are specifically addressed to H.R. 5425. The bill would in effect assure the public greater access to records and formulate specific procedures for making information available. The bill would provide for both administrative and judicial reme-

dies to obtain the information where the agency's denial of a request appears unjustified.

The Federal Maritime Commission endorses the ideology of the Freedom of Information Act. We are not convinced, however, of the need for H.R. 5425. In the event your Committee, after hearing, should determine to act favorably on this legislation, we urge that the following be taken into consideration.

We oppose any attempt to allow indiscriminate access to information the disclosure of which is prohibited by section 20 of the Shipping Act, 1916 (46 U.S.C. 819), the administration of which this Commission is charged.

H.R. 5425 would amend subsection 552(b)(7) of title 5, U.S. Code by adding several new provisions, including subsection 552(b)(7)(B)(iii).

This provision would require access to information upon which any public policy statement is based when made by the Commission, or an official or employee thereof, or which serves as a basis for rulemaking. This provision appears to be in conflict with title 5, U.S. Code, 552(b)(5) which specifically exempts inter-agency or intra-agency memorandums or letters from disclosure to any party other than another agency in litigation with the Commission. We would oppose any amendment which would have the effect of eliminating this exemption.

Proposed subsection 552(d)(1) to title 5 would require the Commission to maintain extensive records of requests for records made, and to report to Congress the number of such requests filed annually. The Commission currently maintains records on *denials* of requests based upon the Freedom of Information Act and the pertinent information relating to such denials. However, thousands of requests are made annually for such records as described in title 5, U.S. Code, 552(a) which are routinely granted. It would appear that the benefit sought by proposed subsection 552(d) is to monitor the relatively few agency *denials* of requests and the reasons therefor, and not the multitudinous instances where requests are granted. We, therefore, oppose this provision insofar as it pertains to maintaining records and reporting instances in which access to Commission records are granted.

Finally, the proposed amendments to subsections 552(a)(3) would require the court to examine *in camera* any agency records to determine if such records should be withheld under any of the criteria set forth in subsection 552(b).

It is our view that the judiciary should be allowed discretion in the determination of which records should be so examined. Accordingly, we recommend that paragraph (d)(1) of Section 1 of the bill be stricken. Appropriate conforming revision should be made in paragraph (d)(2) of Section 1.

The Office of Management and Budget has advised that there would be no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

HELEN DELICH BENTLEY,
Chairman.

BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,
Washington, May 23, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for the opportunity to present the Board's views regarding H.R. 5425, a bill to amend section 552 of Title 5 of the United States Code, known as the Freedom of Information Act.

In general, the Board supports the objectives of the proposed amendments to the Freedom of Information Act and has no objections or reservations with respect to those amendments except as hereinafter indicated.

Section 1(c) of the bill would provide specific time limits for determination by an agency as to whether it should comply with a request for records and for determinations with respect to an appeal from an agency's denial of an access to records. Although the Board is in sympathy with the purposes of this provision, it feels that it should be amended to permit an agency, upon notice to the requester, to defer such determinations beyond the periods specified if there is reasonable ground for doing so. Such a provision for deferment of determinations in exceptional cases is included in recently adopted amendments to the rules of the Department of Justice relating to the production or disclosure of information.

Section 2(d) would amend paragraph (7) of section 552(b) of Title 5 of the U.S. Code, relating to the exemption of investigatory records from disclosure, to require such records to be made available in any case in which they serve as a basis for a public policy statement by the agency or serve as a basis for rule making. The Board questions whether this requirement is necessary. There could be instances in which disclosure of records compiled in the course of a law enforcement proceeding would hamper the effectiveness of such proceedings, even though such records might form a part of the background for subsequent public policy statements or rule making proceedings by the agency.

We hope the foregoing comments will prove helpful to you in the consideration of this matter. Please let me know if we can be of further assistance.

Sincerely yours,

ARTHUR F. BURNS.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., April 11, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations,
House of Representatives.

DEAR MR. CHAIRMAN: Your letters of January 12 and March 16, 1973, requested our views on H.R. 5425, a bill to amend section 552 of title 5, United States Code, known as the Freedom of Information Act. This is to advise that we have no comments to offer.

Sincerely yours,

PAUL G. DEMBLING,
For the Comptroller General of the United States.

GENERAL SERVICES ADMINISTRATION,
Washington, D.C., May 25, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: With respect to your letter of March 16, 1973, requesting the views of the General Services Administration on H.R. 535 and H.R. 5425, 93d Congress, similar bills to amend section 552 of title 5, United States Code, known as the "Freedom of Information Act."

The bills would make certain clarifying and technical amendments to the Act; provide additional detail regarding time periods for replying to requests for information, filing appeals, and deciding appeals; and require annual reports from agencies providing certain statistics relevant to requests for information.

GSA defers to the views of the Department of Justice, the agency which administers the Freedom of Information Act, on the merits of the bills.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,

ALLAN G. KAUPINEN,
Assistant Administrator.

U.S. POSTAL SERVICE,
LAW DEPARTMENT,
Washington, D.C., June 11, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Postal Service on H.R. 5425, "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act." This bill would tighten several of the exemptions to the Freedom of Information Act and make numerous changes in the rules for its administration.

The Postal Reorganization Act generally exempts the Postal Service from Federal laws dealing with agency operations, 39 U.S.C. § 410(a), but 39 U.S.C.

§ 410(b)(1) specially applies the Freedom of Information Act, 5 U.S.C. § 552, to the Postal Service, subject to the limitations in 39 U.S.C. § 410(c). Under a well-known canon of statutory construction, subsequent amendments to specifically incorporated statutes do not affect the incorporating statutes. See 2 J. G. Sutherland, Statutes and Statutory Construction § 5208 (3d ed. 1943). In accordance with this principle, H.R. 5425, if enacted in its present form, would not apply to the Postal Service.

Naturally, the amendments would apply to the Postal Service if H.R. 5425 contained a provision specifically stating their applicability to the Postal Service or if the bill contained an amendment to the Postal Reorganization Act incorporating the provisions of the bill into that Act. Since the enactment of the Postal Reorganization Act, Congress has consistently inserted specific references to the Postal Service in bills it wished to apply to the Postal Service. Examples are H.R. 1746 and S. 2515, 92d Cong., 1st Sess. (P.L. 92-261), the "Equal Employment Opportunity Act of 1972", and H.R. 11021 and S. 3342, 92d Cong., 2d Sess. (P.L. 92-574), the "Noise Control Act of 1972."

If it is the intention of Congress to apply H.R. 5425 to the Postal Service, the bill should be amended by the addition of specific language accomplishing this result. The amendments to § 552 contained in H.R. 5425 would then be applicable to the Postal Service, to the same extent as is the present version of the section specifically incorporated in the Postal Reorganization Act.

Because of the qualified nature of the application of § 552 to the Postal Service, 39 U.S.C. § 410(c), and in view of the nature of most of the proposed changes and the generality of their application, we would generally defer to Congress on the policy issue of whether changes in the law should be made at this time. We object, however, to one proposed change, the new sentence that § 1(e) of the bill would add to § 552(a)(3) allowing successful litigants to recover "reasonable attorney fees and other litigation costs reasonably incurred." Instead of adding to the effectiveness of the Freedom of Information Act by permitting individual citizens or public interest groups to obtain information from the Government in an expeditious manner, we fear that this provision would be more likely to encourage preliminary "fishing expeditions" by concerns able to afford the cost of litigation, such as those that are already contemplating contract or other litigation against the Postal Service. Congress has not found it wise to encourage litigation of other types by holding out the prospect of reimbursement for legal fees, and there would seem to be no reason to single out this area of the law for special treatment.

In our opinion, moreover, this provision would be inequitable, in the absence of a concomitant opportunity for agencies to recover litigation costs when they are successful. Application of this one-sided proposal to the Postal Service would be particularly unfortunate, in view of the generally self-sustaining charter under which the Postal Service operates. It would be anomalous to force the Postal Service to underwrite the legal fees of its adversaries, yet deny the Postal Service all opportunity to recover its own costs, regardless of the outcome of the litigation.

The stated purpose of this amendment would be to allow litigation costs "when attempts to obtain records under provisions of the Act are frustrated by arbitrary or capricious acts of the bureaucracy or by foot-dragging tactics." 119 Cong. Rec. S4156 (daily ed. March 8, 1973). Although we believe the best approach would be to delete the litigation costs provision altogether, we suggest, at a minimum, that the requirement for arbitrary or capricious acts or delays as a precondition to allowing such costs be written into the bill itself, rather than left to legislative history.

Sincerely,

ROGER P. CRAIG,
Deputy General Counsel.

SMALL BUSINESS ADMINISTRATION,
Washington, D.C., June 13, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will reply to your letters of January 12, 1973, and March 16, 1973, requesting the views of the Small Business Administration (SBA) on H.R. 535 and H.R. 5425, respectively, bills to amend 5 U.S.C. 552,

The Freedom of Information Act. Our comments are keyed to the sections of H.R. 5425 since it is the more comprehensive bill and contains all the provisions of H.R. 535.

Section 1(a) would require agencies to publish promptly and distribute (by sale or otherwise) copies of a current index providing identifying information for the public as to opinions, orders, statements of policy, interpretations, staff manuals and the like issued, adopted, or promulgated after July 4, 1967. Under current law such an index must now be made available for public inspection and copying. Unless there is a compelling need for this proposed change, we have serious doubts that the administrative burden and expense of maintaining a "for sale" inventory of such an index, particularly a continually changing one, could be justified.

Section 1(b) reduces the degree of particularity with which a person must identify a record by requiring only a reasonable identification of the record. We favor this change.

We question the desirability of firm time limits for agency responses to requests for records and to appeals of denials of requests, believing that requests of any kind made of a Government agency, whether under this law or any other law, should be handled as expeditiously as possible. There is always the danger that time limits become the norm. But there is also the danger that setting a priority of treatment for one aspect of an agency's activities will make other responsibilities of an agency seem less important and not deserving of equally prompt treatment.

Section 1(d) would apparently counter the January 23, 1973, decision of the Supreme Court of the United States in *Environmental Protection Agency* v. *Mink* by permitting in camera examination of agency records by the courts. Since records required by Executive Order to be kept secret in the interest of the national defense or foreign policy are generally outside of the jurisdiction of this agency, we defer to the views of those agencies more properly concerned on this point. With regard to nonclassified records, we believe that the Supreme Court decision provided a reasonable middle ground, first giving the agencies a reasonable opportunity to demonstrate to the court by means short of an in camera inspection (e.g., detailed affidavits or oral testimony) that the records are clearly beyond the range of material that would be available to the requester.

Section 1(e) reduces the time available to the United States for answering complaints to 20 days and makes the United States subject to reasonable attorney fees and litigation costs where it does not prevail. Although our initial reaction is to consider 20 days too brief a period, we defer to the views of the Department of Justice which is responsible for litigation involving this agency.

Section 2(a) would further limit the exemption from disclosure for matters relating to internal personnel rules and practices of an agency by having the word "personnel" expressly modify practices as well as rules. We do not favor this change. It does not protect from disclosure manuals and other instructions to agency staffs governing enforcement methods which, if disclosed, would defeat the valid objective of inducing voluntary compliance. If agencies must reveal classes or types of violations which are left undetected or unremedied because of limited resources some persons will be encouraged to disregard laws and regulations.

Such a change might also adversely affect policies or instructions setting out guidelines to determine the circumstances under which the Government would be willing to compromise obligations owing to it. Other sensitive information might include negotiating techniques for contracting officers, schedules of surprise audits and inspections, and similar matters.

Section 2(b) would change the language of the fourth exemption under the Freedom of Information Act so as to limit it to trade secrets, commercial information, and financial information, all of which must also be privileged and confidential. There is widespread difference of opinion on the reach of the present law, with some support for the proposition that it includes information which is not commercal, financial, or trade-secrets and which private individuals would wish to keep confidential for their own purposes. We favor this broader view of the fourth exemption and prefer to see language formulated to clarify the broader exemption. It may be that the third exemption already provides necessary protection for trade-secrets and commercial and financial information inasmuch as it can be read as incorporating by reference the provisions of 18 U.S.C. 1905. In any event, there is a need to dispel the doubts as to the effect of 18 U.S.C. 1905

caused by the decision in *Schapiro* v. *Securities and Exchange Commission*, 339 F. Supp. 467 (D.D.C. 1972).

Section 2(c) seems to restrict the sixth exemption, which now covers personnel, medical and similar files, by substituting "records" for "files." If we understand the effect of the change, it removes from the exemption certain records within a file the disclosure of which would not involve an unwarranted invasion of personal privacy, even though the file as a whole is exempt. We have no objection to this change. However, this exemption should be broadened to include a prohibition against the release of mailing lists of employees, agency clientele, advisory council members, and the like for purposes of commercial or other solicitation.

Section 2(d) amends the seventh exemption so that such matters as scientific tests, reports, or data, inspection reports relating to health, safety, or environmental protection, or records underlying public policy statements or rulemaking by an agency would not be exempt even though contained in investigatory records. We oppose such a sweeping change in the language of this provision, preferring to let a workable interpretation of its scope evolve through the courts which constantly deal with this kind of problem.

We are not clear on the effect of adding the word "specific" so as to exempt from disclosure "investigatory records compiled for any specific law enforcement purpose." Hopefully, an investigatory record would not lose its identity for purposes of the Freedom of Information Act because the Government decided not to pursue an enforcement action or because an enforcement action had already been completed.

Section 3 which relates to Congressional requests for information raises constitutional questions on which we defer to the Department of Justice.

Section 4 imposes a detailed annual reporting requirement upon agencies in order to demonstrate efforts to administer the Freedom of Information Act. While we have no objection to a reporting requirement, we believe that it is not practicable to determine "the number of requests for records made to such agency under subsection (a)." Agencies probably furnish on a fairly routine basis all kinds of information which would have to be reported. This can create a needless administrative burden unless a precise definition is formulated to define and limit what is a request for information under the Freedom of Information Act. We believe the formulation of a reasonably workable definition presents some difficulty. Reviewing agency refusals to disclose and the reasons for the refusals may well provide a reasonably satisfactory basis for evaluating administration of the law.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

THOMAS S. KLEPPE,
Administrator.

DEPARTMENT OF STATE,
Washington, D.C., June 6, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations,
House of Representatives.

DEAR MR. CHAIRMAN: The Secretary has asked me to reply to your letter of March 16, 1973, requesting a report by the Department of State on H.R. 5425, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act".

Section 1(a) of the bill would amend 5 U.S.C. 552(a)(2) to require the publication and distribution of a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by 5 U.S.C 552(a)(2) to be made available or published. The Department of State has a relatively low volume of material so required to be made available or pubilshed, and consequently indexed. Therefore, it would defer to other agencies with large volumes of such material as to the feasibility of requiring publication of a current index.

Section 1(b) of the bill would amend 5 U.S.C. 552(a)(3) to revise the present requirements governing a request for records to require that the request only "reasonably describe" the records, rather than be a request for "identifiable records". The Department of State believes that under its existing procedures, any

request which reasonably describes records sought is considered to be a request for identifiable records, and has no objection to this revision but sees no need for it.

Section 1(c) of the bill would amend 5 U.S.C. 552(a) further by adding a new paragraph which requires the agency receiving a request for records to decide within ten working days whether to comply with the request and to immediately notify the requester of its decision and the reasons. The new paragraph would also require the agency which decides not to comply to immediately notify the requester that he has twenty working days from receipt of the notice to appeal the decision within the agency and require the agency to decide on any appeal within twenty working days from receipt of the appeal. The new paragraph also provides that failure of the agency to meet the time limits either for initial decision or decision on appeal shall be considered as exhaustion of administrative remedies by the person requesting records. The Department of State believes that it is important to have speedy decisions on requests for documents, but experience, especially recent experience, shows that many requests are for such voluminous records—numbering in the hundreds or even thousands of pages—that meaningful review for purposes of decision within any specific time period is not physically possible. The Department would therefore oppose this provision of H.R. 5425 as unworkable.

Section 1(d) of the bill would amend 5 U.S.C. 552(a)(3), relating to judicial review, to provide for the reviewing court to examine the contents of agency records in camera to determine if the records or any part of them shall be withheld under exemptions in 5 U.S.C. 552(b) and specifically would direct such a review for cases under 5 U.S.C. 552(b)(1) relating to classified information. The Department of State believes that court review in camera in the area of records bearing a security classification is inappropriate. Courts have traditionally refrained from reviewing the conduct of foreign affairs as something peculiarly within the responsibility and competence of the Executive. Under Executive Order 11652, security classification depends upon whether disclosure could reasonably be expected to cause exceptionally grave damage to the national security (Top Secret), could reasonably be expected to cause serious damage to the national security (Secret), or could reasonably be expected to cause damage to national security (Confidential). The examples given in section 1(A), (B), and (C) of Executive Order 11652, however, illustrate the kind of foreign policy judgments that may be involved, and this provision of H.R. 5425, if enacted, would place courts in the position of reviewing substantive foreign policy judgments. This we believe would be a serious problem. We accept the decision of the Supreme Court, in *Environmental Protection Agency, et al* v. *Mink, et al* (January 22, 1973) that *in camera* inspection may be appropriate for the application of some exemptions but not for information classified pursuant to Executive Order.

Section 1(e) of H.R. 5425 also amends 5 U.S.C. 552(a)(3) to require the United States to answer any complaint to a court for review of non-disclosure within twenty days after service upon the United States attorney and for assessment of costs against the United States in cases where non-disclosure is not upheld. The Department defers to the Department of Justice on this provision, but notes the point made earlier about the impossibility of adequately reviewing requests for large numbers of records within a period of ten days for initial decision and twenty days on appeal.

Section 2(a) of H.R. 5425 would amend 5 U.S.C. 552(b)(2) to exempt from disclosure only those internal personnel rules and practices of an agency the disclosure of which would unduly impede the functioning of such agency. The Department of State believes that to expose its internal instructions to its negotiators and to other personnel whose activities are conduced in arms lengh situations would unduly impede its functioning.

Section 2(b) of the bill would amend 5 U.S.C. 552(b)(4) to provide that only trade secrets obtained from a person which are privileged and confidential may be exempt from disclosure. The Department of State sees no need for this amendment.

Section 2(c) of the bill amends 5 U.S.C. 552(b)(6) to substitute "records" for "files." The Department has no objection to this amendment, in principle but believes its practical effect may tend to erode protection for individual privacy.

Section 2(d) of the bill amends 5 U.S.C. 552(b)(7), relating to investigative files, to attach several new conditions for exemption. The investigatory files of

this Department would appear to be unaffected by the new conditions, and we would defer to other agencies on this amendment.

Section 3 of H.R. 5425 would amend 5 U.S.C. 552(c) to require the furnishing of records to the Congress notwithstanding the exemptions in 5 U.S.C. 552(b). The Department opposes this amendment because it fails to take into consideration the constitutional power of the President to withhold information from Congress and its Committees in appropriate situations including some which pertain to the responsibilities of this Department. The Department believes that the proposed amendment, therefore, raises serious constitutional questions.

Section 4 of the bill would add a new subsection (d) to 5 U.S.C. 552 which would require each agency to report annually to the Government Operations Committee of the Congress on that agency's administration of the Freedom of Information Act. The Department has no objection to such a reporting requirement.

Section 5 of the bill defers the effect of the proposed amendments for ninety days. The Department believes that this is desirable.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely yours,

MARSHALL WRIGHT,
Assistant Secretary for Congressional Relations.

OFFICE OF THE SECRETARY OF TRANSPORTATION,
Washington, D.C., June 13, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your Committee has asked for the views of this Department concerning H.R. 535, [related to H.R. 5425] a bill "To amend section 552 of Title 5, United States Code, known as the "Freedom of Information Act."

This bill would impose additional procedural requirements on Government agencies in responding to requests for information and in making determinations on appeal; it would substantially narrow the present exemptions from mandatory disclosure; and it would require detailed record keeping as a basis for annual reports to Congress concerning each agency's activities under the Freedom of Information Act.

The Department is generally sympathetic to the broad purpose of the bill, which is to clear up present ambiguities in the Freedom of Information Act, and to make Government records available to the greatest extent possible. We are opposed, however, to the amendments as proposed, because they would create new ambiguities and increase the costs and administrative burdens on the Government to an extent not justified by any additional benefits the public might receive. Our objections to specific provisions are set forth below.

Section 1(a). The requirement for publication and distribution (by sale or otherwise) of the current index of all final agency orders, opinions, policy statements, interpretations, and staff manuals and instructions is unnecessary. The Department receives few requests for copies of the index, and the present system of maintaining a current index and making it available for public inspection and copying has served the public adequately without unduly burdening the Government.

Section 1(b). The proposal to change the requirement that a request be for "identifiable records", and require instead a request which "reasonably describes such records", would create new problems of interpretation. Moreover, the proposed language might provide a basis for withholding records because an agency determined that they were not reasonably described in the request.

Sections 1(c) and 1(d). The absolute requirement that an agency make its determination within 10 days after receipt of an initial request, make a determination wth respect to an appeal within 20 days after receipt of the appeal, and make its answer to a complaint in a court action under the Freedom of Information Act within 20 days after service of the complaint on the United States Attorney, is unnecessarily rigid.

Some flexibility is necessary for situations where the records initially requested are stored at other locations (such as field offices), where the request covers a substantial number of records, where the request is couched in categorical terms and requires extensive search, where the records are classified, or where unusual difficulties are encountered in locating the records. Most requests for records are complied with promptly, but in those cases where an exemption is involved, review may require evaluation by persons competent to determine whether the documents are exempt, and whether they should be released with appropriate deletions. Insufficient time to make an analysis as to whether an exempt document should be disclosed as a matter of policy might encourage agencies to rely on exemptions whenever available.

The requirements that an agency rule on an administrative appeal within 20 days, and file an answer to a complaint served on the United States Attorney within 20 days, are both unrealistic. In a large Department such as ours, with many operating administrations and many field offices, a final denial of a request, or an answer to a complaint, must be coordinated first within the administration immediately concerned, then with the Department's General Counsel, and then with the Department of Justice. In connection with the filing of an answer to a complaint, it is often necessary to prepare affidavits, draft legal memoranda and coordinate the proposed answer with both the Civil Division of the Department of Justice and the United States Attorney's office.

The Department is also opposed to the assessment of attorney fees against the United States in cases brought under the Freedom of Information Act in which the United States does not prevail. There is no reason to treat these cases differently from others in which the United States is a party.

Section 2(a). The proposed addition of the words "the disclosure of which would unduly impede the functioning of such agency" would create another problem of interpretation.

Section 2(b). The proposal to amend exemption (4) would unduly narrow the exemption and may be subject to the interpretation that non-commercial and non-financial information may be made available. We therefore oppose this section.

Section 2(d). This amendment would narrow the "investigatory files" exemption of 5 U.S.C. 552(b)(7). It would limit the exemption to "investigatory records compiled for any *specific* law enforcement purpose the disclosure of which is not in the public interest." We oppose such a change, since it would make available records compiled in the course of investigations which do not relate to specific enforcement cases. Pursuant to its legal mandate, the Department undertakes many investigations for law enforcement purposes without reference to a particular incident or violator.

This amendment appears to require disclosure of factual investigatory records regardless of whether an investigation is open or closed. It may also be undesirable to require disclosure even after the investigation is closed.

The amendment would except from exemption (7) scientific tests, reports or data, and inspection reports relating to health or safety. A number of Federal statutes give agencies law enforcement responsibilities that can be carried out only through scientific and technical testing. For example, the National Highway Traffic Safety Administration (NHTSA) enforces the Motor Vehicle Safety Standards by laboratory testing of sample vehicles. If NHTSA were compelled prematurely to disclose the results of its tests, particularly to motor vehicle manufacturers, the results would be a crippling of its enforcement program. A similar situation could arise in connection with the Bureau of Motor Carrier Safety inspection of motor carrier facilities and vehicles concerning health or safety. Since the "public" includes the motor carriers who are the subject of enforcement cases arising out of those inspections, the premature disclosure of the evidence in such inspection reports could frustrate our enforcement program.

Section 3. Proposed new subsection (d) would require agencies to submit annual reports to Congress on the number of requests for records received, the number of denials, the number of appeals, the number of days taken for initial determinations and for appeals, the number of complaints filed in court, etc. Compliance with this section would necessitate the establishment of special record keeping systems requiring field offices of agencies to route all action on requests for documents through a central Federal office. In our opinion it is desirable that agencies keep records of the number and basis of initial denials, appeals, and final denials, but we question the necessity or desirability for keep-

ing such detailed records of all requests routinely granted and for annual reporting, because of the burden placed on the Government in terms of time and money expended.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report to the Committee.

Sincerely,

JOHN W. BARNUM.

DEPARTMENT OF JUSTICE,
Washington, D.C., May 8, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN MOORHEAD: In accordance with the request of Congressman John R. Moss in his letter dated July 30, 1968, to Mr. Clifford Sessions, we are pleased to enclose herewith a list of suits filed under 5 U.S.C. 552 that are being handled by the Civil Division of the Department of Justice as of May 1, 1973.

Sincerely yours,

HARLINGTON WOOD, Jr.,
Assistant Attorney General.

A LIST OF SUITS FILED UNDER 5 U.S.C. 552 THAT ARE BEING HANDLED BY THE CIVIL DIVISION AS OF MAY 1, 1973

1. *Gilbert A. Cuneo and Herbert L. Fenster* v. *Robert S. McNamara and William B. Petty*, Civil Action No. 1826-67, D.D.C. (Defense Contract Audit Manual) (Defendants' Motion for Summary Judgment granted, January 1972). (Plaintiffs have appealed).

2. *Grumman Aircraft Engineering Corp.* v. *The Renegotiation Board*, Civil Action No. 1595-68, D.D.C. (Complaint alleges that the defendant Renegotiation Board refused to make available certain records for inspection and copying by plaintiff involving the adjudication of renegotiation cases for numerous listed companies) (Status: Government's motion to dismiss, or in the alternative for summary judgment granted November 4, 1968; March 1970, reversed and remanded by Court of Appeals; Opinion on remand filed April 26, 1971, Appeal pending from decision on remand).

3. *Edward Irons* v. *Schuyler*, D.D.C. Civil Action No. 75-70 (Plaintiff seeks "manuscript decisions" from Patent Office) (Status: Order dated October 23, 1970, required Patent Office to maintain index of unpublished manuscript decisions and otherwise granted defendant's Motion to Dismiss) (Affirmed and remanded by Court of Appeals June 15, 1972) (Plaintiff's petition for a writ of certiorari denied by Supreme Court, December 18, 1972). (Plaintiff has subsequently filed a motion to amend complaint in District Court).

4. *Marilyn Fisher, et al* v. *Renegotiation Board, D.D.C.*, Civil Action No. 342-70 (Suit to obtain Renegotiation Board excessive profits data) (Defendant's motion for summary judgment granted November 10, 1970) (Reversed and Remanded by Court of Appeals, November 1972). (Decision on remand favorable to defendant entered March 1973).

5. *Laurent Alpert, et al.* v. *Farm Credit Administration*, D.D.C., Civil No. 446-70 (Plaintiffs seek certain Farm Credit Administration loan records) (Status: Defendant's Motion for summary judgment granted June 1972). (Plaintiffs have appealed).

6. *Bannercraft Corp.* v. *Renegotiation Board*, D.D.C., Civil Action No. 1340-70 (Suit to obtain various Renegotiation Board records) (Administrative proceedings enjoined until documents sought filed for in camera inspection. May 1970). (Affirmed by Court of Appeals, July 1972) (Petition for a writ of certiorari granted).

7. *National Cable Television Assn., Inc.* v. *FCC*, D.D.C., Civil Action No. 1331-70 (Suit to obtain records allegedly pertinent to pending rulemaking proceeding and to enjoin the proceeding) (Status: Court of Appeals reversed District Court decision granting summary judgment for defendant, and remanded for further proceedings, April 17, 1973).

8. *Carolyn M. Morgan* v. *Food and Drug Administration, et al.*, D.D.C., Civil Action No. 1928-70 (Plaintiff seeks records of clinical and toxocological tests

of various birth control pills) (Status: Defendant's Motion for Summary Judgment granted July 6, 1971). (Plaintiff has appealed).

9. *David B. Lilly Corp., et al.* v. *Renegotiation Board,* D.D.C., Civil Action No. 2055–70. (Suit to obtain records allegedly pertinent to pending administrative proceeding and to restrain the proceeding) (Status: Preliminary injunction restraining administrative proceedings entered August 1970) (Affirmed by Court of Appeals, July 1972). (Petition for a writ of certiorari granted).

10. *Harold Weisburg* v. *Department of Justice,* D.D.C., Civil Action No. 2301–70. (Suit to obtain spectographic analysis constituting part of FBI investigation file pertaining to assassination of President Kennedy) (Status: Defendants' Motion to Dismiss granted November 1970). (Petition for rehearing following Court of Appeals decision pending).

11. *Astro Communications Laboratory* v. *Renegotiation Board,* D.D.C., Civil Action No. 2403–70. (Suit to obtain many records and enjoin Renegotiation Board proceeding) (Status: Preliminary injunction restraining Renegotiation Board proceeding entered August 1970) (Affirmed by Court of Appeals and appeal dismissed July 1972) (Petition for a writ of certiorari granted).

12. *Harold Weisburg* v. *General Services Administration, et al.,* D.C. Civil No. 2549–70. (Suit allegedly under 5 U.S.C. 552 to order the National Archives to permit plaintiff to examine the clothing worn by President Kennedy at the time of his assassination, to permit plaintiff to photograph same, and to declare transfer agreement void) (Status: Dismissed, June 1971). (Plaintiff has appealed).

13. *Committee to Investigate Assassinations, Inc.* v. *U.S. Department of Justice,* D. D.C., Civil No. 3651–70. (Suit to obtain FBI file compiled as the result of its investigation of the assassination of Senator Robert F. Kennedy). (Status: Defendant's Motion for Summary Judgment granted July 29, 1971). (Plaintiff has appealed).

14. *Mary Helen Sears* v. *Schuyler,* E.D. Va., Civil No. 521–70–A. (Suit to obtain access to all abandoned U.S. patent applications) (Status: Decision favorable to defendant entered April 1973).

15. *James L. Hecht* v. *Department of the Interior,* E.D. Va. Civil No. 345–71–R. (Plaintiff seeks National Park Service records pertaining to motor vehicle accidents). (Status: Dismissed).

16. *American Manufacturing Company of Texas* v. *The Renegotiation Board,* D. D.C., Civil No. 1246–71. (Plaintiff seeks various Renegotiation Board records) (Status: June 23, 1971, preliminary injunction restraining administrative proceedings entered) (Affirmed by Court of Appeals, July 1972 pursuant to agreement to be bound by result in *Bannercraft Corp.* v. *Renegotiation Board*).

17. *Wendy Hecht, et al.* v. *United States,* S.D. Cal., Civil No. 71–215–N. (Plaintiff seeks aircraft accident investigation report compiled by Navy) (Status: Dismissed by stipulation).

18. *Ash Grove Cement Company* v. *Federal Trade Commission, et al.,* D. D.C., Civil No. 1298–71. (Plaintiff seeks a variety of documents allegedly pertinent to pending administrative proceedings before the Federal Trade Commission) (Status: Motion for judgment on the pleadings or, in the alternative, for summary judgment pending).

19. *Patsy T. Mink, et al.* v. *Environmental Protection Agency, et al.,* D. D.C. (Plaintiff seeks records pertaining to proposed underground nuclear test) (Status: Defendants' Motion to Dismiss and for summary judgment granted August 1971) (Reversed and Remanded by Court of Appeals, October 15, 1971). (Supreme Court reversed Court of Appeals decision and remanded case, January 22, 1973). (Dismissed by stipulation subsequently).

20. *Reuben B. Robertson III* v. *Shaffer, et al.,* D. D.C., Civil No. 1970–71. (Plaintiff seeks documents known as Mechanical Analysis Program Report and System Worthiness reports from Federal Aviation Administration) (Status: Order entered October 31, 1972 granting access to records involved "upon terms and conditions no more burdensome than those which are imposed upon persons connected with the airline industry") (Appeal pending).

21. *James Lafferty, et al.* v. *Rogers', et al.,* D. D.C., Civil No. 2033–71. (Suit seeking studies concerning the circumstances surrounding American involvement in the Middle East including contingency plan for deployment of American armed services personnel). (Status: Answer filed).

22. *Andre J. Therault, et al.* v. *United States of America,* C.D. Cal., Civil No. 71–2384–AAM. (Plaintiff seeks Aircraft Accident Board Report prepared by Air Force) (Order favorable to plaintiffs entered July 1972) (On appeal).

23. *Center for National Policy Review on Race and Urban Issues, et al.* v. *Richardson*, D. D.C., Civil No. 2177–71. (Plaintiffs seek information relating to new activities regarding racial segregation in northern public school systems) (Status: Memorandum Order generally favorable to plaintiffs filed December 8, 1972) (On appeal).

24. *Ronald V. Dellums* v. *Department of Health, Education and Welfare, et al.*, D. D.C., Civil No. 181–72. (Plaintiff seeks "Contract Performance Review Reports," Evaluation of part A Intermediary Performance and reports on the level of prevailing doctors' fees in Penna.) (Status: Defendants' Motion to Dismiss or in the alternative for Summary Judgment pending).

25. *Edward K. Devlin* v. *Department of Treasury, etc.*, D.D.C., Civil No. 205–72. (Plaintiff seeks customs' records on entry of certain whiskey into the United States) (Status Summons dated February 2, 1972) (Defendant's Motion to dismiss or, in the alternative for Summary Judgment granted) (Appeal by plaintiff pending).

26. *John J. Wild* v. *United States Department of Health, Education and Welfare, et al.*, Minn. Civil No. 4–72 Civil 130. (Plaintiff seeks various Public Health records, including correspondence and evaluations) (Status: Answer filed).

27. *National Parks and Conservator Association* v. *Morton, et al.*, D. D.C., Civil No. 426–72. (Plaintiffs seek financial information submitted by applicants for concession in National Parks) (Status: Defendants' motion for summary judgment granted). (Notice of Appeal filed by plaintiffs).

28. *Les Aspin, et al.* v. *Department of Defense, et al.* D. D.C., Civil No. 632–72. (Plaintiff seeks a report allegedly entitled "Department of the Army Review of the Preliminary Investigation into the My Lai Incident.") (Status: Defendants' Motion for Summary Judgment granted, August 1972) (Plaintiffs have appealed).

29. *Michael T. Rose* v. *Department of the Air Force, et al.*, S.D. N.Y., Civil No. 72 Civ. 1605. (Plaintiffs seek 1) "case summaries of honor hearings maintained" by the Air Force Academy; 2) "case summaries of ethics hearings maintained in the Academy's Ethics Code Reading Files"; and 3) "a complete copy of a study of resignations from the Air Force by Academy graduates") (Status: Court rendered decision in December 1972 sustaining nondisclosure of case summaries and ordering disclosure of study of resignations) (Plaintiffs have appealed).

30. *Peter H. Schuck* v. *Butz*, D. D.C., Civil No. 956–72. (Plaintiff seeks "all credit reports and investigatory reports prepared by the office of the Inspector General" of the Department of Agriculture "concerning compliance by any USDA agency, or any recipient of USDA assistance, with the Civil Rights Act.") (Status: Defendant's motion to dismiss or, in the alternative for summary judgment pending).

31. *Ernestine Robles, et al.* v. *Environmental Protection Agency*, D. Md., Civil No. 72–517–HM. (Plaintiff seeks data disclosing the location of structures involved in testing of radiation exposure levels in Grand Junction, Colorado) (Status: Defendant's Motion for Summary Judgment granted October 1972). (Plaintiffs have appealed).

32. *Catherine Rabbitt* v. *Department of the Air Force*, S.D. N.Y., Civil No. 72 Civ. 2323. (Plaintiff seeks Aircraft Accident Report compiled by Air Force) (Status: Answer filed).

33. *Lee S. Kreindler* v. *Department of the Navy*, S.D. N.Y., Civil No. 72 Civ. 2053. (Plaintiff seeks Aircraft Accident Report and "JAG Manual Investigation Report") (Status: Answer filed).

34. *National Paint and Coatings Assn., Inc.* v. *Edwards*, D. D.C., Civil No. 1129–72. (Plaintiff seeks all records "which relate to any way" to a Food and Drug Administration Order proposing to classify certain paints and other materials as banned hazardous substances) (Status: Defendant's Motion for Summary Judgment pending).

35. *National Tire Dealers and Retreaders Assn. Inc.* v. *Toms*, D. D.C., Civil No. 1331–72. (Plaintiff seeks documents relating to the conclusions reached by the Administrator, National Highway Traffic Safety Administration in rulemaking proceedings amending the Motor Vehicle Safety Standard concerning tire casings) (Status: Defendants' Motion for Summary Judgment pending).

36. *David Comey, et al.* v. *Atomic Energy Commission, et al.*, N.D. Ill., Civil No. 72 C 1744. (Plaintiffs seek 13 categories of records from the Atomic Energy Commission) (Status: Defendants' Motion for Summary Judgment granted in part and denied in part). (Appeal pending).

37. *Fred Bramblett* v. *William R. Desobry,* W.D. Ky., Civil No. 7333A. (Plaintiff seeks hearing examiner's report from commanding general of Fort Knox Military Reservation) (Status: Defendant's Motion for Summary Judgment pending).

38. *Butz Engineering Corp.* v. *United States Postal Service, et al.,* D. D.C. Civil Action No. 1566–72. (Plaintiff seeks "technical evaluation and all revisions thereof" allegedly prepared by Postal Service personnel pursuant to a specified contract) (Status: Pending on Cross-Motions for Summary Judgment).

39. *People of the State of California* v. *Richardson,* N.D. Cal., Civil Action No. C072–1514–AJZ. (Plaintiffs seek "Extended Care Facility Certification Reports on California nursing homes") (Status: Defendant's Motion for Summary Judgment granted, November 28, 1972) (Plaintiff has appealed).

40. *McNeill Stokes, et al.* v. *Hodgson,* N.D. Ga., Civil No. 17058. (Plaintiff seeks to obtain a copy of the Training Course for compliance Safety and Health Officers from the Department of Labor) (Status: Judgment for plaintiff affirmed by Court of Appeals, April 1973).

41. *Max Serchuk* v. *Richardson, et al.,* S.D. Fla., Civil No. 72–1212. (Plaintiff seeks medicare Extended Care Facility Survey Reports from HEW) (Status: Order favorable to plaintiff entered November 1972) (On Appeal).

42. *Ethyl Corporation* v. *Environmental Protection Agency,* E.D. Va., Civil No. 447–72–R. (Plaintiff seeks 7 internal memoranda relating to proposed regulations on use of lead additive in gasoline). (Status: Order partially favorable to plaintiff entered November 1972) (Appeal pending).

43. *Montrose Chemical Corp. of California* v. *Ruckelshaus,* D. D.C., Civil No. 1797–72. (Plaintiff seeks staff memoranda relating to DDT administrative hearings from the Environmental Protection Agency) (Status: Order favorable to plaintiff entered) (Notice of appeal filed).

44. *Robert P. Smith* v. *Department of Justice,* D. D.C., Civil No. 1840–72. (Plaintiff seeks FBI records relating to Lee Harvey Oswald and certain "FBI Laboratory examinations or other reports") (Status: Defendant's motion for summary judgment pending).

45. *Jeffrey Wheeler Hurt, et al.* v. *United States of America,* C.D. Cal., Civil No. 72–2126–CC. (Plaintiffs seek Aircraft Accident Investigation Report compiled by Air Force) (Status: Order favorable to Plaintiff entered, November 1972) (on appeal).

46. *Holiday Magic, Inc., et al.* v. *Federal Trade Commission,* D. D.C., Civil No. 1878–72. (Plaintiff seeks documents allegedly relating to FTC administrative proceedings involving plaintiff and documents relating to Proposed Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising") (Status: Defendant's Motion for Summary Judgment granted).

47. *Lee S. Kreindler* v. *Department of the Air Force, etc.,* S.D. N.Y., Civil No. 72 Civ. 4207. (Plaintiff seeks Aircraft Accident Investigation Report interpreted by Air Force) (Status: Answer filed).

48. *Robert G. Vaughn* v. *Bernard Rosen,* D. D.C., Civil No. 1753–72. (Plaintiff seeks reports known as Evaluation of Personnel Management and certain special studies etc. from the Civil Service Commission for the 1969–1972, inclusive, fiscal years) (Status: Pending on cross motions for summary judgment).

49. *Heidi Packer* v. *Kleindienst, et al.,* D. D.C., Civil No. 1988–72. (Plaintiff seeks copies of the audit report of the Massachusetts Committee on Law Enforcement and Administration of Criminal Justice for 1971; and the audit report of the Administration of Justice for 1971) (Status: Defendants' Motion to Dismiss pending).

50. *Porter County Chapter of the Izaak Walton League of America, Inc., et al.* v. *United States Atomic Energy Commission,* N.D. Indiana, Civil No. 72 H. 251. (Plaintiffs seek documents allegedly relating to AEC proceedings regarding granting of a permit for the construction of a nuclear power plant . . . on the shore of Lake Michigan in Porter County, Indiana) (Status: Defendants' Motion to Dismiss or in the Alternative for Summary Judgment pending).

51. *Peter J. Petkas* v. *Staats,* D.D.C., Civil No. 2238–72. (Plaintiff seeks documents "which disclose the current costs accounting practices of certain corporations which participate in government defense contracting.") (Status: Defendant's motion to dismiss or, in the alternative for summary judgment pending).

52. *Allen Weinstein* v. *Kleindienst, et al.,* D.D.C., Civil No. 2278–72. (Plaintiff seeks records allegedly in the custody of the FBI concerning its investigation of Alger Hiss and Whittaker Chambers during the period 1933 through 1952 in-

clusive) (Status: Defendants' motion to dismiss or, in the alternative, for summary judgment pending).

53. *Bertram D. Wolfe* v. *Froehlke*, D.D.C., Civil No. 2277–72. (Plaintiff seeks a file entitled Forcible Repatriation of Displaced Soviet Citizens Operation Keilhaul). (Status: Defendant's motion to dismiss or, in the alternative, for summary judgment pending).

54. *Malvin Schechter* v. *Richardson*, D.D.C., Civil No. 2319–72. (Plaintiff seeks Medicare Extended Care Facility reports regarding nursing homes) (Status: Answer filed and Defendant's Motion for Summary Judgment is pending).

55. *Clarence Ditlow, et al.* v. *John Volpe, et al.*, D.D.C., Civil No. 2370–72. (Plaintiffs seek certain documents that relate to motor vehicle safety and the standards that are applied by defendants in enforcing the laws relative to motor vehicle safety from the Department of Transportation). (Status: Defendants' motion to dismiss or, in the alternative, for summary judgment pending).

56. *Anchorage Building Trades Council* v. *Department of Housing and Urban Development*, D. Alaska, Case No. A–184–72 Civ. (Plaintiff seeks to examine certified payrolls on a construction project known as the Woodside East Project) (Status: Amended Complaint and Summons dated January 2, 1973).

57. *Patricia Chappell* v. *James D. Hodgson, et al.*, D. Conn., Civil No. 15480. (Plaintiff seeks the names and addresses of all employees and employee-enrollees of the Neighborhood Youth Corps. Program in New Haven, Connecticut) (Status: Motion to Dismiss or, in the Alternative, for Summary Judgment pending).

58. *Rural Housing Alliance* v. *United States Department of Agriculture, et al.*, D.D.C., Civil No. 2460–72. (Plaintiff seeks alleged report prepared by the Office of Inspector General, Department of Agriculture in response to allegations of administrative abuses committed by the Farmers Home Administration in Palm Beach and Martin Counties, Florida) (Status: Defendants' motion to dismiss or, in the alternative, for summary judgment pending).

59. *Frederick P. Schaffer* v. *William P. Rogers*, D.D.C., Civil No. 2520–72. (Plaintiff seeks investigation reports on conditions in prisoner-of-war camps in South Vietnam by the International Committee of the Red Cross from the Department of State) (Status: Answer filed).

60. *Michael Kaye* v. *United States Civil Service Commission, et al.*, S.D. Cal., Civil No. 72–513–6T. (Plaintiff seeks all final opinions, orders, statements of policy, interpretations of law and instructions to staff that have affected plaintiff's administrative appeal) (Status: Answer filed).

61. *Center for Science in the Public Interest, et al.* v. *Ruckelshaus*, D.D.C., Civil No. 2567–72. (Plaintiff seeks documents regarding certain brands of gasoline additives which were submitted to the Environmental Protection Agency by manufacturers) (Status: Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment pending).

62. *Van W. Smart* v. *Food and Drug Administration*, N.D. Cal., Civil No. C–73–6118 SW. (Plaintiff seeks, *inter alia*, data considered by advisory panel on antiacid drugs) (Status: Answer filed).

63. *Consumers Union of United States, Inc.* v. *Peterson, et al.*, D.D.C., Civil No. 133–73. (Plaintiff seeks, *inter alia*, rules and/or statements utilized by the Committee for the Implementation of Textile Agreements established by the Secretary of Commerce) (Status: Extension of time to respond to complaint obtained).

64. *Wheatland Irrigation District* v. *U.S. Department of Agriculture, et al.*, D. Wyoming, Civil No. 5816. (Plaintiff seeks, *inter alia*, records pertaining to private ranching operations) (Status: Suggestion of mootness made).

65. *Carl R. Stern* v. *Kleindienst*, D. D.C., Civil No. 179–73. (Plaintiff seeks documents allegedly concerning a counter-intelligence program of the Federal Bureau of Investigation) (Status: Extension of time to respond to complaint obtained).

66. *David L. Brockway, Sr.* v. *Department of the Air Force*, N.D. Iowa, Civil No. 73–C–11–CR. (Plaintiff seeks portions of Aircraft Accident Investigation Report) (Status: Extension of time to respond to complaint obtained).

67. *Sierra Club* v. *Department of the Interior*, N.D. Cal., Civil No. C–73–963 WTS. (Plaintiff seeks Department of the Interior Task Force Report on Redwood National Park) (Status: Extension of time to respond to complaint obtained).

68. *Mark J. Green, et al.* v. *Kleindienst*, D. D.C., Civil No. 331–73. (Plaintiff seeks business review records compiled by Justice Department Antitrust Division) (Status: Extension of time to respond to complaint obtained).

69. *Roger E. Hawks* v. *Bureau of Customs, et al.*, W.D. Washington, Civil No. 127–73C–2. (Plaintiff seeks documents relating to the conduct and efficacy of searches and seizures performed at border-crossing points) (Status: Summons dated February 20, 1973).

70. *Aviation Consumer Action Project* v. *Civil Aeronautics Board*, D. D.C., Civil No. 413–73. (Plaintiff seeks CAB "decision" submitted to the President on proposed airline merger) (Status: Answer filed).

71. *Legal Aid Society of Alameda Co., et al.* v. *Brennan, et al.*, N.D. Cal., Civil No. C–73–0282–ACW. (Plaintiffs seek EEO–1's, affirmative action programs and compliance review reports concerning federal contractors) (Status: Summons dated March 2, 1973).

72. *William A. Stretch* v. *Weinberger*, D. N.J., Civil No. 274–73. (Plaintiff seeks extended care facility survey reports on nursing homes from HEW) (Status: Summons dated March 21, 1973).

73. *ITT Gilfillon, Inc.* v. *Froehlke*, D. D.C., Civil No. 416–73. (Plaintiff seeks certain attachments to report on protest to GAO of decision to award a particular contract to a competitor from the Department of the Army) (Status: Summons dated March 2, 1973).

74. *David L. Brockway Sr.* v. *Department of the Air Force*, N.D. Iowa, Civil No. 73–C–11–CR. (Plaintiff seeks portions of investigative report compiled by Air Force following aircraft accident) (Status: Summons dated January 30, 1973).

75. *Gerald A. Robbie* v. *Department of the Air Force*, S.D. N.Y., Civil No. 73 Civ. 1031. (Plaintiff seeks Air Force Accident Investigation Report) (Status: Summons dated March 8, 1973).

76. *Ethyl Corporation* v. *Environmental Protection Agency*, E.D. Va., Civil No. 193–73–R. (Plaintiff seeks various internal documents relating to proposed lead regulations from EPA) (Status: Summons dated April 11, 1973).

GARDEN GROVE, CALIF., *June 13, 1973.*

Hon. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, House Government Operations Committee, Rayburn Office Building, Washington, D.C.

DEAR CONGRESSMAN MOORHEAD: I submit this letter in the hope that it may be included in the record of your recent hearings on secrecy of government information.

Tonight President Nixon announced a general consumer price freeze for 60 days, and said he had directed the Internal Revenue Service to make a special study of gasoline prices, possibly leading to a price roll-back. We can only conclude that the President has finally understood that Phase III was a disaster in general, and a special disaster in respect to refined petroleum products.

To be effective, of course, in helping to balance the consumers' budgets, a price freeze should come at or just past a trough, and not at a peak.

In any event, no method of price control can make any sense, whether freeze, roll-back, limited upward creep, or profit margin limitation, unless the actual prices, both base prices and current, are available for public inspection.

Most unfortunately, the Cost of Living Council has taken the position that prices of petroleum products are confidential. Presumably their illogic extends to other products also, but I can testify at this time only to their handling of refined petroleum products.

In early February, 1973, there was a shortage of No. 2 fuel oil, used as home heating fuel. The oil companies had raised their prices for No. 2 oil, and had requested the approval of the Cost of Living Council. The Council called a 3-day public hearing on 7, 8, and 9 February, in the North Interior Building Auditorium. Representing the National Consumers League, of which I have been a director for the past dozen years, I was the last witness, and actively opposed the price increase. A copy of my prepared statement is attached for your record. (Marked Appendix A)

The key elements of my testimony were that (a) the winter weather for the period 1 September 1972 to 3 February 1973 was right on normal, and that after two warmer-than-normal winters in a row, the industry had no reason to expect a *third* warm winter; and (b) shortages of crude oil for refining were the responsibiilty of the major world oil companies who had not complied with the re-

quests of the host governments in the Middle East (notably Iran and Iraq) to increase their production of crude from the most prolific oil fields in the world.

When the Cost of Living Council had taken no action three weeks later, several of the consumer witnesses sent a telegram to Dr. John T. Dunlop, Director of the CLC, on 1 March requesting a meeting with him for further discussion of the problems. A copy is attached, marked Appendix B.

We received no official acknowledgement nor reply, but word filtered back to us that the CLC was working on it and would let us know.

On 6 March 1973, the Cost of Living Council issued its ruling permitting a one and one-half percent increase in overall petroleum products prices.

On 21 March 1973, several of the consumer representatives met with Mr. James McLane, Deputy Director of CLC, Mr. Charles Owens, their oil expert, Mr. Jack Dempsey, and a couple of other members of the CLC staff. Messrs. McLane and Owens assured us that the oil companies were in full compliance with the ruling, in that the price increases to February 1973 had not averaged as much as 1.5% above the 1971 base period.

I objected violently, and read a series of price increases for Gulf Coast, Cargo lot prices for gasoline, and No. 2 fuel oil, from 1971 to March 1973, as reported by Platt's Oilgram Price Service, the standard trade price reporting agency. These showed gasoline up 15%, and No. 2 oil up 20%.

Gulf Coast Cargoes have long been taken as the basic level at which one refining company deals with another refining company, in volumes of at least 20,000 tons, or more than 140,000 barrels, or over 6 million gallons.

Mr. Owens replied that the Platt's prices were wrong, and he knew because he had worked for McGraw-Hill Publishing Co. which owns Platt's Service. I agreed that there are deficiencies in Platt's price reports, but they were *consistently* higher than actual transaction prices. If Platt's reported price increases of more than 15% in a period of 18 months, there was no possibility that actual prices had held constant.

The Bureau of Mines, U.S. Department of the Interior, publishes annually in their Minerals Yearbook the refinery out-turn of gasoline, distillate (light), fuel oil, Bunker C oil, and other refined products. Gasoline runs some 44%, and distillate fuel oil runs 22% of the total. Thus, these two products account for two-thirds of the refined petroleum products made in the United States. Simple arithmetic tells us that significant price increases of 15% on 66% of the product would have to be balanced by at least a 25% price *decrease* on the entire balance of 34% of output to stay within a 1.5% average price increase. The only possible conclusion over the year and a half period is "No Way!"

Messrs. McLane and Owens replied that the Cost of Living Council figures followed a complicated formula, but whatever increase there had been was within the 1.5% limit.

At that point, I made what still strikes me as a reasonable request, "If your figures don't match my figures, let's see your figures."

Mr. Owens gave me what I believe to be a fantastic answer: "Our price figures are confidential."

Mr. Chairman, George Orwell could not have posed a wierder situation in his "1984." The Cost of Living Council is charged with the public duty of holding prices down in a period of inflation and of shortages (however the shortage may be arranged). Standard published trade reports show large price increases. The CLC staff says the published figures are wrong, the price increases have been less than 1½%, but nobody in the public can see the figures the CLC is relying on.

Before the meeting broke up, we requested Mr. McLane to have his general counsel review Cost of Living Council's authority and discretion in the matter of publication of price data, and to inform us of what oil prices in their files we could see.

There being no answer by 12 April, three of us who had testified in February, and who had attended the 21 March meeting, again wrote to Dr. Dunlop, this time requesting him to confirm or deny the CLC's secrecy policy. That request was delivered by hand to Dr. Dunlop's office. A copy is attached, marked Appendix C. There has been no response.

On 26 April, from California, I sent Dr. Dunlop a night letter, calling attention to the Wall Street Journal's report of 25% increases in oil company net profits for the first quarter 1973, compared with first quarter 1972, and giving him full credit for the price increase which made that gain possible. (Appendix D) No answer.

As late as 1 June 1973, Mr. Craig R. McClellan of the Cost of Living Council, deputy to Mr. Owens, appeared before a California Legislative Committee in San Francisco, still claiming that the oil company price increases were within the 1.5% allowed by CLC, and still saying that the price data were too secret to present to the Committee.

Mr. Chairman, let me now make a positive recommendation to your subcommittee. Prices, which people have to pay, cannot be treated as "Company Confidential." If I have to pay them, or you have to pay them, we should be able to find out what they are, what they have been, and what they have become by next week. There is no more justification for keeping consumer, or even wholesale (equals next-to-consumer) prices secret, than there is keeping tax rates secret.

The Congress should enact positive, mandatory legislation that provides for publication of all prices the Federal Government controls, or pays, or even knows about, in Washington and in the various localities where they apply.

In conclusion, I would like to point out that the oil industry for a great many years has done its very effective best to cover up its prices and profits. It is high time for the Congress to move in on the industry, and force it to disclose the results of its Government-protected operations.

Thank you for the opportunity of submitting this statement for your record.

Sincerely yours,

E. WAYLES BROWNE, Jr.

APPENDIX A

STATEMENT OF DR. E. WAYLES BROWNE, JR., REPRESENTING THE NATIONAL CONSUMERS LEAGUE, WASHINGTON, D.C.

(Presented before the Cost of Living Council on February 9, 1973)

Mr. Chairman and Gentlemen of the Panel: I am E. Wayles Browne, Jr. I am an economist and a statistician, now retired from the Federal Service. My last Government position was Professional Staff Member, Antitrust and Monopoly Subcommittee, United States Senate. For the four years 1967 to 1971, before retiring, I worked primarily on oil for the series of hearings on "Governmental Intervention in the Market Mechanism: The Petroleum Industry". Last year, as a consultant to a public-interest-oriented law firm, I worked for several months on gas and fuel oil problems.

For the past dozen years I have been a director of the National Consumers League, founded in 1899, and am today appearing on behalf of the League.

As I understand the problem, the *narrow* question before you is whether the petroleum industry can show cost increases to "justify" a price increase for home heating oil. The broad question is: Does the industry deserve to be rewarded for having so inadequately performed its function during the present Winter? If you are stuck with studying a mass of overly specific data while wearing mule-type blinders, no doubt you can find that costs have gone up, and profit margins have to be protected—no matter what.

On the other hand, if you are entitled to consider the broad picture, you may come to the conclusion that the petroleum industry has been prospering for far too many years on the consumers money, under the all-too-paternal aegis of the Federal and of several of the State Governments. Such a conclusion should convince you that this is not the time to raise prices of any petroleum products, simply to keep on protecting the industry's profits.

Testimony here on Wednesday, and before various Congressional hearings in recent months, make it clear that the industry, and those few Government people in charge of the oil import control program, badly underestimated the requirements of oil in the past several years. General George A. Lincoln, Director, and Mr. D. M. Trent, Deputy Director of the late Office of Emergency Preparedness, have been quoted as saying that the industry assured them there would be plenty of home heating oil this winter, and that perhaps the Government had allowed the industry too high a price for gasoline, so that the refiners shifted from heating oil to gasoline. On these two points, Mr. Chairman, I am prepared to believe the OEP officials.

Now everybody, including the oil company chairmen and presidents who have appeared before you, is in complete agreement that things didn't quite work out the way they were supposed to, and that some people have indeed gone cold, and some schools and factories, trucks and railroads, have been shut down. Who do you suppose is responsible?

OEP had a very small staff working on oil. For that matter, so did the Oil Import Control Administration. You might find it interesting to inquire into the sources of the staff work for these two governmental offices.

The demand for refined petroleum products is highly inelastic. For the benefit of those on the panel, and those in the Cost of Living Council, who were not trained in economic jargon, let me say that inelasticity of demand means that a substantial increase in price is followed by a very small decrease in demand or sales. Thus, the customers pay a lot more total cash money for buying only slightly less product. The sellers—in this case the major integrated oil producer-refiner-marketer corporations—get a lot more money for slightly less oil, when either they or you—the Phase III controllers—raise the prices.

While full detailed documentation of this point might take more time than we have left this week, the fact that the industry wants to raise its price for home

heating oil should suggest to you (even the lawyers among you) that the industry figures that a higher price will bring more total money.

In case you have any lingering doubts about this concept of inelasticity, think how you would use coal or wood, to run your car, heat your house, cook your food in your home or apartment, or fuel the airplanes you will use to take you to Houston when, as, and if, you insist on looking at the industry's real records.

If the OEP people are correct in saying that the government allowed too high a price for gasoline, as compared with home heating oil, as is quite likely, does it perhaps occur to you that the better solution is to cut the price of gasoline, rather than to raise the price of heating oil?

The supply of crude oil in the United States is also highly inelastic. Wednesday's testimony by the industry people was quite clear on this point. Supply is declining year by year, and in the short run minor price increases are not going to do anything about it.

On an elegant technical economic basis, Dr. Henry Steele, Professor of Economics at the University of Houston, demonstrated the short-run inelasticity of crude oil supply on 26 March 1969, in Part I, of the Antitrust Subcommittee hearings noted above. This chart entitled "Short Run Supply Schedule for Crude Oil Produced at the Wellhead, United States, (1965)", shows that above $1.05 per barrel, there was almost *NO* additional production to be expected up to $2.70 per barrel. Obviously, he did not expect the curve to turn to the right above the top line on his chart. Chairman Shultz had this chart reproduced on page 217 of the report of the Cabinet Task Force on Oil Import Control in 1970.

The trade testimony on Wednesday, beginning with the lead-off industry man, Mr. Rawleigh Warner, Jr., Chairman of Mobil Oil Corporation, appeared to be unanimous—there is a world-wide shortage of crude oil. I did not hear any industry spokesman dispute the point

Now gentlemen of the Cost of Living Council, the conclusion is inescapable from the testimony before you. If you grant an increase in price of home heating oil (or any other refined petroleum product), you will effectively and promptly transfer money from the pockets of the consumers to the larger pockets of the oil companies. You will *not*, however, increase the supply of refined petroleum products available to the domestic customers. What, then, is to be gained for the public welfare from such a use of public power?

Comes Monday morning, can those of you who shave before going to work, look yourselves in the eye in the bathroom mirror and say, "The oil industry deserves a price rise?"

Has it occurred to you to ask *WHY* the supply of crude oil is short, world wide? The reported reserves in the Middle East are far greater than ours. The reserves in Africa may well be far greater than published figures would admit. Even our reserves are known only to the industry.

The Shah of Iran has been widely reported in the trade press as insisting on having more Iranian crude oil produced than the Consortium has in fact produced. Do you know who the Consortium companies are? They are the people who are presently—and for nearly the past 20 years—in charge of the production of crude oil in Iran. The list of member companies is:

	Percent
British Petroleum	40
Royal Dutch-Shell (parent of the U.S. Shell Oil Co.)	14
Companie Francaise	6
Jersey Standard (Exxon)	7
Mobil Oil Corp	7
Standard Oil Co. of California	7
Texaco	7
Gulf Oil	7
Iricon Agency (7 U.S. Oil Co's.)	5
	100

The Government of Iraq recently (within the past year or so) took back the oil concessions from the Iraq Petroleum Company on the ground that IPC was not producing enough oil from Iraq wells. Who were the parties to IPC?

	Percent
British Petroleum	23.75
Royal Dutch-Shell	23.75
Companie Francaise	23.75
Near East Development Co	23.75
(Jersey (Exxon)—50%)	
(Mobil—50%)	
Gulbenkian estate	5.00
	100.00

IPC also owns the Qatar Petroleum Co., operating in Qatar, and the Abu Dhabi Petroleum Co., Ltd., operating in Abu Dhabi.

Production of crude oil in Saudi Arabia appears to be handled by The Arabian American Oil Co. (ARAMCO). Who makes up ARAMCO?

	Percent
Standard Oil Co. of California	30
Texaco, Inc	30
Standard Jersey (Exxon)	30
Mobil Oil Corp	10
	100

The above oil family connections were reprinted from the testimony of Prof. Wayne A. Leeman in Part I, "Governmental Intervention in the Market Mechanism: The Petroleum Industry", page 447.

If you on the Council staff have dirty, low, mean, nasty, suspicious minds, you might want to call Mr. Rawleigh Warner, Jr., back to ask him how it happens that there was such a world-wide shortage of crude oil in the very prolific crude oil producing areas his Mobil Oil Corporation helps to control.

There was some discussion of the tanker problem and transportation rates on Wednesday. (This statement is being written Wednesday night, 7 February 1973, so it cannot comment properly on Thursday's testimony.) The world tanker fleet is owned or long-term-leased mainly by the international major oil companies, and only partially by the Chinese, the Golden Greeks, and the latter-day Vikings.

It is quite true that *spot* tanker rates are highly volatile, and may vary in a short time from 50% of the world scale book rate to 300% WS. Most of the tankers are not in the spot market, however, and the people who pay the WS 300 rates are most likely to be the small, independent fuel oil terminal operators (dealers, not refiners) and are most likely *not* to be named Exxon, Mobil, Gulf or SOCAL.

Mr. Chairman, don't let anybody kid you. The people who charter tankers at the top of the market are the blood brothers of the people who have to cover a short position in a bull market when they guessed wrong. The economy doesn't go to hell in a handbasket when the shorts get caught, and it doesn't go to hell when a few tankers get chartered at a high rate. The main crude oil tanker fleet is still running at some 60¢ per barrel of crude from the Persian Gulf to either New York, Rotterdam, or Los Angeles, for the size tankers that can dock and unload at those points.

* * * * * * *

Some 30-odd years back, the Steel Industry assured the Government that there was plenty of steel producing capacity for the winning of World War II. To put a plug in for my organization, our present Chairman, Robert R. Nathan, then a Government Economist, said they were crazy as hell, and demanded more capacity. Fortunately, he convinced President Roosevelt, and the industry was shoved into expanding. (On that one issue, Bob Nathan did more to win World War II than a lot of Generals.)

A little later, in 1943 or 1944, I think, the industry said they had to have a price increase but it was very difficult to show detailed cost figures. The Steel Division of the Office of Price Administration dug in its heels and said very directly, "The industry has got to produce some solid, auditable, cost figures before they get any increase." OPA drafted up a long cost questionnaire and waited until the answers came in. Some solid data came, I think, and some increases were

granted. (I was off being a Second Lieutenant in the War at the time, and only came upon it years later when I looked at the reports in the Archives about 1957 or 1958.)

The point is, Mr. Chairman, the sort of numbers that have been batted about in these hearings have *NOT* produced enough hard evidence on which to base a transfer of several hundred million dollars from the customers to the oil companies. If there is a case, which you must suspect by now that I seriously doubt, you need a lot of hard, audited cost data from inside the companies. What does it really cost them to produce crude oil? What does it really cost them to buy or trade, crude oil between companies? What are the costs of transporting oil in pipelines which they own parts of, or in tankers which they own or have under 20 year-life lease? What does it cost to run a refinery for a year, and how much crude oil and natural gas liquids went into the refinery? How much products came out of the refinery, and how did they sell or trade them? Through whose system were the products disposed of, and to whom?

To put it gently, gentlemen, the oil industry is a very complicated business. When they make it simple for you, watch out. We, the customers, are going to be had.

* * * * * * *

What to do? First, don't give the industry an across-the-board price increase on anything.

Whoever now holds the control of the oil program (let us hope it is Secretary Shultz) should give careful thought to the oil problem. As I see it, the only possible solution is to eliminate all aspects of the Import Control Program. Wipe out the import tax on crude and products. Kill all controls on imports, so *ANYBODY* can import any oil, crude or refined, from anywhere, for any purpose, in any tanker, any time, from here on out.

It is perfectly clear that a short period allotment, given only to people engaged in reselling oil, without assurance that they can support long term contracts, is a long way from decontrol. It amounts to an illusion, that seems to the uninitiated on the surface to be a good deal, but which is well understood by those in the trade to be a hoax. The only way to have a free market in imported oil, whether crude or refined, is to make it FREE—to anybody, for any purpose, from anywhere.

Unfortunately, I missed hearing Mr. Rawl, speaking for EXXON. The Washington Post for Thursday quoted him as follows:

"Price and supply and demand in the marketplace are the best allocators of resources there are."

This is, of course, good economic theory, but it hasn't got anything to do with the way oil supply and price are controlled--and EXXON has long been one of the three or four top controllers in the world.

* * * * * * *

One more major point. I realize that you weren't hired to handle the National Security angle, but you should realize it is also a phony.

There are only two possible aspects to National Security. One is Wartime Operations, and the other is maintaining the peacetime economy in good order. You should note that a program that leaves us with closed schools, closed factories, cold homes, and, I understand, inadequate supplies of jet fuel for operations in Viet Nam, and for commercial air transport at Kennedy Airport, at the same time, has not done very well by us in the peace-time economy area.

For wartime operations on a real wartime scale, we have no national security in oil. Listen slowly, Mr. Chairman and gentlemen of the Panel, while I repeat: We have no national security in oil for war time.

Fifteen to twenty percent or more of our domestic production of crude oil is off-shore in the Gulf of Mexico or close on-shore in Louisiana, Texas and California. This production could be cut off by a few divers, using delayed-action explosives, without exposing themselves to any effective risk.

Half of our refining capacity, more or less is on or near salt water—thereby being within submarine deck-gun range. There is no classified information being disclosed to an enemy here. All you need is a list of refineries, maps of the At-

lantic, Gulf of Mexico, and Pacific Coast, and a little knowledge of weapon capabilities.

Mr. Chairman, I say to you again, don't be a sucker for the National Security gag. It won't even hold water, much less oil.

As a near-final word, gentlemen, let me say this: In case none of us convinced you that the proper solution is a roll-back rather than a price increase, you still have a small measure of protection for the consumer.

If you must give a price increase to the oil crowd, require as a condition precedent that they bind themselves to deliver all the home heating oil that may be required by whatever weather we have for the next x winters, in addition to the gasoline, jet fuel, diesel oil, residual fuel oil, etc. The binding, of course, should take the form of a performance bond, which runs into the billions of dollars, if they leave the customers cold, or walking.

One thing that gives me the shudders is the blythe statement of several of the industry top executives that they were out guessed by the weather. You need to take note that some of the smartest predictors in the economics and statistics business work for the oil companies, when they aren't on loan to the Federal Government.

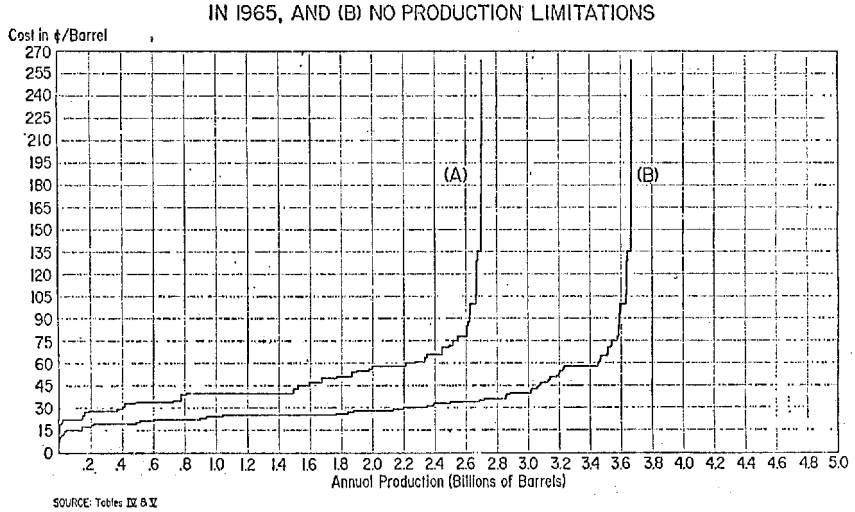
The degree-day reports, as recounted by Platt's oilgram—show that the 1972–73 winter was in fact considerably colder than 1971–72, and maybe colder than 1970–71, but was not, much off the normal for long-time winter. When the Petroleum Industry says that they were taken by surprise, you are entitled to ask—who do we shoot?

The only people I can think of who might be entitled to an increase in the price of #2 fuel oil are the independent marketers who have cold customers to take care of, but who have no refineries or crude oil production. They are apparently scrambling for oil and tankers in a very tight foreign spot market. Delivered cost to their terminals may well be above the legal resale price. You might wish to treat them quite separately from the integrated major oil producing and refining companies.

Thank you, Mr. Chairman, for giving me the opportunity of appearing here today.

SHORT RUN "SUPPLY" SCHEDULES FOR CRUDE OIL PRODUCED AT THE WELLHEAD, UNITED STATES, 1965

ASSUMING (A) PRODUCTION LIMITATION CONTROLS AS OPERATIVE IN 1965, AND (B) NO PRODUCTION LIMITATIONS



SOURCE: Tables IX & X

DEGREE-DAYS, 1972–73 HEATING SEASON VERSUS NORMAL

Area	Sept. 1, 1972, to Jan. 6, 1973	Normal	1972–73 in percent of normal
East coast	1,965	1,992	98.6
Great Lakes	2,742	2,581	106.2
Midwest	3,147	2,574	122.3
West coast	1,679	1,504	111.6
Southeast	1,243	1,276	97.4
U.S. average	2,176	2,086	104.3

	Sept. 1, 1972, to Feb. 3, 1973	Normal	1972–73 in percent of normal
East coast	2,810	2,887	97.3
Great Lakes	3,712	3,674	101.0
Midwest	4,128	3,844	107.4
West coast	2,246	2,103	106.8
Southeast	1,890	1,854	101.9
U.S. average	3,026	3,017	100.3

Note: Degree-days are the cumulated sum of the difference between 65°F and the average of the high and the low temperature for each day of the heating season.

Source: U.S. Weather Bureau, reprinted by Platt's Oil Gram.

APPENDIX B

[TELEGRAM]

CONSUMERS UNION,
Washington, D.C., March 1, 1973.

Dr. JOHN DUNLOP,
Director, Cost of Living Council,
Washington, D.C.:

Petroleum prices up, supplies remain short. Council staff advises it will not deal with production supplies or imports. Request meeting with you in immediate future to discuss Council policies and authority. Please reply to Mr. Silbergeld at 7851906 or 1714 Massachusetts Avenue, Northwest.

Joe Browder, Environmental Policy Center; E. Wayles Browne, Jr., National Consumers League; Samuel Buffone, Stern Community Law Firm; Jerry S. Cohen, Attorney; Lynn Jordan, Virginia Citizens Consumer Council; Martin Lobel, Lobel, Novins and Lamont; Helen Nelson, Consumer Federation of America; Alex Radin, American Public Power Association, Mark Silvergeld, Consumers Union.

APPENDIX C

REQUEST FOR INFORMATION

APRIL 12, 1973.

To: John T. Dunlop, Director, Cost of Living Council, Washington, D.C.
From: Wales Browne, Director, National Consumers League, Washington, D.C.; Martin Lobel, Attorney, Lobel, Novins & Lamont, Washington, D.C.; Mark Silbergeld, Attorney, Consumers Union, Washington, D.C.
Re. Oil Price Increase Data.

Re billions of dollars in oil price increases. Because you were unavailable, consumer representatives met March 21 with your deputy, Jaime McLane, to object to price increases granted oil companies. We presented trade press data showing refinery gasoline prices up thirteen to eighteen percent from August 1971 to March 1973 and heating oil prices up over twenty percent, indicating overall increase in total refined products prices above eleven percent. McLane et al. said published figures were wrong; Council had better price data showing lower oil prices in 1973 than 1971 so companies were well within one percent ruling. We asked to see such data. McLane said data was Company Confidential. We asked for aggregate data three weeks ago but have not received any information yet.

Now we request you to promptly produce oil industry price data for public inspection or confirm official secrecy policy so we can proceed to take appropriate remedial action.

APPENDIX D

[TELEGRAM]

NATIONAL CONSUMERS LEAGUE,
Washington, D.C., April 26, 1973.

Dr. JOHN T. DUNLOP,
Director, Cost of Living Council,
Washington, D.C.

DEAR JOHN: Reference oil price increase, kindly refer Wall Street Journal Wednesday, 25 April story headlined "Oil Firms Report Earnings Climbed in First Quarter." Nine more post profit gains reflecting increasing U.S. prices and world demand. Obviously you did it in face of opposition testimony early February hearing. Are your boys still claiming trade press wrong; COLC knows better; prices and profits really down instead of up? How can you reconcile Journal story with your 1 percent allowed fuel oil increase? When are you going to answer memo April 12, requesting public disclosure COLC oil price date?

E. WAYLES BROWNE, Jr.,
Director, National Consumers League.

EXCERPTS FROM TRANSCRIPTS OF INTERVIEWS—"THE FREEDOM OF INFORMATION ACT AND BROADCAST JOURNALISTS"

(Written and Produced by Alex Chadwick and David Molpus, Department of Communication, The American University, Washington, D.C.)

"The public has a right to know not only what the government says it is doing but what it is actually doing and if the public officials close off access to them the public loses, and I might say that this administration for all its—all the President's comments in his early days about keeping an open administration, this administration is about as open as Jack Benny's safe."

DAVID MOLPUS. That was a network news Justice Department correspondent. He was talking about the difficulty newsmen have getting information from the government. This session, a congressional subcommittee is investigating the problem of government secrecy. It's a problem that affects everyone, especially working journalists. In the next half hour several network radio and television correspondents will give their views on the subject.

The House Subcommittee on Foreign Operations and Government Information is reviewing the Freedom of Information Act which went into effect in 1967. The chairman of that subcommittee, Congressman William Moorhead, says he wants to ensure open government. The FOI Act was supposed to help do that. The Act ordered Federal agencies to make more information available to the public, but many newsmen say the law has not worked. In practice, they say, the law allows the government to keep secret almost as much material as before.

In fact, the Act does list several categories of information which do not have to be revealed, such as matters dealing with national defense. If a reporter is denied information he believes should be made public, he can take the particular agency to court. Under the FOI law the agency must prove to the court that it acted legally, but that process has not been effective. NBC Pentagon correspondent Robert Goralski explains.

ROBERT GORALSKI. I think there're several things wrong with the Act. One, it docsn't provide enough or sufficient machinery to take immediate action to redress our grievances. If we have a point, we feel it's a point well taken, that somebody is suppressing information, there's no immediate recourse that we have to get that situation corrected. I've never used it. I don't know of any newsman in Washington who has used it.

DAVID MOLPUS. Other reporters agree with Goralski that court action is too slow and they point out that the FOI Act talks specifically about identifiable records. One complained that the Freedom of Information Act only applies to documents and that the average day-to-day problem that a reporter encounters is not that of being foreclosed an opportunity to see a document. Normally, the reporter said, he doesn't even know of the precise document. He wants to get

questions answered about a policy or about a phenomenon that he knows about, and the Freedom of Information Act doesn't apply in that situation at all.

DAVID MOLPUS. But correspondent Peter Hackes, also of NBC, thinks the law has done some good.

PETER HACKES. I think the fact that it's on the books and the fact that in passing it a great many coals were raked over the fire has served in a good way as a kind of a threat to various and sundry bureaucrats who otherwise might have been tempted to try to keep things quiet, keep things secret, keep things classified. More and more I see at the Pentagon, at the Atomic Energy Commission now in the last six months, in various agency memos and communications much more freedom of information. I don't think, as I said, I don't think it's because they're being magnanimous or because a great wave of trying to help the folks is sweeping through the government. I think it's because of the presence of the Freedom of Information law, even if it isn't invoked as such in each case.

DAVID MOLPUS. Newsmen also worry about other occasions when, they say, instead of withholding information, the government actually lies about it. State Department correspondent, Phil Jurey of the Voice of America:

PHIL JUREY. I suppose I can see cases where an outright lie is necessary but those would be very extreme cases I would think. During the Cuban missile crisis when John Kennedy got sick in the Midwest, I think it was in Chicago, he really didn't get sick. He came back because of the Cuban missile crisis. That was I suppose an outright lie but it was an extreme case. I really hate to say that the government has a right to lie, but nothing is sharply defined so you have these gray areas.

DAVID MOLPUS. But a Capitol Hill correspondent for ABC, Sam Donaldson, says the government never has to lie.

SAM DONALDSON. I think government has a right to withhold the facts on some occasions in the conduct of foreign policy. The secret negotiations in Paris, whether you think they were fruitful or not, meaning whether you think they really had a chance or not—I think government had the right to keep that secret. But a right to lie directly and deliberately, no, I don't think it does. I think it can say "No comment." I think it can simply be silent, but when it speaks I think it should speak truthfully.

DAVID MOLPUS. Honesty and freedom of information are not partisan issues. Democrats and Republicans alike have been accused of abusing the privileges of government secrecy but in early 1969 President Nixon made a special pledge to the Moorhead subcommittee on government information. Mr. Nixon wrote a letter saying he intended to uphold not only the letter of the Freedom of Information Act but the spirit of it. We asked Sam Donaldson if he thought the administration had lived up to its commitment to open government.

SAM DONALDSON. My general impression after 11 years in Washington is that this administration if anything is more secretive, is more closely holding information which probably, in my opinion, should be made public, than predecessor admnistrations, although I must quickly add that predecessor administrations did the same thing; it's just a little bit stronger now.

DAVID MOLPUS. The Johnson administration never escaped charges that it created a serious credibility gap. Reporters talked of news manipulation, the release of only self-serving information. Mr. Johnson was accused of covering up unfavorable news and of misleading the news media. Reporters' suspicions were confirmed with the publication of the Pentagon papers. During the early years of the Vietnam war Peter Hackes was NBC correspondent at the Defense Department, and Hackes talked to us about news manipulation under the Johnson administration.

PETER HACKES. We were had by the image makers, the mouthpieces if you will, of the Johnson administration who were mouthing all of this spurious information out of Vietnam.

DAVID MOLPUS. And yet Hackes believes most Pentagon spokesmen were not lying to him. Rather, they too were being manipulated.

PETER HACKES. This was a very closely held matter that only I think one or two people in the Pentagon knew about. So that the party line, that is to say, what was to be issued to the public was known by a great many people but what lay behind that was known to only one or two. The people that we talked with at the Pentagon, aside from Mr. McNamara who must have known, everybody else I'm sure felt that they were giving us all of the really honest information. They

just did not know. They, too, were had, and it was a clear out and out misuse of this whole concept of freedom of information.

DAVID MOLPUS. Some correspondents say it's particularly hard to get information from the Pentagon and it's getting harder. The Defense Department says much of its information falls into the category of national defense, and that category is protected from disclosure by the FOI Act. The Pentagon correspondent for CBS, Bob Schifer, talks about the flow of information there.

BOB SCHIFER. It's very difficult to get information; it's the most difficult job I've ever had and I've been a reporter about 15 years and I've never found it so difficult to get information. The people who've been covering this building for 20 years or so tell me that it's more difficult now to get information from the Pentagon than it ever was before and I have every reason to believe that they know what they're talking about.

DAVID MOLPUS. Fellow Defense Department reporter, Robert Goralski, says the problem in getting information now has changed in only one respect.

ROBERT GORALSKI. This administration probably isn't that different from other administrations in the suppression of news. I think this particular group is more maladroit than most, but essentially no administration is going to give us all its information, all that we want to know. They're going to withhold material of course and this is part of the problem. They again make that determination of what is secret for national security purposes and I am sure they cannot be completely objective about that. The subjectivity of protecting the administration is bound to be a factor in determining classification of documents and materials.

DAVID MOLPUS. But that's not to say reporters are having an easier time at the Pentagon. We asked Goralski to describe its relations with the press.

ROBERT GORALSKI. Bad and getting worse. I don't think anybody who covers the Pentagon is particularly pleased with the information policies over there. It's been very difficult to get even minimal information from them, the kind of information which you would think would be helpful to them, and yet we don't get it. They're really concerned about keeping their hands on certain information. Certain topics are just off limits completely—you cannot talk to anybody about Laos, Cambodia and in other areas like that. Nobody knows anything about it. They say the Pentagon has no jurisdiction.

DAVID MOLPUS. And we asked Goralski if press relations had worsened after publication of the Pentagon papers.

ROBERT GORALSKI. Yes, since the Pentagon papers have come out, we've had people coming around searching desks in the Pentagon press room looking for classified material but we're assured that this was just a routine check, that the particular investigating officers or enlisted men, I'm not sure what they were, really weren't aware that was the press room. Well how they could have been unaware it was the press room, I can't imagine.

DAVID MOLPUS. Withholding information, especially unfavorable information, is only one method of news manipulation.

Newsmen talked to us about staged events, created events, that demand news coverage without offering any substantive information. An example of this, given by one reporter, is the commotion that accompanies high government officials, like Cabinet members, at airports. When the public already knows where a public official is going and why, just how important is it to watch him get on an airplane? Television is particularly vulnerable to this kind of news event because film is so important in that medium and if an administration understands how television works, news manipulation becomes almost easy.

DAVID MOLPUS. But while the administration encourages coverage of some news events, it limits coverage of others. Sam Donaldson.

SAM DONALDSON. Well, a year ago this month the Bureau of Labor Statistics would routinely offer a briefing on the main statistics—unemployment figures, the consumer price index—I think the two people are really interested in. That was cut out by the administration on the theory, they said, that the newsmen could get the same thing by calling the officials and they didn't want them put on the spot, when in fact I'm convinced, as is almost every other reporter in town, it was to prevent people from the Bureau of Labor Statistics from giving an unbiased, straightforward view of the figures.

DAVID MOLPUS. Donaldson thinks this cheats the public.

SAM DONALDSON. If I have Herb Stein speaking for the administration, I want to use him. He is a spokesman for the administration. It would be just as wrong

for me to try to eliminate him as to eliminate an opponent. Now, I can use Larry O'Brien telling us that the unemployment figures are terrible and in fact, if it's pertinent, I will use him, too. But that third essential man in a spot like this, the man who has no axe to grind, the statistician who is non-partisan. I can't find him now because the administration has cut him off, and I think the story suffers and the understanding suffers because of it.

DAVID MOLPUS. President Kennedy wanted his administration to speak with one voice. It can be embarrassing to have government officials contradicting each other. To avoid that embarrassment, the use of public information officers has grown. The government restricts newsmen from talking to whichever public official they want. Frequently now, reporters must go through public affairs offices. Reporters agree that a public affairs office can be helpful, but it can also get in their way. Once again, Sam Donaldson.

SAM DONALDSON. It is harder and harder to talk openly with subordinate policy-makers in the various agencies as one used to do. You can talk to the information officer and query him and formally query him. You may make appointments through him with assistant attorney generals, but the days when you could openly, now I stress that word because newsmen still have their contacts, and information still flows, the day you could openly just walk into the Assistant Attorney General's in charge of the Criminal Division's office and ask to see him or make an appointment for lunch with him and be seen leaving the Department together, those days have ended.

DAVID MOLPUS. Bob Schifer agrees. He discusses public affairs operations at the Pentagon.

BOB SCHIFER. Here at the Pentagon you have this enormous public relations apparatus, this enormous, just sheer numbers, it's the largest public relations organization in the world, literally hundreds of people, whose job is simply public relations. You have a large organization that works for the Secretary of Defense under the Assistant Secretary of Defense for Public Affairs. Then each of the uniform services, the Army, the Navy, the Air Force, has a separate public relations office. Also the Marine Corps. And then of course that's only the beginning and you get down to each base and you have another public relations officer with a complete staff. For example, in Vietnam at a base like Long Binh, a public relations staff of more than 40 people I'm told, just at one base, at one place in Vietnam. It's very difficult to crack that group of people. It's very difficult to get through those people to find out what's really going on and anybody that's covered the news 5 minutes knows that to really find out what's going on, you have to go past the public relations man.

DAVID MOLPUS. And Schifter says public relations officials sometimes can inhibit access to information simply by their presence. He talks about the International Security Agency, what he calls the "Pentagon's Little State Department".

BOB SCHIFER. Reporters are not even allowed to call people in that department on the telephone unless they go through the public affairs department. People in that agency are not allowed to take calls from reporters. In order to interview people in that agency, you must always have a monitor present, a monitor from the public affairs office. Well it doesn't, I don't think it's difficult to see, that people can be less than candid under those circumstances.

DAVID MOLPUS. For this broadcast we interviewed one reporter who works for the Voice of America. Before talking to us, that reporter had to get clearance through the agency public information office. This brings up the question of the role of the public affairs officer. Where does his loyalty lie? Robert Goralski gives his view.

ROBERT GORALSKI. I think the saddest part, the saddest commentary on public information policies within the U.S. Government today and this has been true for a long time too, it isn't this administration alone, the public affairs officer, or the public information officer, does not believe he is serving the American public. Now the taxpayer pays his money. He is in that job to provide a free flow of information. He is the means by which Government policy, attitudes, activities are reported to the taxpayers, to the people at large. Unfortunately, most public affairs officers don't take that attitude. Their position, they feel, is to protect the people who have hired them or to put the best foot forward, the best face forward.

That is not the role of the public affairs officer, it should not be the role. A person who is a public affairs officer in Washington for the U.S. Government is

an employee of the United States, not the administration, the government, which is the American people. Now they've forgotten that, and I think what they're trying to do in most cases is protect their agency or their department, put their secretary up as the greatest man in the world, get him on as many television shows as possible, and it's not to provide the American people with the information that is needed in a democracy.

DAVID MOLPUS. President Nixon himself has stated that there is too much secrecy in government, too much overclassification of documents. After the Pentagon papers came to light, the White House ordered a review of classification and declassification policies. The President asked Congress to finance a 5-year program to declassify secrets from World War II to the Cuban missile crisis. There are 160,000,000 pages of secret documents on World War II alone. On March 8 this year, Mr. Nixon issued an executive order on government secrecy. It established a new procedure for declassifying secret documents. From now on, most classified material will automatically be made public in no more than 10 years but government retains the right to halt the declassification process of any particular document if that document is still sensitive. Administration officials aren't sure yet how the new order will work, whether it will really make more information available, but Chairman Moorhead of the House Subcommittee on Government Information already has some opinions about the President's announcement. Moorhead says the order was written by classifiers for classifiers. He doesn't think it will make government more open. Indeed, it may have the opposite effect.

An aide to Moorhead says that under the new order only people reviewing classified documents will be those who classified them in the first place. There will be no public representative, and the new order broadens the old category of "national defense" to "national security." Moorhead's aide says this could easily be interpreted to include domestic matters which would then be subject to classification. Moorhead's staff admits that their study of Mr. Nixon's new declassification plan is incomplete, but they say that is not their fault. They haven't enough time to study it. The Government Information Subcommittee asked for a copy of the order before it was made public, but their request was denied. And, again, government information did not flow.

The broadcast journalists we talked with hold some varying opinions about the Freedom of Information Act, but on freedom of information itself, they are in agreement: there must be more of it. A political system where the government is the people cannot function unless the people know what is being done in their name. Most of the newsmen interviewed thought it would be difficult, if not impossible, to legislate open government.

But reporters say some improvements in the FOI Act could be made. They would like to see a Commission set up to rule on complaints quickly. They think this would help provide information while it is still timely. And the journalists say the activities of the Moorhead subcommittee are helpful. That committee has documented a number of cases of government abuse of its privilege of secrecy.

The clash between the government's right to keep things secret and the public's right to know will continue. Neither right is expressly guaranteed by the Constitution, but each is considered essential for the proper functioning of a democracy. As one reporter told us, in the end perhaps only public pressure and resentment will force governments to tell the people what it is governments are doing.

I'm David Molpus, for Alex Chadwick and myself, thank you for joining us.

[The opinions of reporters interviewed for this broadcast are their own and do not necessarily represent the views of their employers.]

U.S. ATOMIC ENERGY COMMISSION,
Washington, D.C., May 3, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations,
House of Representatives.

DEAR MR. HOLIFIELD: Thank you for the opportunity to comment on H.R. 4938, a bill "[t]o amend the Freedom of Information Act to require that all information be made available to Congress except where Executive privilege is invoked," and H.R. 4960, a bill "[t]o amend section 552 of title 5 of the United States Code to limit exceptions to disclosure of information, to establish a Freedom of Information Commission, and to further amend the Freedom of Information Act."

The Atomic Energy Commission considers enactment of H.R. 4938 unnecessary with respect to AEC activities, particularly in view of section 202 of the Atomic Energy Act of 1954, as amended, and subsection (c) of 5 U.S.C. 552, the Freedom of Information Act. We oppose enactment of H.R. 4960 as presently written.

H.R. 4938 would add to the Freedom of Information (FOI) Act a new subsection (d) which would place a time limit of 30 days on an agency's response to a request for information from a House or committee of Congress, or from the Comptroller General, unless Executive privilege were invoked over the President's signature.

An officer or employee of an agency would be required to appear in response to a request by a House or committee of Congress for his presence to present testimony. The agency representative would have to supply all information requested except those items specifically ordered withheld by the President in a signed statement invoking Executive privilege.

Finally, H.R. 4938 would limit the invocation of Executive privilege to those instances involving certain policy recommendations whose disclosure would jeopardize the national interest and the obtaining of forthright advice.

The AEC is required by section 202 of the Atomic Energy Act to keep the Joint Committee on Atomic Energy "fully and currently informed" regarding its activities. Beyond this statutory requirement, AEC has consistently been responsive to Congressional inquiries in general, both from individual members and from the committees, and to inquiries from the Comptroller General. We thus see no need for this legislation as regards the AEC.

Comments concerning H.R. 4960

In general, H.R. 4960 would limit the FOI Act exemptions and require the Federal courts to examine records claimed by an agency to be exempt from disclosure; establish a Freedom of Information Commission to investigate allegations of improper withholding of information by an agency; fix time limits for agencies' processing of FOI requests; and require agencies to submit annual reports to named Congressional committees concerning FOI actions during the preceding year. Specific provisions of H.R. 4960 are detailed as necessary in the comments which follow.

H.R. 4960

TITLE I—LIMITING FREEDOM OF INFORMATION ACT EXEMPTIONS

Section 101 of the bill would amend 5 U.S.C. 552(a) by adding a paragraph (5), which would require *in camera* inspection in all FOI Act cases pending in a district court, and involving refusal to furnish records to the complainant on the grounds that the records were exempt under 5 U.S.C. 552(b). In its review, the court could obtain the assistance of the Freedom of Information (FOI) Commission, which would be established under Title II of the bill.

While we are somewhat concerned about the potential for delay which could result from the mandatory *in camera* inspection of all documents, our principal objection to this provision is the delay which would result from the court's referral of questions to the FOI Commission. At the minimum there would be in such cases a new round of proceedings. In addition, the *prima facie* nature of certain determinations of the FOI Commission opens the way for a trial *de novo* in the district court even after the hearing before the FOI Commission. This latter point is discussed in greater detail below, in regard to Section 222 of the bill.

Section 103 of the bill would make substantive changes in three of the existing exemptions in 5 U.S.C. 552(b). We have no comment concerning the proposed amendment to exemption 7 (5 U.S.C. 552(b)(7)) regarding investigatory records. However, the remaining two changes are of concern to us. First, the proposed revision to exemption 4 (5 U.S.C. 552(b)(4)) would allow withholding of so-called "proprietary" data only if obtained from a person "under a statute specifically conferring an express grant of confidentiality * * *" We believe that some limited provision for withholding propietary information should remain in the Freedom of Information Act itself. Otherwise, it is possible that the AEC's ability to obtain and protect confidential data from vendors and utilities would be seriously hampered by the proposed amendment.

Second, the terms of exemption 5 have been changed from inter-agency or intra-agency memoranda or letters "which would not be available by law to a party * * * in litigation with the agency; * * *" (5 U.S.C. 552(b)(5)) to

memoranda or letters "which contain recommendations, opinions, and advice *supportive of policy-making processes.*" (Emphasis added.) The meaning of "supportive" is not clear. We oppose this provision if it is intended to exempt only advice which happened to agree with the decision ultimately made. The implication that views which turn out to be at odds with the decision should always be disclosed can have a chilling effect on free exchange of views.

TITLE II—FREEDOM OF INFORMATION COMMISSION

Section 201 would establish a Freedom of Information Commission. Under section 202, there would be three members appointed by the President and two each by the Speaker of the House of Representatives and the President pro tempore of the Senate.

Section 209 would require the FOI Commission to "be responsible for maintaining the confidentiality" of material in its custody. It is not clear whether this provision would be limited to material exempt from disclosure under the revised "trade secrets" provision (exemption 4, as it would be amended by section 103 of the bill, discussed above).

Section 209 also would provide that "all security procedures prescribed by law and Executive Order" shall be followed. For AEC purposes, this apparently means that members of the FOI Commission, and its staff, would have to obtain "Q" clearance, in accordance with AEC procedures.

Section 214 would empower the FOI Commission to request an agency for "information" in addition to documents. This could be construed as authorizing complex and time-consuming discovery procedures, which go far beyond the present statute.

Although the bill contains provisions for hearings and other procedural rights before the FOI Commission (section 218), it is not clear whether such procedures would have to conform to the Administrative Procedure Act.

Section 218(b) would also permit the FOI Commission either to compensate directly or order assessed against a Federal agency reasonable attorneys' fees and other costs, in proceedings where there is financial need by a private party. The agency assessment could occur only where the FOI Commission determined that the agency "without reasonable justification" withheld information from a party. This standard could trigger still another time-consuming dispute attaching to an FOI request.

Section 219 would give a Federal court, Congress or one of its committees, the Comptroller General, or a Federal agency the right to request the FOI Commission to initiate an investigation into allegations that some other agency was improperly withholding documents. The intent of this provision with respect to a complaining Federal agency is not clear.

As noted in the comment above respecting section 101, Title II of H.R. 4960 might simply complicate the existing situation by requiring two proceedings—one before the FOI Commission and under section 222, one before the courts—instead of the present single proceeding before a court. If the Congress wishes to adopt the "commission" approach, a second *de novo* proceeding could be avoided by providing in section 222 for ordinary judicial review of decisions of the new agency. In this way, review would be limited to such questions as substantial evidence and abuse of discretion, and there would be no need for a factual retrial as to every line and every document in issue.

Finally, the relationship between the proposed FOI Commission proceedings and other agency actions involving the FOI Act is vague. The bill does not make clear whether a person must exhaust remedies before thhe agency before resorting to the FOI Commission.

TITLE III—IMPROVING THE ADMINISTRATION OF THE FREEDOM OF INFORMATION ACT

Section 301 of the bill would change the FOI Act so as to provide that district counts "shall enjoin" an agency from withholding records. The present Act, at 5 U.S.C. 552(a)(3), states only that a court "has jurisdiction to enjoin" an agency. Such a mandatory rule would improperly require injunctions even in cases where all equitable considerations pointed the other way. We see no reason why an injunction, which is an equitable remedy, should automatically issue in every case.

Section 302 of the bill would require the court to award reasonable attorneys' fees and court costs to the complainant if an injunction or order were issued

against an agency. To avoid possible abuse, we suggest that the matter be discretionary with the court.

Section 303 of the bill would add a new paragraph (6) to 5 U.S.C. 552(a). The new provision would fix a basic time limit of ten working days for an agency's processing of a request for records. Subparagraph (c) would apparently allow an extended deadline under certain circumstances of either twenty working days or thirty working days (the latter only on personal authorization of the head of the agency). At the conclusion of the applicable deadline, the agency would have to process an intra-agency appeal within twenty working days unless the agency head personally authorized another ten working days. Absent personal action by the head of the agency, this means that requests would have to be processed and moved through intra-agency appellate channels within a forty-day time period.

The Atomic Energy Commission cannot function within rigid time limits for all requests, some of which involve nearly 20,000 pages. Unless some limitation is placed on a request, such as a requirement of "relevance" in requests arising out of regulatory proceedings, AEC strongly opposes such time limitations.

Additionally, an agency time limit is meaningless unless the courts (and the proposed FOI Commission) are bound by contraints. It does no good to require agency determinations within, say, thirty days, if the courts and the FOI Commission deliberate on the matter for months.

The provisions which allow an additional increment of ten working days for determination and for intra-agency appeal require personal authorization of the head of the agency. We believe that an agency head should not be called upon to rule on time extensions for FOI requests. If there must be such a mechanism, it should be delegable to some other official within the agency.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

DIXY LEE RAY, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your request for the Commission's comments on H.R. 5425, a bill to amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Enclosed are copies of the Commission's comments on S. 1142. Because that bill is identical to H.R. 5425, our comments are equally applicable to H.R. 5425.

Sincerely,

DEAN BURCH, CHAIRMAN.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C.

Hon. EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, U.S. Senate, Washington D.C.

DEAR MR. CHAIRMAN: This refers to your May 17 request for the Commission's comment on S. 1142, a bill to amend section 552 of Title 5, United States Code, known as the Freedom of Information Act.

Specifically, section 1(a) of the bill would amend section (a)(2) of the Act to require Federal agencies to promptly publish, and distribute (by sale or otherwise) copies of a current index providing identifying information for the public as to matters issued, adopted or promulgated by the agencies after July 4, 1967. The present law requires that such indices be made available for public inspection and copying. The Federal Communications Commission Reports, 2d Series, contain all matters of precedential value issued, adopted or promulgated by the Commission since July 7, 1965. The cumulative indices to FCC 2d, as well as the reports themselves, each of which contain a table of documents by title and main parties, are available for sale by the United States Government Printing Office. Thus, the Commission presently complies with, and has no objection to, this section of the bill.

Section 1(b) of the bill would amend subsection (a)(3) of the Act to require each agency, upon any request for certain records which "reasonably describes" such records, and is made in accordance with published rules stating the time, place, fees, to the extent authorized by statute, and procedures to be followed, to make the records promptly available to any person. The present statute requires that such requests be for "identifiable records." The Commission has no objection to the bill's substitution of the phrase "reasonably describes" for the phrase "identifiable records" so long as the reasonable description contemplated is sufficient to permit the identification and location of the records requested.

Section 1(c) of the bill would add a new paragraph to section (a)(5) of the Act. Subparagraph (A) of the new section would require each agency to make its initial determination on Freedom of Information requests within ten working days. The Commission is of the opinion that the imposition of a specific time limit of such short duration is impracticable. The agency has no control over the number, nature and scope of requests for records, and the circumstances surrounding them vary extensively. Most requests involve records which are routinely available for public inspection and can be handled within a very short time period by the bureau or office which keeps the records. In some cases, however, the request may involve an extensive list of records of a diverse nature, which may be kept at different locations, involve a series of searches by various persons, and may involve a variety of legal or policy questions. Under the Commission's rules implementing the Freedom of Information Act, requests for materials not routinely available for public inspection are acted on initially by the Commission's Executive Director. The Executive Director consults with the bureau or office which exercises responsibility over the subject matter of the request, and often requires detailed information from the bureau or office concerned in order to properly act upon the request. In addition, the Executive Director consults the General Counsel's Office before acting upon a request, and in certain cases the General Counsel may need time to consult formally or informally with the Justice Department before advising the Executive Director. Some cases warrant consideration by the full Commission prior to disclosure.

In addition, the Commission's implementing rules presently provide safeguards designed to protect the rights of certain persons who provide materials to the Commission. For example, when a request relates to papers which contain trade secrets, commercial or financial information, or which were submitted in confidence by third parties, persons having an interest in nondisclosure of the records are afforded an opportunity to comment on the request, and to request Commission review of any adverse staff ruling. Such safeguards, which the Commission believes to be in the public interest, would probably have to be abandoned if the bill's general ten day limitation were enacted.

The Commission, of course, recognizes the importance of expeditious handling of requests for records under the Freedom of Information Act. The computations of the House Foreign Operations and Government Information Subcommittee reveal that for the agencies analyzed, the average number of days taken to respond to initial requests was 33, and the average number of days taken to respond to appeals from initial requests was 50 (Hearings before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations on U.S. Government Information Policies and Practices---Administration and Operation of the Freedom of Information Act, 92nd Cong., 2d Sess. pt. 4, p. 1337). The Commission's average in these two categories was 27 days and 30 days respectively (Hearings, p. 1341). The Commission's averages include requests for access to trade secrets, commercial and financial information, the notification and response procedures for which were detailed above. In fact, the Commission receives more requests for access to records which fall under the trade secrets exemption than requests falling under any other exemption. Thus, although the Commission has endeavored to act upon requests for records under the Freedom of Information Act as rapidly as practicable, our experience indicates that due to the diverse nature of requests, and the variety of circumstances in which they arise, the bill's imposition of an inflexible standard ten day period for action upon all initial requests is not appropriate or desirable. For similar reasons, we would also find it impracticable to comply with the requirements of subparagraph (C) that each agency act upon an appeal from any denial of a request for records within twenty working days.

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Subparagraph (B) of the new paragraph (5) requires each agency denying a request for records under the Act to notify the person making the request that he has twenty working days within which to appeal the denial to the agency. It is our normal practice that our Executive Director's letters which deny a request, wholly or in part, contain an explanation of the individual's right to file an application for review. Although the Commission's rules provide thirty days within which to file an appeal, we have no objection to either the proposed notification requirement or time limitation.

We note that in all three subparagraphs, (A), (B), and (C), the time period begins running on the day of receipt of the request, denial, and appeal respectively. In all three cases, if the mode of communication is by letter the sender would generally not know when the statutory period had passed, since he normally would not be aware of the exact date on which his communication was received.

Section 1(d)(1) of the bill would amend subsection (a)(3) of the Act to authorize the United States District Courts with appropriate jurisdiction hearing the appeal of a final agency determination to examine the contents of any agency records in camera to determine if such records or any part thereof should be withheld under any of the nine exemptions listed in subsection (b) of the Act. The Commission has no objection to this section.

Likewise, we find no objection to section 1(d)(2) of the bill which also amends section (a)(3) of the Act to authorize the court to examine agency records in camera to determine whether the disclosure of records withheld under authority of subsection (b)(1) of the Act (specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy) would be harmful to the national defense or foreign policy of the United States.

Section 1(e) of he bill would add two new sentences to the end of subsection (a)(3) of the Act. The first requires an answer within twenty days after service upon the United States attorney of a complaint alleging a violation of the Freedom of Information Act. The Department of Justice is the entity of primary responsibility with regard to this provision and the Commission would defer to any views that Department has on this issue. The second new sentence of subsection (a)(3) would authorize the court to assess reasonable attorney fees and other litigation costs against the United States when the court rules against an agency under the Freedom of Information Act. Title 28 U.S.C. § 2412 provides that court costs may be awarded to the prevailing party in any civil action brought by or against the United States (since July 18, 1966), except as otherwise specifically provided by statute. We know of no statute which would prevent a court which overruled a Commission decision under the Freedom of Information Act from awarding costs to the prevailing party. This statute generally places the United States and its agencies on the same footing as private patries with respect to the award of costs in civil cases. Rule 39 of the Federal Rules of Appellate Procedure allows a similar result in appeals cases. Thus, if the section's reference to "other litigation costs" contemplates the award of court costs to the prevailing party, the reference seems unnecessary.

On the other hand, Section 2412, in keeping with standard American jurisprudence, specifically exempts from its provisions the awarding of attorney fees to the prevailing party. The Commission, therefore, does not support the bill's reference to the award of attorney fees to the prevailing party because we do not see sufficient justification for singling out Freedom of Information litigation for such treatment.

The Freedom of Information Act presently requires (5 U.S.C. 552(b)) that information be made publicly available except for nine specific exempt categories. Section 2 of the bill would amend four of the exemptions presently contained in subsection (b) of the Act. Specifically, section (2)(a) would amend subsection (b)(2) of the Act (internal personnel rules and practices) by adding an additional "internal personnel" before practices, and by adding at the end of the exemption the phrase, "and the disclosure of which would unduly impede the functioning of the agency." The Commission's rule implementing exemption (2) of the Act presently provides for disclosure of internal management matters "unless their disclosure would interfere with or prejudice the performance of the internal management functions to which they relate, or unless their disclosure would constitute a clearly unwarranted invasion of privacy." Although the bill's "unduly impede" language appears on its face to be a more restricted exemption than the phrase used in the Commission's rule, we do not object to the bill's language.

The Commission reads section 2(b) of the bill as a clarification of the present meaning of the trade secret's exemption contained in subsection (b)(4) of the Act. We point out that the clarification would, of course, have no effect on the United States Criminal Code's prohibition against the unauthorized disclosure of certain confidential information (e.g., trade secrets, operations, processes, etc.) by Federal government employees.

Section 2(c) of the bill substitutes the word "records" for "files" with regard to the personnel and medical files exemption set forth in subsection (b)(6) of the Act. The Commission's rule implementing exemption (6) uses the word records, and we thus support the amendment.

Section 2(d) of the bill amends the exemption contained in subsection (b)(7) of the Act relating to investigatory files compiled for law enforcement purposes. Initially, the amended section would exempt investigatory *records* compiled for any *specific* law enforcement purpose *the disclosure of which is not in the public interest* (new language indicated by italics). Although we have no particular objection, the Commission is not clear as to the distinction to be made between a "specific" as opposed to a general investigatory file. Likewise, although we do not object to the bill's requirement that a public interest determination be made, we point out that the legislative history of the Freedom of Information Act specifies as a purpose of the bill the elimination of the government's withholding legitimate information on the basis of "secrecy in the public interest" (S. Rept. No. 813, 89th Cong., 1st Sess., p. 3).

Section 2(d) of the bill lists three exceptions to the investigatory records exemption. The Commission has no objection to the first two, (i) scientific tests, reports, or data, and (ii) inspection reports of any agency which relate to health, safety or environmental protection. On the other hand, we have some difficulty with the third exception to the investigatory records exemption which excepts records which serve as a basis for any public policy statement or rulemaking by an agency. The Commission's rule implementing exemption (7) essentially provides that a complaint against a licensee will be made available for inspection upon request "if it appears that its disclosure will not prejudice the conduct of the investigation." The rule further provides for availability of a complaint when it has been determined that no investigation should be conducted or when the investigation has been completed provided that there is no need to protect the identity of the complainant, and the complaint contains no scurrilous or defamatory statements. In the past the Commission has on occasion issued a public notice to its licensees for the purpose of alerting them to a possible widespread rule violation or misinterpretation based on complaints received against a licensee or licensees who after an investigation were not formally sanctioned by the Commission because their violation was not found to be willful or repeated. It is foreseeable that instances could arise where the disclosure of such complaints, or the complainant's identity, would serve no useful purpose, and could perhaps be harmful. However, it is unclear under the bill's language whether such information could be justifiably withheld on the basis of a public interest determination. We therefore would urge clarification of the proposed exemption, or elimination of this third exception.

Likewise, we are also unclear as to the scope of the amendment to subsection (c) of the Act made by section 3 of the bill. Subsection (c) now provides that the Freedom of Information Act is not authority to withhold information from Congress. The bill appears to impose a more affirmative duty, i.e., that notwithstanding subsection (b), an agency *shall furnish* any information or records to Congress or any Committee of Congress promptly upon written request to the head of each agency by the Speaker of the House of Representatives, the President of the Senate, or the chairman of any such committee as the case may be. It is, of course, the policy of the Commission to cooperate in every way with the Congress in keeping it apprised of our functions and activities. However, to the extent that the proposed language may be construed to broaden an agency's obligation to furnish information to Congress, it should be noted that we have on occasion had to delay access to records pertaining to a case in an adjudicatory posture to avoid prejudice to the rights of participants and to protect the integrity of the quasi-judicial process. One such case, for example, involved a Commission decision in a hearing case still subject to reconsideration where, in the absence of any indication of wrongdoing, the Committee's request for records was considered to be analagous to an improper *ex parte* contact which could give the appearance of influencing the Commission's decision on reconsideration. Of course, we readily make such records available to the Congress upon the com-

pletion of an adjudicatory proceeding. Some clarification of the intent of section 3 in this regard may be helpful. Any such clarification might also make explicit that information so furnished to the Congress, and exempt from public disclosure, will remain non-public and be treated in a confidential manner.

Finally, Section 4 of the bill would add a new subsection (d) which would require each agency to submit to the appropriate committees of Congress an annual report detailing the agency's administration of the Freedom of Information Act during the preceding year. The bill enumerates seven topics which would be required to be included in the report. If the Congress decides that such a report would be useful to it in its function of overseeing the administratiton of the Freedom of Information Act, the Commission would be glad to comply with the requirement. However, we believe that the first topic to be included in the annual report, "(1) the number of requests for records made to such agency under subsection (a)," needs clarification. Subsection (a) of the Act refers to records which are routinely available for public inspection as well as those which are not routinely available. The Commission's procedures for making available records which are routinely available for public inspection call for the direct delivery to any individual asking for such material here at the Commission, or for mailing such material to the requestor. In these instances, no record is maintained of such public service. This procedure, which permits us to provide quick access and an expeditious response to the public, has been used successfully in handling thousands of requests. The evaluation of our performance can best be measured by the general absence of complaints received with respect to this type of request. Necessary supervision over this activity is being exercised by the heads of the respective bureaus or offices from whose files material is being requested. We believe that the major results of requiring a record keeping system for granting this type of request would be unnecessary delay to the requestor, and increased cost to the government. On the other hand, the Executive Director maintains a chronological log, which includes the type of request and disposition of all requests received, for information not routinely available for public inspection. This log could serve as a convenient basis for our enumeration of such requests in an annual report. For the reasons stated, we believe paragraph (1) should be clarified to specify that it pertains only to requests for records "not routinely available for public inspection."

The Commission hopes these comments will prove useful to the Subcommittee in its consideration of S. 1142.

The Office of Management and Budget advises that while there is no objection to submission of this report, the Administration opposes enactment of S. 1142 for the reasons stated by the Department of Justice.

This letter was adopted by the Commission on June 6, 1973; Commissioner Johnson concurring in part and dissenting in part and issuing a statement which is attached.

By direction of the Commission.

DEAN BURCH, *Chairman.*

STATEMENT OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

I do not believe the 10 and 20 day limitations are unreasonable, nor do I oppose the awarding of attorney's fees—which I believe would have a salutary effect on Freedom of Information Act enforcement.

FEDERAL HOME LOAN BANK BOARD,
Washington, D.C., July 2, 1973.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, U.S. House of Representatives, Rayburn Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request, dated March 16, 1973 for the views of this Board on H.R. 5425, 93d Congress, a bill to amend section 552 of title 5, United States Code, known as the "Freedom of Information Act", along the lines suggested by the report of the Committee on Government Operations of the House of Representatives, entitled "Administration of the Freedom of Information Act" (H.R. Rep. No. 92-1419), 92d Congress, 2d Sess. (1972)).

I

Subsection (a) of Section 1 of the bill would amend the fourth sentence of 5 U.S.C. 552(a)(2) to require publication and distribution of the public index now maintained by each agency under the statute. It contains "identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published". This change does not track any of the "Legislative Objectives" of the House Committee Report. Further, no basis is laid for it in any of the information supplied or recommendations made in the report. This may indicate that thorough consideration has not been given to the technical problems that would be involved in the change.

The public index requirement of the Freedom of Information Act is not a very clear directive, even with the benefit of the gloss provided in the *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (June, 1967) and there is reason to believe that the practices of agencies in complying with the present requirement vary widely. For some agencies a publication requirement would be no more onerous than the existing directive. For others, such as those issuing and indexing large numbers of orders, publication would be extremely burdensome and probably of no more value to the public than the unpublished index now made available in accordance with 5 U.S.C. 552. The publication requirement might in addition have the unintended effect of causing some agencies to narrow the range of existing indices to make them easier to publish. The public index system could be made more useful to the public by requiring publication only of that part of an index concerned with opinions and interpretations of an agency which have precedential significance. We would support an amendment that is so limited.

Subsection (b) would amend 5 U.S.C. 552(a)(3) by rewording the requirement that a request be for "identifiable" records to read "any request for records which (A) reasonably describes such records . . ." It is clear from the House Report that the purpose of the amendment is to make the statutory language consistent with the determinations of the courts that a person seeking information need not make a detailed identification of the records sought. The purposes and the new wording are unobjectionable. But since the courts have given the existing statutory lanugage ("identifiable records") an interpretation that provides the results presumably wished for by the draftsmen (*Bristol-Myers Co.* v. *FTC*, 283 F. Supp. 745 (D.D.C. 1968); *Wellford* v. *Hardin*, 315 F. Supp. 768 (D.D.C. 1970), a statutory amendment may not be necessary.

Subsection (c) would amend section 552(a) by adding a new paragraph (5) at the end thereof. In substance, the new paragraph would require an agency to grant or deny a request for information within ten working days, to notify a person whose request had been denied of the right to appeal within twenty working days, and to rule on an appeal within twenty working days. If an agency did not comply with a time limit, the requesting person would be deemed to have exhausted his administrative remedies. Although the idea of such limitations upon agency action is reasonable, a ten-day period is too brief in view of the practical difficulties that they face. The bill calls for a "determination" within ten days and, if the determination is favorable to the request, production of records "as soon as practicable". This would allow an agency to make an initial determination and then have a reasonable period to get its records out of storage. However, the process of locating and assembling records may take considerable time if the records are located in several different places within the agency or in a Federal Records Center or a distant storage building. Unfortunately, there are many instances in which an adequate determination cannot be made before a responsible official of the agency can review the records. If the records are difficult to obtain promptly, a ten day period might be required to obtain them, and there would be no time allowed for review. The Board therefore recommends that the statute be flexible enough to allow greater time in such situations although a specific period could be specified as a goal or a norm.

Subsection (d) would amend the third sentence of section 552(a)(3): (1) by providing for *in camera* examination of agency records by the court that will rule on a complaint against the agency for withholding records; (2) by providing specifically for *in camera* examination of records withheld pursuant to section 552(b)(1) ("specifically required by Executive Order to be kept secret in

the interest of the national defense or foreign policy") in order to determine if disclosure of such records would be harmful to the national defense or foreign policy of the United States. We should not object to the first change so far as our own records are concerned, although we do not believe it should be required routinely. We take no position on the second.

Subsection (e) would add two new sentences to section 552(a)(3). The first would require the Government to file responsive pleadings to freedom of information cases within twenty days, and the second would allow the assessment of reasonable attorney fees and other litigation costs against the United States in a freedom of information case in which the Government did not prevail. The first sentence would shorten the time available to the Government from the sixty days allowed under Rule 12 of the Federal Rules of Civil Procedure to the time allowed under Rule 12 to private litigants. We understand that the Department of Justice objects to this amendment; the Board defers to the Department's view on this matter.

II

Subsection (a) of Section 2 of H.R. 5425 would amend the second exemption of the Freedom of Information Act (5 U.S.C. 552(b)(2)), which now reads "related solely to the internal personnel rules and practices of an agency", by inserting "internal personnel" immediately before "practices" and by inserting " and the disclosure of which would unduly impede the functioning of such agency" at the end. The first proposed change seems unnecessary, and the new phrase proposed to be added to the end of the exemption to narrow it would seem to be unnecessary in light of the narrow judicial interpretation of the exemption found in several recent decisions.

Subsection (b) would amend the fourth exemption of the Act (5 U.S.C. 552(b)(4)), which now reads "trade secrets and commercial or financial information obtained from a person and privileged or confidential", by inserting "obtained from a person which are privileged or confidential" immediately after "trade secrets" and by striking the "and" before "privileged or confidential" at the end of the phrase and replacing it with "which is". The second change seems unnecessary; it is clear that the words "privileged and confidential" already modify "commercial or financial information". The first change, however attempts to eliminate an ambiguity in the existing language, however attempts to eliminate an ambiguity in the existing language. It should be remarked, however, that this exemption would still remain subject to the criticisms that have been made of it in the past. Both the Attorney General Professor Davis (in Davis, *The Information Act, a Preliminary Analysis*, 34 U. Chi. L. Rev. 787 (1967)) have shown that the words of this exemption do not express the intentions of Congress in passing the Act. Most notably, both legislative history and common sense indicate that the United States Government should be able to withhold some information submitted to it in confidence even if it is not "trade secrets" or "commercial or financial information". The 1964 version of the bill (S. 1666) which provided for the exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential", but was changed without explanation, may not have been perfect, but was more clearly consistent with what appears to have been the legislative purpose.

Subsection (c) would amend the sixth exemption ("personnel and medical files and similar files" 5 U.S.C. 552(b)(6)) by substituting "records" for "files" in both places in which it appears. The intention is to prevent an agency from mingling exempt and non-exempt records in a single file and declaring the file as a whole to be exempt. The Board has no objection to this objective, but believes the amendment may be unnecessary and that the courts are alert to prevent any abuses.

Subsection (d) would amend the seventh exemption (5 U.S.C. 552(b)(7)), which now reads "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency", by substituting "records" for "files", by requiring that such records be compiled for a "specific" law enforcement purpose "the disclosure of which is not in the public interest" and by excepting from the exemption not only records available by law to a party other than an agency, but records that are "(i) scientific tests, reports, or data, (ii) inspection reports of any agency which relate to health, safety, environmental protection, or (iii) records which serve as a basis for any public

policy statement made by any agency or officer or employee of the United States or which serve as a basis for rulemaking by any agency". The addition of "specific" to the phrase "law enforcement purpose" and the additional insertion of "the disclosure of which is not in the public interest" are unnecessary in light of recent judicial interpretations of the law enforcement exemption. In addition, the Board objects to the third specific exception to the exemption, which deals with records providing a basis for agency statements or rulemaking. An agency regulating financial institutions, such as the Board, frequently conducts investigations for "specific" law enforcement purposes. The disclosure of the records of such investigations is clearly not in the public interest, owing in large part to the possible damage to an institution or to such institutions in general and to their borrowing and saving members and to the Federal Savings and Loan Insurance Corporation. It is not at all unlikely that information acquired in the course of such an investigation might be used as the basis of a policy statement or of a preventive regulation of a general nature issued while the investigation is still running its course. Although the general basis of such a rule should be explained by an agency, it seems clear that in such a situation, disclosure of the investigatory records should not be required. It appears, however, that H.R. 5425 would require such disclosure. Beyond particular examples of this nature, the wording of the new exemption is unfortunate, requiring that records, "the disclosure of which is not in the public interest", must be disclosed nevertheless if they fall within three broad categories. Should Congress ever require disclosure that is not "in the public interest"? It does not appear that the attempt to balance public interest considerations of disclosure against nondisclosure has been successfully achieved in this part of the proposal to amend the seventh exemption.

III

Section 3 of H.R. 5425 would amend subsection (c) of section 552, which now reads as follows:

> "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The proposed amendment would designate the first sentence of (c) as paragraph (1). Paragraph (2) would provide that any agency shall furnish any information or records promptly upon written request by the Speaker of the House, the President of the Senate, or the Chairman of any committee of Congress, "notwithstanding subsection (b)". Insofar as this pertains to the possible use of subsection (b) as a ground for refusing a Congressional request, the change is unnecessary; the existing language is quite clear on this point. The expansion of subsection (c) to treat in detail of relations between agencies and Congress is not in harmony with the rest of the Administrative Procedure Act, which treats of relations between agencies and the public. Further, the proposed amendment may go beyond negating the use of subsection (b) to deny Congressional requests and strike at the doctrine of executive privilege; but it is unclear under the language of the amendment whether the effect of the change would be limited to a clarification of existing subsection (c) or would be so broad as to concern executive privilege. Accordingly, the proposed amendment of subsection (c) is objectionable on two grounds: (1) lack of harmony with the rest of the Administrative Procedure Act; (2) lack of clarity.

IV

Section 4 of H.R. 5425 would add a new subsection (d) to 5 U.S.C. 552 that would require each agency to file an annual report with the House Committee on Government Operations and the Senate Judiciary Committee concerning its handling of requests under the Freedom of Information Act. The Board has no objection to this proposed amendment.

The Office of Management and Budget has advised that, from the standpoint of the program of the President, there is no objection to the submission of this report.

Sincerely,

HENRY L. JUDY,
Deputy General Counsel.

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,
Reston, Va., June 29, 1973.

Hon. WILLIAM S. MOORHEAD,
Chairman, Foreign Operations and Government Information Subcommittee, Committee on Government Operations, U.S. House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: In our May 9 letter to you, we indicated that more time was needed to review and comment on the proposed amendments to the Freedom of Information Act. The proposals are before your Committee as H.R. 4960 and H.R. 5425. We hope this letter can be included in the Addendum to the Hearing record.

The members of our Government Relations Committee have studied the proposals and I offer the following general comments on behalf of this Association.

We believe that any effort to make the Freedom of Information Act more workable and more efficient is commendable. ANPA's general position is that we favor a bill which makes available the widest possible selection of information contained in the government files and records to the press and the public. As one of our committee members aptly stated, we would oppose as much as possible any restrictions on the availability of such information except, of course, for reasons of national security or privileged situations where exposure of the records would impede the proper conduct of government business.

We in the newspaper business are well aware of the criticism of us for not making sufficient use of the Freedom of Information Act. We believe that if the Act were duly amended to provide a shorter response period from government agencies to requests, a less cumbersome appeal procedure when requests are denied and accountabiilty of agencies to the Congress, the Act would certainly be more adaptable to newspaper interests.

Additionally, we feel strongly that the formation of a Freedom of Information Commission would be a serious mistake. The Commission, if established, would simply be another bureaucratic proceeding which would inhibit the free flow of information to the public and to newspapers in particular. Because newspapers operate under severe time constraints, to impose yet another delay in the information-gathering process would only defeat the original purpose of the Freedom of Information Act.

In this regard, we believe the Act should be self-operative, and enforcement should be through the courts rather than a Commission.

We commend your Committee's efforts to rectify the confusing situation which exists in obtaining information from government agencies. The problem of devising specific language to improve the complex provisions of both bills before you is beyond the scope of our present analysis. However, we have great confidence in the ability and statesmanship of your subcommittee in solving these problems in the public interest.

Although the Freedom of Information Act has become unwieldy and sometimes it has been used by agencies to retain more information than they dispense, we feel that any measure which eliminates some of the problems and opens up the government will surely be of benefit to the public and to newspapers.

With high esteem.

Sincerely yours,

STANFORD SMITH, *President.*

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