The original documents are located in Box 17, folder "Freedom of Information - Legislation (2)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

9/26/74

To: Ken Lazarus

From: Jay French

FYI

September 24, 1974

Dear Ted:

This is in acknowledgement of the September 23 letter from you and Congressman Moorhead reporting to the President the conference decisions with respect to the Freedom of Information Act.

I want you to know that your very detailed report will be called to the President's attention without delay.

With best regards,

Sincerely,

William E. Timmons
Assistant to the President

The Honorable Edward M. Kennedy
United States Senate
Washington, D.C. 20510

cc: w/incoming to Philip Buchen for further handling.

WET:EF:VO:vo

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Assistant to the President

The Honorable William S. Moorhead
House of Representatives
Washington, D.C. 20515

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WET:EF:VO:vo

9-23

NINETY-THIRD CONGRESS

Congress of the United States

House of Representatives

FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS
RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B
WASHINGTON, D.C. 20515

225-3741

September 23, 1974

The Honorable Gerald R. Ford
President of the United States
The White House
Washington, D. C. 20500

BT

Dear Mr. President:

We were most pleased to receive your letter of August 20 and to know of your personal interest in the amendments to the Freedom of Information Act being considered by the House-Senate conference committee. And we appreciate your recognition of the fundamental purposes of this milestone law and the importance you attach to these amendments. They of course would provide support for your own policy of "open government" which is so desperately needed to restore the public's confidence in our national government.

When we received your letter, all of the members of the conference committee agreed to your request for additional time to study the amendments and have given serious consideration and careful deliberation to your views on each of the major concerns you raised. The staffs of the two committees of jurisdiction have had several in-depth discussions with the responsible officials of your Administration. Individual Members have also discussed these points with Justice Department officials.

At our final conference session we were able to reopen discussion on each of the major issues raised in your letter. We believe that the ensuing conference actions on these matters were responsive to your concerns and were designed to accommodate further interests of the Executive branch.

You expressed concern in your letter about the constitutionality and wisdom of court-imposed penalties against Federal employees who withhold information "without a reasonable basis in law." This provision has been substantially modified by conference action.

At our last conference meeting, after extensive debate and consideration, a compromise sponsored by Representative McCloskey and modified by Senate conferees was adopted. This compromise leaves to the Civil Service Commission the responsibility for initiating disciplinary proceedings against a government official or employee in appropriate circumstances--but only after a written finding by the court that there were "circumstances surrounding the withholding (that) raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." The actual disciplinary action recommended by the Commission, after completion of its standard proceedings, would actually be taken by the particular agency involved in the case.

We feel that this is a reasonable compromise that basically satisfies your objections to the original Senate language.

You expressed fear that the amendments afford inadequate protection to truly important national defense and foreign policy information subject to in camera inspection by Federal courts in freedom of information cases. We believe that these fears are unfounded, but the conference has nonetheless agreed to include additional explanatory language in the Statement of Managers making clear our intentions on this issue.

The legislative history of H. R. 12471 clearly shows that the in camera authority conferred upon the Federal courts in these amendments is not mandatory, but permissive in cases where normal proceedings in freedom of information cases in the courts do not make a clear-cut case for agency withholdings of requested records. These proceedings would include the present agency procedure of submitting an affidavit to the court in justification of the classification markings on requested documents in cases involving 552(b)(1) information.

The amendments in H. R. 12471 do not remove this right of the agency, nor do they change in any way other mechanisms available to the court during its consideration of the case. The court may still request additional information or corroborative evidence from the agency short of an in camera examination of the documents in question. Even when the in camera review authority is exercised by the court, it may call in the appropriate agency officials involved to discuss any portion of the information or affidavit furnished by the agency in the case.

The conferees have agreed to include language in the Statement of Managers that reiterates the discretionary nature of the in camera authority provided to the Federal courts under the Freedom of Information Act. We will also express our expectation that the courts give substantial weight to the agency affidavit submitted in support of the classification markings on any such documents in dispute.

Thus, Mr. President, we feel that the conference committee has made an effort to explain our intentions so as to respond to your objections on this important area of the amendments, operating as we must within the scope of the conference authority because of the virtually identical language in both the House and Senate versions of H. R. 12471.

The conference committee has also acted affirmatively to satisfy your major objections to the proposed amendment to subsection (b)(7) of the Freedom of Information Act, dealing with specific criteria for the withholding of Federal investigatory records in the law enforcement area.

The conference committee had already added an additional provision, not contained in the Senate-passed bill, which would permit withholding of information that would "endanger the life or physical safety of law enforcement personnel." This made it substantially identical to the language recommended by then Attorney General Richardson during Senate hearings on the bill and endorsed by the Administrative Law Section of the American Bar Association.

After reviewing the points made in your letter on this point, the conference committee also agreed to adopt language offered by Senator Hruska to permit the withholding of the information provided by a confidential source to a criminal law enforcement authority during the course of a criminal or "lawful national security intelligence investigation." The Federal agency may, in addition, withhold the identification of the confidential source in all law enforcement investigations--civil as well as criminal.

To further respond to your suggestion on the withholding of information in law enforcement records involving personal privacy, the conference committee agreed to strike the word "clearly" from the Senate-passed language.

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award

attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.

You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

In conclusion, Mr. President, we appreciate your expression of cooperation with the Congress in our deliberations on the final version of this important legislation. In keeping with your willingness "to go more than halfway to accommodate Congressional concerns", we have given your suggestions in these five key areas of the bill renewed consideration and, we feel, have likewise gone "more than halfway" at this late stage.

We welcome your valuable input into our final deliberations and appreciate the fine cooperation and helpful suggestions made by various staff members and officials of the Executive branch. It is our hope that the fruits of these joint efforts will make it possible for the Senate and House to act promptly on the conference version of H. R. 12471 so that this valuable legislation will be enacted and can be signed into law before the end of the month.

With every good wish,

Sincerely,

Edward M. Kennedy
Chairman, Senate Conferees

William S. Moorhead
Chairman, House Conferees

THE WHITE HOUSE

WASHINGTON

October 10, 1974

MEMORANDUM FOR: Phil Buchen

FROM: Ken Lazarus

SUBJECT: H. R. 12471, Amendments to the Freedom of Information Act.

Attached is a memo from Ken Cole to the President dealing with the subject noted above which received final congressional action and was sent to the President two days ago.

I have indicated to Geoff Shepard that you favored signing the legislation. If this course is taken, the President's signing statement should make two points: (1) the President can strengthen the legislative history with respect to the procedures governing exemptions 1 and 7; and (2) the preservation of the right of the Executive to litigate any possible encroachment upon core Executive functions in the context of exemption 1 should be noted.

It is my opinion that the President can expect no more than 20-25 votes in the Senate to support a veto. Prospects in the House are even dimmer. Unless the pocket veto is utilized, there is likely no possibility of defeating this bill.

cc: Phil Areeda
Bill Casselman

Attachment

THE WHITE HOUSE

WASHINGTON

October 8, 1974

MEMORANDUM FOR: THE PRESIDENT

FROM: KEN COLE

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

The Conference Bill passed the Senate by voice vote October 1st and the House yesterday 347 to 2. As previous discussions with your legal staff have indicated, the bill contains a severely objectionable provision providing for judicial review of document classification. There are also difficulties with a section permitting search and disclosure of law enforcement agency investigatory files.

Utilizing your letter to Kennedy and Moorhead of August 20th, the affected Departments (State, Justice, Defense and CIA) as well as OMB and your Domestic Council have worked extensively to moderate these provisions without substantial progress, although a number of your concerns about other problems have been accommodated. The Conference Committee maintained that the House and Senate versions of the judicial review provision were virtually identical and that they therefore lacked the authority to make substantial alterations. The best we were able to obtain was some favorable legislative history in the Conference Report and in the debate on the House floor (attached at Tab A). The affected agencies can be expected to recommend a veto.

Assuming the legislation is transmitted before the scheduled recess, you have basically two options:

_____ Sign the legislation. Recognize the political difficulties of opposing "Freedom of Information"; have a signing ceremony; and issue a signing statement which reinforces your Administration's interpretations of the judicial review of classified documents provision and expresses your intention to seek resolution of the constitutional issue in the courts.

Veto the legislation and simultaneously transmit virtually identical legislation with your proposed changes. This would be preceded by a meeting with the senior Conferees when you endorse all aspects of their bill but one, empathize with their inability to alter this provision in Conference, but point out its crucial effect on the Executive; and ask that they work toward immediate passage of your virtually identical bill instead of attempting to override your veto. A draft veto message is attached for your consideration in this regard (Tab B).

other disposition of animals, timber, hay, grass, or other products of the soil, minerals shells, sand, or gravel, from other privileges, or from leases from public accommodations or facilities incidental to, but not in conflict with, the basic purposes for which those areas of the National Wildlife System were established are required to be covered into a separate fund in the U.S. Treasury. At the end of each fiscal year, the Secretary is required to pay out of the net receipts in the fund—which funds are to be expended solely for the benefit of public schools and roads—as follows: First, to each county in which reserved public lands are situated, an amount equal to 25 percent of the net receipts from such reserved public lands in that particular area; and second, to each county in which lands are situated which have been acquired in fee, either three-fourths of 1 percent of the cost of the area, or 25 percent of the net receipts from such area, whichever is greater. All moneys remaining in the fund after payments to the counties are used by the Secretary for management of areas within the System and for enforcement of the Migratory Bird Treaty Act.

The Senate amended H.R. 11541 to provide that any excess receipts—after payment to counties—would be earmarked for the Migratory Bird Conservation Fund for land acquisition, the theory being that these funds would be used to replace lands that are being utilized for purposes other than for which they were intended. In the future, the Secretary would be required to obtain funds with which to manage the areas within the System and enforce the Migratory Bird Treaty Act through regular appropriation channels.

In fact, it was brought out by Interior witnesses at my subcommittee hearings on the predecessor legislation that by fiscal year 1977 revenue sharing to the counties will gradually increase—because of the requirement under present law of adjusting the cost of acquiring lands within the System at 5-year intervals—and the Department will have to resort to the appropriation process for such funds during fiscal year 1977. It is anticipated that after fiscal year 1976 there will be no excess receipts which currently amount to approximately $1 million per year.

Mr. Speaker, I would like to make it clear—and this is consistent with the language in the Senate report—that in transferring these excess receipts to the Migratory Bird Conservation Fund, this action in no way negates or lessens the responsibility of the Department of the Interior to come forward and obtain through the regular appropriation process the funds that would be necessary for it to carry out its functions and responsibilities to enforce the Migratory Bird Treaty Act and to manage the National Wildlife Refuge System.

Mr. Speaker, I do not want the Members to think that I am advocating an increase in the sale and utilization of the various resources within the System as a [illegible] appropriations for acquiring wildlife habitat in the future. The main source for such acquisitions at the present and, as a matter of fact, in the foreseeable future is from duck stamp sales which are running about $12 million per year. After fiscal year 1976, when three-fourths of such receipts will be used to pay off the loan under the Wetlands Accelerated Acquisition Act—which amounts to approximately $85 million at this time—there will only be about $3 to $4 million remaining to be used for acquisition purposes.

Mr. Speaker, in view of the present energy crisis and the demands being made upon these Federal areas, one of these days mineral receipts from refuges may run into the millions annually, and this would appear to be a good time to earmark this possible source of revenue for land acquisition. I congratulate the Senate for adding this provision to the bill.

Mr. Speaker, I think this is a good piece of legislation and one that is greatly needed. The House considered this legislation earlier in the year at which time it passed by Voice Vote under Suspension of the Rules. I ask the House once again to declare its support for this measure.

The SPEAKER. Is there objection to the request of the gentleman from Michigan?

There was no objection.

The Senate amendment was concurred in.

A motion to reconsider was laid on the table.

FREEDOM OF INFORMATION ACT AMENDMENTS

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I call up the conference report on the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, and ask unanimous consent that the statement of the managers be read in lieu of the report.

The Clerk read the title of the bill.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

The Clerk read the statement.

(For conference report and statement, see proceedings of the House of September 25, 1974.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, since the text of the conference report has been printed with the amendment and also printed in the CONGRESSIONAL RECORD of Wednesday, September 25, 1974, I ask unanimous consent that the statement of the managers be considered as read.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I yield myself such time as I may consume.

(Mr. MOORHEAD of Pennsylvania [illegible] miscellaneous matter.)

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, on March 14 of this year this important bill to make a number of needed procedural and substantive amendments to the Freedom of Information Act of 1966 was considered by the House and passed by the overwhelming vote of 383 to 8. A Senate version of the bill was considered by that body and passed on May 30 by a vote of 64 to 17. The Senate bill contained several amendments not previously considered by the House, two of which were of considerable significance. One dealt with the imposition of administrative sanctions against Government officials or employees for the improper withholding of information under the law and the second amendment tightens loopholes in the exemption dealing with law enforcement records. There were also a number of important differences in language between the two bills on amendments contained in both the House and Senate versions.

The conference committee met on four separate occasions to resolve differences between the House and Senate bills, reaching final agreement on August 21, except for minor technical changes in language that were resolved after the Labor Day congressional recess. Mr. Speaker, I will now indicate the major changes in the House bill that have resulted from the conference:

First, the conference version directs each Federal agency to issue regulations covering the direct costs of searching for and duplicating records requested under the Freedom of Information Act. It also provides that an agency may waive the fees if it determines that it would be in the public interest.

Second, the Senate bill contained a provision authorizing Federal courts—in Freedom of Information Act cases—to impose a sanction of up to 60-days suspension from employment against a Federal official or employee which the court found to have been responsible for withholding the requested records without "reasonable basis in law." This amendment, the most controversial part of the conference committee's deliberations, was opposed by many House conferees on the grounds that it gave the court such unusual disciplinary powers over Federal employees. After extensive discussion over 3 days of meetings, the conferees reached a reasonable compromise—if the court finds for the plaintiff and against the Government and awards attorney fees and court costs, and if the court makes a written finding that circumstances surrounding the withholding raise questions whether the Federal agency personnel acted "arbitrarily or capriciously," the Civil Service Commission must initiate a proceeding to determine whether or not disciplinary action is warranted against the responsible Federal official or employee. The Civil Service Commission would then investigate the circumstances, may hold hearings, and otherwise proceed in accordance with regular civil service proce-

dures. The employee has full rights of due process and the right to appeal any adverse finding by the Commission. If the Commission's decision is against the Federal official or employee, it would submit its findings and disciplinary recommendations for suspension to the affected agency, which would then impose the suspension recommended by the Commission.

Mr. Speaker, there has been some misunderstanding about this sanction provision and I trust that this explanation will help clarify our intent. I seriously doubt that such procedures will actually be invoked except in unusual circumstances. Its inclusion in the law will make it crystal clear that Congress expects that this law be strictly adhered to by all Federal agency personnel and that withholding of Government records be only when clearly authorized by one of the nine exemptions contained in the freedom of information law.

Mr. Speaker, at this point in the RECORD, I would like to include a letter sent to all members of the conference committee by Mr. John A. McCart, operations director of the AFL–CIO Government Employees Council in which his organization—representing some 30 unions and 1.5 million Federal and postal employees—endorses the compromise sanction provisions contained in this bill:

GOVERNMENT EMPLOYEES COUNCIL—AFL–CIO,
Washington, D.C., September 10, 1974.

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

DEAR CONGRESSMAN MOORHEAD: Because of your membership on the conference committee on H.R. 12471 (Freedom of Information Act Amendments), we believe you will be interested in the views of our organization on the provision affecting Federal officers and employes in connection with alleged violations. Thirty AFL–CIO unions representing more than 1.5 million Federal and postal workers comprise the Council.

Our concern with the original language in the measure is that it permitted Federal courts to impose administrative penalties on employes where violations were confirmed by the courts. This arrangement would deprive postal and Federal employes of due process permitted under existing laws governing disciplinary actions. Moreover, the language could open lower level employes to court imposed discipline, even though they were acting in keeping with instructions from higher level officials.

Section A 4(f) of the measure agreed to by the conferees on August 21 is much less onerous. In cases where Federal courts find a violation exists and believe disciplinary action may be justified, the matter will be referred to the Civil Service Commission for processing through the employing agency. Under this procedure, we assume employes will be entitled to the appellate rights normally available in current statutes applicable to the Federal service.

The Council urges acceptance of the conference agreement of August 21.

Respectfully yours,

JOHN A. MCCART,
Operations Director.

TEXT OF M'CART LETTER

Finally, Mr. Speaker, another provision of the Senate bill, not previously considered by the House but included in the conference bill, is an amendment to section 552(b)(7), the exemption in the law dealing with law enforcement records. Under recent court decisions, the language of the present law has been interpreted as almost a blanket exemption against the disclosure of any "law enforcement files," even if they have long-since lost any requirement for secrecy.

The bill now contains modified language of the amendment sponsored by the Senator from Michigan, Mr. HART, and adopted in that body by a vote of 51 to 33, which tightens up the loopholes of the seventh exemption by providing six specific areas of criteria under which agency withholding of information is permitted. Certain of these criteria were the subject of compromise language to accommodate unusual requirements of some agencies such as the Federal Bureau of Investigation.

Mr. Speaker, before yielding to other members of the committee, I would like to refer briefly to communications between the conference committee on this legislation and President Ford. During the meetings of the committee and only a few days after his swearing in, President Ford requested a delay in our proceedings to give him an opportunity to study the bill and agreements already reached by the conferees. We unanimously agreed to this request. On August 20, President Ford sent a letter to the conference committee setting forth his views in four major areas—sanctions, the in camera review language that was virtually identical in both House and Senate bills, the law enforcement exemption amendment, and the provision for discretionary award by the courts of attorney fees and court costs to successful Freedom of Information Act plaintiffs.

Mr. Speaker, the conferees seriously considered each of the points made by President Ford in his letter and have gone "more than halfway" to accommodate his views. We modified the sanction provision of the bill. We included language on the in camera review part of the conference report to clarify congressional intent along the lines he suggested. We modified two provisions of the law enforcement exemption language to meet points he raised. We had already acted to clarify our intent that corporate interests not be subsidized by the award of attorney fees and court costs in freedom of information cases. The conference committee made every effort to cooperate with the President in our consideration of this measure and feel that we have acted responsibly to deal with each of the questions he raised in his letter. I ask unanimous consent to insert in the RECORD at ths point the text of President Ford's letter to me, dated August 20, 1974, and the text of the responsive letter from Senator KENNEDY and myself, dated September 23, 1974, which sets forth conference action on each of the major points he raised:

THE WHITE HOUSE,
Washington, D.C., August 20, 1974.

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

DEAR BILL: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch: I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government, and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all seek to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective.

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without [a] reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him.

Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to this kind of personal liability for the performance of his official duties. Any potential harm to successful complainants is more appropriately rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations is, in fact, properly classified, following an *in camera* inspection of the document by the court. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof. My great respect

September 23, 1974.

Hon. GERALD R. FORD,
President of the United States, The White House, Washington, D.C.

DEAR MR. PRESIDENT: We were most pleased to receive your letter of August 20 and to know of your personal interest in the amendments to the Freedom of Information Act being considered by the House-Senate conference committee. And we appreciate your recognition of the fundamental purposes of this milestone law and the importance you attach to these amendments. They of course would provide support for your own policy of "Open government" which is so desperately needed to restore the public's confidence in our national government.

When we received your letter, all of the members of the conference committee agreed to your request for additional time to study the amendments and have given serious consideration and careful deliberations to your views on each of the major concerns you raised. The staffs of the two committees of jurisdiction have had several in-depth discussions with the responsible officials of your Administration. Individual Members have also discussed these points with Justice Department officials.

At our final conference session we were able to reopen discussion on each of the major issues raised in your letter. We believe that the ensuing conference actions on these matters were responsive to your concerns and were designed to accommodate further interests of the Executive Branch.

You expressed concern in your letter about the constitutionality and wisdom of court-imposed penalties against Federal employees who withhold information "without a reasonable basis in law." This provision has been substantially modified by conference action.

At our last conference meeting, after extensive debate and consideration, a compromise sponsored by Representative McCloskey and modified by Senate conferees was adopted. This compromise leaves to the Civil Service Commission the responsibility for initiating disciplinary proceedings against a government official or employee in appropriate circumstances—but only after a written finding by the court that there were "circumstances surrounding the withholding (that) raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." The actual disciplinary action recommended by the Commission, after completion of its standard proceedings, would actually be taken by the particular agency involved in the case.

We feel that this is a reasonable compromise that basically satisfies your objections to the original Senate language.

You expressed fear that the amendments afford inadequate protection to truly important national defense and foreign policy information subject to *in camera* inspection by Federal courts in freedom of information cases. We believe that these fears are unfounded, but the conference has nonetheless agreed to include additional explanatory language in the Statement of Managers making clear our intentions on this issue.

The legislative history of H.R. 12471 clearly shows that the *in camera* authority conferred upon the Federal courts in these amendments is *not mandatory, but permissive* in cases where normal proceedings in freedom of information cases in the courts do not make a clear-cut case for agency withholdings of requested records. These proceedings would include the present agency procedure of submitting an affidavit to the court in justification of the classification markings on requested documents in cases involving 552(b)(1) information.

The amendments in H.R. 12471 do not remove this right of the agency, nor do they change in any way other mechanisms available to the court during its consideration of the case. The court may still request additional information or corroborative evidence from the agency short of an *in camera* examination of the documents in question. Even when the *in camera* review authority is exercised by the court, it may call in the appropriate agency officials involved to discuss any portion of the information or affidavit furnished by the agency in the case.

The conferees have agreed to include language in the Statement of Managers that reiterates the discretionary nature of the *in camera* authority provided to the Federal courts under the Freedom of Information Act. We will also express our expectation that the courts give substantial weight to the agency affidavit submitted in support of th classification markings on any such documents in dispute.

Thus, Mr. President, to feel that the conference committee has made an effort to explain our intentions so as to respond to your objections on this important area of the amendments, operating as we must within the scope of the conference authority because of the virtually identical language in both the House and Senate versions on H.R. 12471.

The conference committee has also acted affirmatively to satisfy your major objections to the proposal amendment to subsection (b)(7) of the Freedom of Information Act, dealing with specific criteria for the withholding of Federal investigatory records in the law enforcement area.

The conference committee had already added an additional provision, not contained in the Senate-passed bill, which would permit withholding of information that would "endanger the life or physical safety of law enforcement personnel." This made it substantially identical to the language recommended by then Attorney General Richardson during Senate hearings on the bill and endorsed by the Administrative Law Section of the American Bar Association.

After reviewing the points made in your letter on this point, the conference committee also agreed to adopt language offered by Senator Hruska to permit the withholding of the *information* provided by a confidential source to a criminal law enforcement authority during the course of a criminal or "lawful national security intelligence investigation." The Federal agency may, in addition, withhold the identification of the confidential source in *all* law enforcement investigations—civil as well as criminal.

To further respond to your suggestion on the withholding of information in law enforcement records involving personal privacy the conference committee agreed to strike the word "clearly" from the Senate-passed language.

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.

You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested

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Having what they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security.

The Constitution commits this responsibility and authority to the President. I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This amendment could have that effect if the sources of information or the information itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime. I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

In conclusion, Mr. President, we appreciate your expression of cooperation with the Congress in our deliberations on the final version of this important legislation. In keeping with your willingness "to go more than halfway to accommodate Congressional concerns", we have given your suggestions in these five key areas of the bill renewed consideration and, we feel, have likewise gone "more than halfway" at this late stage.

We welcome your valuable input into our final deliberations and appreciate the fine cooperation and helpful suggestions made by various staff members and officials of the Executive branch. It is our hope that the fruits of these joint efforts will make it possible for the Senate and House to act promptly on the conference version of H.R. 12471 so that this valuable legislation will be enacted and can be signed into law before the end of the month.

With every good wish,

Sincerely,

EDWARD M. KENNEDY,
Chairman, Senate Conferees.
WILLIAM S. MOORHEAD,
Chairman, House Conferees.

Mr. Speaker, our committee has worked for more than 3 years in investigations, studies, legislative hearings, and careful drafting of this legislation to strengthen and improve the operation of the Freedom of Information Act. It has been passed by overwhelming votes in both the House and Senate. The conferees have labored hard and long to reconcile the differences between the two versions of the bill and have arrived at reasonable compromises on each of the major issues in dispute. We have a good bill. We have a fair and workable bill that will plug major loopholes in the present Freedom of Information Law.

In remarks soon after he took office, President Ford pledged to the American people an "open Government." Enactment of these amendments to the freedom of information law and their prompt signing into law will be the important first step toward the achievement of this badly needed objective of "open Government" and a restoration of the faith of the American public in the institution of government—faith that has been so seriously eroded over the last several years.

In conclusion, Mr. Speaker, I would like to call attention to the language of the statement of managers on page 15 of House Report No. 1320 which clarifies the intent of Congress with respect to the impact of this legislation on the Corporation for Public Broadcasting. The gentleman from California (Mr. VAN DEERLIN) raised such questions during a colloquy when the bill was debated last March. This language makes it clear that the definition of "agency" for purposes of Freedom of Information Act matters does not include the Corporation for Public Broadcasting.

I had sought assurance that CPB would follow the open government principles of the Freedom of Information Act in its information activities—even though they were not specifically covered by that act—so as to serve the public interest. I am pleased that CPB has reaffirmed that position in correspondence with me. At this point in the RECORD I include two letters from Mr. Henry Loomis, president of CPB, in which he sets forth such assurances:

CORPORATION FOR
PUBLIC BROADCASTING,
Washington, D.C., September 23, 1974.

Hon. WILLIAM S. MOORHEAD,
Chairman, Subcommittee on Foreign Operations and Government Information, Washington, D.C.

DEAR MR. MOORHEAD: On behalf of the Board and Management of the Corporation for Public Broadcasting, I wish to congratulate you and the House Conferees on the Freedom of Information amendments (HR 12471) recently reported by the Conferees. We believe the amendments serve a very real public need and will, when implemented, reward the wisdom and dedication of the House Members in the Freedom of Information area. We are most encouraged by the recognition, in the Conference Reports, of CPB's unique status as a private, nonprofit corporation dedicated to the purposes set out in the Public Broadcasting Act of 1967.

The Conferees' generous and statesmanlike response to CPB's comments on the pending legislation prompt us to reaffirm CPB's traditional commitment to freedom of information principles, and to pledge fullest implementation of these principles in CPB's operations, consistent with its private status and constitutionally protected activities in the area of broadcast program support. You have our full assurance of CPB's continued dedication to the spirit of the Freedom of Information Act.

Sincerely,

HENRY LOOMIS.

CORPORATION FOR
PUBLIC BROADCASTING,
Washington, D.C.

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

DEAR MR. MOORHEAD: In my letter to you of September 23, it was my pleasure to reaffirm CPB's "fullest implementation of freedom of information principles in CPB's operations, consistent with its private status and constitutionally protected activities in the area of broadcast program support."

In order to add some specifics to that general commitment, I should like to describe current CPB practices regarding the dissemination of information relating to CPB activities, and regarding requests for information about CPB activities from the press and the public.

All of CPB's public information activities are coordinated by our Office of Public Affairs. The Office of Public Affairs is located at the Corporation for Public Broadcasting, 888 16th Street, N.W., Washington, D.C. 20006 Phone (202) 293-6160).

This office publishes the following informational documents relating to CPB activities:

(1) The Annual Report of the Corporation for Public Broadcasting which represents "a comprehensive and detailed report of the Corporation's operations, activities, financial condition, and accomplishments . . . [including] such recommendations as the Corporation determines appropriate", required by the public Broadcasting Act of 1967, as amended, (47 U.S.C. 395(i)). This report is submitted to the President for transmittal to the Congress on or before the 31st day of December of each year. After transmittal to the Congress it is available to all who request it from the CPB Public Affairs Office.

(2) The CPB *Report*, a weekly newsletter containing reports of official CPB Board and Management actions and activities, as well as additional information of interest to public broadcasting stations, viewers, listeners, and citizens.

(3) Press releases, containing official reports and statements of the CPB Board and management. Such releases are issued from time to time as, in the opinion of the Public Information Office, they are required.

(4) CPB testimony before legislative, oversight, and appropriations committees and subcommittees of the U.S. Congress. These comprehensive statements on CPB activities, financial conditions, projects, and accomplishments are routinely duplicated for convenient public access by request to the Public Affairs Office. In addition, these statements, together with the transcripts of questions and answers before Congressional committees are routinely published and available as Congressional documents.

(5) Technical studies, final grant reports, etc. From time to time, the Corporation commissions research and development or other projects that result in the presentation of reports, monographs, statistical compilations, and other written materials of interest to the public broadcasting community or the public at large. The availability of all these materials is noted in the CPB Annual Report, CPB *Reports*, or CPB press releases. Copies of these materials are available upon request at the Public Affairs Office (in limited numbers).

Requests for information or documents coming to CPB employees from the press, the general public or others not dealing with CPB in its business operations are routinely referred to the Public Affairs Office. It is the practice of the Corporation to provide information specifically requested in every instance in which furnishing such information will not:

(1) divulge confidential personnel information regarding individual employees without their consent; or

(2) divulge financial or trade secret data acquired from any person under a promise of confidence; or

(3) impair CPB ability to:

(a) conduct its activities free from the "extraneous interference and control" Congress sought to bar in authorizing establishment of CPB as a private nongovernment corporation [47 U.S.C. 395(a)(6)].

(b) "carry out its purposes and functions and engage in its activities in ways that will most effectively assure the maximum freedom of the noncommercial educational television or radio broadcast systems and local stations from interference with or control of program content or other activities." [47 U.S.C. 396(g)(1)(D)];

(c) avoid ". . . any direction, supervision, or control of educational broadcasting; or over the charter or bylaws of the Corporation; or over the curriculum, program of construction, or personnel of any educational institution, school system, or educational broadcasting station or system" by "any department, agency, officer, or employee of the U.S. . . ." [47 U.S.C. 398]; or

(d) conduct its activities as a private, "nonprofit corporation . . . which will not be an agency or establishment of the United States Government." [47 U.S.C. 395(b)]; or

(4) otherwise compromise the constitutionally protected activities of the Corporation, stations, or systems, in the broadcast program area.

I am sure you will recognize that CPB's practices regarding public access to CPB information are consistent with, and in a number of instances, actually exceed principles of access applicable to government agencies under the Freedom of Information Act and the amendments recently considered by House and Senate conferees. I stress again that CPB's voluntary commitment to freedom of information principles is a continuing one, limited only by the sensitive nature of some of its functions. I doubt that you will find another private corporation so committed to public understanding of its work and activities.

Sincerely,

HENRY LOOMIS.

Mr. MOORHEAD of Pennsylvania. I yield to the gnetleman from Ohio.

Mr. SEIBERLING. Mr. Speaker, on a matter of such importance, particularly in the light of what we have gone through this year with respect to Watergate, I would hope we could have enough order so that all Members of the House who are interested in this can hear what the gentleman is saying.

If I may proceed just a little further, in my mind the whole conspiracy aspect of Watergate was made possible because of the abuses of the power of people in the executive branch to keep matters secret. The distinguished gentleman from Pennsylvania is talking about what the conferees have done to remedy this situation. I think we deserve to understand exactly what the conferees did.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, the gentleman is entirely correct. That is the thrust of the legislation as passed by this body and passed by the other body and reported back through conference.

The other major change in the bill was tightening up loopholes on public access to law enforcement records, and I think the conferees have reached a very good compromise which we can endorse to all the Members of the House.

Mr. ALEXANDER. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I now yield to the able gentleman from Arkansas (Mr. ALEXANDER) a member of our Foreign Operations and Government Information Subcommittee, who has made such a significant contribution to this legislation as a House conferee.

Mr. ALEXANDER. Mr. Speaker, I note that section 3 of this act requires each agency to file an annual report with the Speaker of the House and the President pro tempore of the Senate. These annual reports are to contain specific information as enumerated in the act. Following this enumeration there is a requirement that the "Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year" certain information regarding litigation brought under the Freedom of Information Act, as well as a description of action taken by the Department of Justice to encourage compliance with the act.

Is it the intent of this section that the Department of Justice file two annual reports?

Mr. MOORHEAD of Pennsylvania. The answer is yes. The Department of Justice, as an agency, just as any other agency, is required to file an annual report containing specific activities of the Department of Justice in complying with the requests under the Freedom of Information Act; to wit, that additionally the Attorney General is required to file a second report dealing with the activities of the Department of Justice in its role as legal counsel to all of the other agencies under the Freedom of Information Act.

his remarks.)

Mr. ALEXANDER. Mr. Speaker, truth is the foundation of democracy. Thomas Jefferson said:

> Whenever the people are well-informed, they can be trusted with their government, because whenever things get so far wrong to attract their notice, they can be relied on to set them right.

Our democracy is based on truth. Our Declaration of Independence declares that all men are created equal, and that we are endowed with the unalienable right of liberty; that to secure our liberty we established a representative democracy; and that our Government derives its powers from the consent of the governed.

But, the very survival of democracy depends on an informed citizenry. Therefore, if we are to survive as a free nation, we must not tolerate deception in government. If the basis of government is the consent of the governed from which it derives its just powers; then, clearly, unjust powers of government can also be consented to by the governed.

But, once the consent to unjust power is given, liberty can soon be replaced by tyranny. And, once tyranny is established, it no longer matters whether the governed consent, or not.

That's why government deception supported by official secrecy causes Americans to become frustrated, powerless, and dissatisfied with elected officials.

Our action here today in adopting the conference report on the Freedom of Information Act Amendments may prove to be one of the most significant steps we have taken in returning the U.S. Government to the hands of the American people. Unfortunately, our action did not come early enough to prevent the scandals which have rocked the Nation in the last year and which have rallied all people behind the cause of open government.

For although the people of this country have the power to go to the polls to record their wishes, they are denied the information with which to make wise decisions. Over the years, as our bureaucracy has expanded unchecked, a curtain of secrecy has fallen over its operations, a curtain only slightly less penetrable than the one which surrounds the Communist bloc.

Since the enactment of the first housekeeping statutes under George Washington for the purpose of allowing department heads to adopt regulations governing the custody, use, and preservation of official Government documents, the executive branch has become more and more effective in twisting these laws into an excuse for hiding information and documents from the American people.

Why do we have this secrecy in Government? In many instances, it appears that it is simpler for our Government officials to have a "secret" stamp on hand than to go to the trouble of digging up the information to answer a lot of questions. This same "secret" stamp makes it easier to hide the errors of judgment

I have read reports of some pretty absurd uses of our information classification system. For instance, during the Korean war, the Department of Labor would not give out the details of the armed services purchase of peanut butter, contending that a clever enemy could deduce from these purchases the approximate number of men in the services. Yet at the same time the Department of Defense was releasing mimeographed sheets with a breakdown of the exact number of men in the Army, Navy, and Air Force.

Things have not improved much over the years, I am afraid, even though the passage of the 1967 Freedom of Information Act was a giant step in returning to the public access to their own public documents.

And although in the 1970's I am not really concerned with supplies of peanut butter, I am most concerned with the price and availability of the bread it is spread on and the effect that the sale of grain and wheat to Russia has had on its cost to the American consumer.

Now let me briefly outline the difficulties I have had in my unsuccessful efforts to obtain information on this deal.

In the fall of 1973, I began an extensive investigation of the transactions behind the Russian grain deal. As a Member of Congress and as a member of the Intergovernmental Relations Subcommittee of the Committee on Government Operations—the committee charged with the investigative powers of the House of Representatives—I sought information on the wheat subsidies paid to each exporting company since July 8, 1972. I also requested information on the status and background of the investigation being conducted by the Department of Justice on the alleged Kansas City Wheat Market price fixing by certain individuals or grain companies. I made my requests through communications with Secretary of Agriculture Earl Butz, ASCS Administrator Kenneth Frick, Acting Attorney General Robert Bork, FBI Director Clarence Kelly, the Commodity Exchange Authority, and Assistant Attorney General Henry E. Peterson.

In each case, I was told that the information I requested was either not available or that it could not be made available to me. I was told that the FBI could not release the details of the investigation and that we must rely on the FBI's judgment that there had not been any illegal activities connected with the sale.

The investigations were secret, but it was no secret that bread prices were higher and the American people were not ready to accept such a decision from the FBI without having access to the facts that would back up such a judgment.

As long as a man is informed, he can usually take action to insure that his other rights are not violated. If, I as a Member of Congress and the Government Operations Committee, who works daily with the bureaucracy, become frus-

forts to get the information he needs?

In conclusion, let me relate one more "horror" story. In 1971, a public interest group asked the Department of Agriculture for some information on pesticides. The Department told them they had have to be a little more specific as to what they wanted.

The group asked the Department for their index of files on pesticides so that they could specifically state the information needed. In response to this request, USDA not only denied them access to the index, stating that the index itself was a secret, but also restated their refusal to release the information on pesticides without the appropriate index number. Fortunately this particular group had the resources to go to court and sue for the information, which the court ordered released.

However, the case did not end here. Undaunted, USDA replied that they would be glad to release a copy of the information, but it would cost $91,000 and take a year and a half to get it together.

The group again went to court where USDA was told by the court to stop fooling around and release the information that was requested.

I shudder to think of the amount of time, energy, and money wasted in this process.

The enactment of these amendments to the Freedom of Information Act will put an end to the ridiculous delays, excuses, and bureaucratic runarounds which have denied U.S. citizens their "right to know" and made Americans a captive of their own Government.

Mr. GROSS. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Iowa.

Mr. GROSS. Are the amendments adopted by the conference germane to the bill?

Mr. MOORHEAD of Pennsylvania. In my opinion they are.

Mr. YOUNG of Florida. Mr. Speaker, will the gentleman yield?

Mr. MOORHEAD of Pennsylvania. I yield to the gentleman from Florida.

Mr. YOUNG of Florida. Can the gentleman tell us what happens to the provision in the bill where certain judges were permitted to make national security determinations?

Mr. MOORHEAD of Pennsylvania. Yes. The bill contains the requirement, which is in the House bill, that, where there is a stamp, a classification stamp, the court could go behind that, but we specified that the court should give great weight to an affidavit by the Department that this was properly classified. What we are trying to overrule is the situation described in the famous Mink case, where the court said to the Congress, no matter how frivolous or capricious the classification should be, that the court could not go behind it.

Mr. ERLENBORN. Mr. Speaker, I yield myself 5 minutes.

(Mr. ERLENBORN asked and was given permission to revise and extend his remarks.)

Act amendments.

Mr. Speaker, this bill passed with a rather overwhelming vote in the House, and there were only a few questions to be adjusted by the House and the Senate. These amendments to the Freedom of Information Act I think are those that all Members can support. We are acting at this time in a way that is consonant with the times, and that is making information more readily available from the Government to members of the general public.

One of the questions that was raised in the conference, and was most difficult to resolve, was the question of an amendment proposed by the other body. It was incorporated in the bill as passed by the other body and would have allowed a sanction to be imposed by the court against Government employees who are found to have refused to give information to someone who requested it without—and I quote—"a reasonable basis in the law."

I objected to this provision. I think it would have been an unconscionable burden on Government employees. I am happy to report that a compromise was adopted by the conference, one that I am not totally happy with, but I think it does improve the provision to the point where I can support the conference report.

As a matter of fact, the provision that is now in the bill is one that, in my judgment, could never result in the imposition of a sanction against a Federal employee.

The conferees agreed to change the test to that of an employee acting arbitrarily and capriciously rather than just without a reasonable basis in law. As a matter of fact, before the case ever gets to court, the employee who refuses to give information when a demand is made will have to have been supported by his superior. There will have had to have been an administrative appeal within the agency.

In most agencies this would mean that the general counsel of the agency would support the decision of the employee, and then the case would have to be brought to court by the one who was seeking the information. The Attorney General or the general counsel of the agency would then have to make a decision at that point that the case is sufficiently meritorious to defend. Then possibly the court might find the agency to be wrong, but I think in that circumstance the court could hardly find that the employee who has been sustained all the way along the line had acted arbitrarily or capriciously. Therefore, though we do have a provision in here for a sanction, it is limited to a case where there is action which is found by the court to be arbitrary and capricious.

The court would not make a determination as to the sanction, but would then certify the matter to the Civil Service Commission. The Civil Service Commission would be required to institute a proceeding.

I find that rather interesting, by the way: Proceeding.

He was unable in conference to define it. It is neither defined in the Civil Service law, nor is it defined in the Freedom of Information Act. What kind of proceeding is intended by the compromise of the conferees is really rather vague. Whether the employee would be entitled to counsel and whether there would have to be a public hearing are things which really are rather vague. However, because I expect this provision never to be utilized, I do not think it makes a great deal of difference.

Besides this provision, which was controversial, there are other noncontroversial provisions, some that I think are great advances in the law.

First of all, this does allow a court to review what could, and sometimes, I am sure, in the past, has been an arbitrary decision to classify a document for security reasons. This would not require the court to view the material, but would allow the court—and we make this clear in the conference report—allow the court to look at the affidavits from the affected agency, whether the Department of State or the Defense Department or other, and give great weight to these affidavits.

At that point only, if there was still a question remaining in the mind of the court, the court could conduct an in-camera inspection of the material and see whether it had been properly classified within the terms of the Executive order setting forth the procedure for classification.

The SPEAKER. The time of the gentleman has expired.

Mr. ERLENBORN. Mr. Speaker, I yield myself 1 additional minute.

Only then would the court have an opportunity to view the material and make a determination as to whether it had been properly classified.

In addition, for those who think that the law has not been applied as it ought to have been in the past, there is one further provision of the act which I think is very helpful. Those who have been denied information when they have made a demand under the law, and then go to court to prove that their demand was meritorious, the court can—is not required to, but can—award attorney's fees and court costs to the successful litigant.

I think that, on balance, the bill as reported by the conference is a good bill. I was happy to sign the conference report.

I hope that it will be adopted.

The SPEAKER. The time of the gentleman from Illinois has expired.

Mr. ERLENBORN. Mr. Speaker, I yield 5 minutes to the gentleman from New York (Mr. HORTON).

(Mr. HORTON asked and was given permission to revise and extend his remarks.)

Mr. HORTON. Mr. Speaker, I rise in support of the conference report on H.R. 12471, the Freedom of Information Act Amendments of 1974.

Before becoming ranking minority member of the Government Operations Committee, I was a member of the subcommittee which has jurisdiction over this legislation. In that capacity, I have

Let me assure you that the measure before us today will strengthen the public's right to know what its Government is doing. By strengthening the public's right to know, we make democracy work better. That is an objective we should all support wholeheartedly.

H.R. 12471 eases public access to Government information in several constructive ways. It requires agencies to publish indexes of documents, respond more quickly to requests for data, and submit annual reports to the Congress on their performance under this act. It grants individuals access to material they can reasonably describe—rather than identify with particularity—more prompt resolution of lawsuits they file under the freedom of information law, and an award of attorney fees—at the courts' discretion—in cases in which they substantially prevail. In addition, this bill makes clear that courts have the discretion to examine in chambers all contested records—including classified material—before deciding whether it is properly exempt from public disclosure.

Mr. Speaker, my dedication to freedom of information remains firm. I think the conference report before us is an improvement over the present law in this area. I urge my colleagues to join me in supporting this legislation.

Mr. Speaker, I would like to ask the gentleman from Pennsylvania some questions about section 2 of this bill. Section 2(a) amends paragraph (1) of 5 U.S.C. 552(b) to exempt from the requirements of the Freedom of Information Act matters which are—

(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.

When coupled with section 552(a)(4)(B), as amended in this bill, this provision would permit a court to look behind the security classification given to a document by an agency to determine whether the document was properly classified. This provision is not intended to permit a court free rein to classify information as it wishes, is it?

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, if the gentleman will yield, it certainly is not.

First of all, a court could only determine whether the information was "properly classified pursuant to (an) Executive order." In other words, the judge would have to decide whether the document met the criteria of the President's order for classification—not whether he himself would have classified the document in accordance with his own ideas of what should be kept secret. Second, as we have said in the joint explanatory statement of the committee of conference:

The conferees expect that Federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

dom of Information Act which exempts certain law enforcement records from disclosure to the public. The new language exempts "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would—among other things—disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducing a lawful national security intelligence investigation, confidential information furnished only by the confidential source."

I would ask the gentleman two questions about this provision. First, with regard to the phrase "a lawful national security intelligence investigation," exactly what types of investigations does that encompass?

Mr. MOORHEAD of Pennsylvania. Let me quote to the gentleman from the joint explanatory statement of the committee on conference. That statement says:

The term "intelligence" in (the) section (we are discussing) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions.

Mr. HORTON. So it would apply to more than just positive intelligence activities?

Mr. MOORHEAD of Pennsylvania. Yes. It would also apply to counter-intelligence activities and background security investigations.

Mr. HORTON. But it would not apply to investigations which were labeled "national security" but in reality had nothing to do with that subject matter?

Mr. MOORHEAD of Pennsylvania. No, it would not. The national security intelligence investigation must be "lawful" for information compiled in the course of it to be exempted from disclosure under the Freedom of Information Act.

Mr. HORTON. My second question is, this bill exempts from public disclosure confidential information furnished by a confidential source in the course of a criminal investigation if the records were compiled by "a criminal law enforcement authority" and the same kind of information given for a lawful national security intelligence investigation if the records were compiled by "an agency." By using the term "criminal law enforcement authority" in one place and "an agency" in another, does this provision mean that the two terms are mutually exclusive, and that as a result, confidential information compiled by a criminal law enforcement authority in the course of a national security investigation would not be exempt from public disclosure?

Mr. MOORHEAD of Pennsylvania. No. Again, let me quote from the statement of managers:

By "an agency" the conferees intend to include criminal law enforcement authorities as well as other agencies.

formation compiled for a lawful national security intelligence investigation.

Mr. HORTON. Mr. Speaker, I thank the gentleman for his lucid explanations and commend him for the interpretations of the bill which he has given.

I would like to make a separate point with regard to the conference report. Section (1)(b)(2) writes into the Freedom of Information Act a requirement that fees charged by agencies for performing services under the act "shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication."

Some question has arisen as to the meaning in this provision of the term "document search." As the ranking minority House member of the committee of conference, I wish to express my opinion that this term means not just a search for documents, but also a search within documents to determine which specific portions are subject to public disclosure and which are exempt from the provisions of the act. It does not encompass a review by agency lawyers or policymaking or other personnel to determine general rules which they or other employees later follow in deciding which specific portions are exempt from disclosure.

Let me cite just one example of how the conferee, in my judgment, mean that this distinction should be applied. Suppose someone requested the FBI to provide all documents in its possession relating to investigations of the Communist Party of the United States. The FBI estimates that it has 2 million pages of such documents. The Bureau's lawyers would first have to review samples of this material to formulate guidelines for other personnel to use in applying the exemptions of the act to the entire group of papers. The Agency could not charge fees for this examination. Then the other personnel would search through the documents, page by page, to determine which portions could be made public and which could not. This action would be subject to fees under the act.

The FBI has estimated that the page-by-page search through the documents would consume 225 man-years. Even if each employee participating in the search was paid only $10,000 per year, the cost of responding to this one request would be more than $2 million. The committee report on the House bill estimated the cost of the entire bill as $100,000 per year; the report on the similar Senate bill estimated the cost as $40,000 annually. Surely, the committee on conference could not have intended that agency expenses in searching through documents to comply with requirements of the law not be reimbursable. If that were the case, the conferees would have written a bill which would entail expenditures for responding to one request more than 20 times greater than the annual expense of the more costly of the two similar bills they were reconciling.

Mr. Speaker, I thank the gentleman for this time and yield back to him.

Mr. ERLENBORN. Mr. Speaker, I yield such time as he may consume to the gentleman from Nebraska (Mr. THONE).

(Mr. THONE asked and was given permission to revise and extend his remarks.)

Mr. THONE. Mr. Speaker, I rise in support of the conference report on H.R. 12471. This bill amends the Freedom of Information Act of 1966 in several ways, all of them designed to increase the public's access to Government information. As one who has fought for openness in Government for many years, first in Nebraska and now in the Congress, I am proud to add my support to that of other Members advocating passage of this conference report.

Mr. Speaker, I would point in particular to provisions of this legislation which require agencies to respond to requests promptly and actually reimburse some successful plaintiffs who bring suit under the law. Section 1(c) of the measure provides that agencies must respond to requests for information within 10 days, and decide on appeals of decisions to withhold data within 20 additional days. These time limits could be extended only in unusual circumstances defined in the bill, and then only for 10 days. This provision will cure the unfortunate tendency which we have noted in some agencies to delay responding to citizen requests. Section 1(a) permits judges to assess attorney fees against the Government in cases in which complaints substantially prevail. This would surely discourage agencies from keeping matters secret unless they are quite convinced that withheld information would be within the law.

In these ways as in others, this bill represents a great step forward for freedom of information. I strongly support H.R. 12471.

Mr. THOMPSON of New Jersey. Mr. Speaker, as a cosponsor of the original bill that was acted upon earlier this session, I am pleased to support the conference report on H.R. 12471. In many ways it is a stronger and more comprehensive Freedom of Information measure than the bill we passed in March by an overwhelming 383 to 8 vote. I commend the House conferees for their insistence on the basic principles of the House version during the conference deliberations and for their wisdom in accepting several important provisions added by the other body. This is an important bill that will make the Freedom of Information law more effective, more workable, and vastly more meaningful in advancing the public's "right to know" about the affairs of our Federal Government.

During the debate on H.R. 12471 last March, I stated that—

> Government secrecy for the purposes of hiding wrongdoing, inept leadership, or bureaucratic errors undermines and can eventually destroy our system of representative government.

Since then, we have seen dramatic evidence of the effects of government secrecy, and the corruption it produced, as a result of disclosures during the impeachment proceedings of the Judiciary Committee. This legislation, when signed into law, will be the first major step forward in helping to restore the confidence of the American people in the institutions of government by purging the body politic of the secrecy excesses which marked the sordid Watergate coverup during the Nixon administration.

Mr. Speaker, I urge the House to adopt this conference report adding these significant strengthening amendments to the Freedom of Information Act.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I have no further requests for time.

Mr. ERLENBORN. Mr. Speaker, I have no further requests for time.

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I move the previous question on the conference report.

The previous question was ordered.

The SPEAKER. The question is on the conference report.

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. ANNUNZIO. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The SPEAKER. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 349, nays 2, not voting 83, as follows:

[Roll No. 574]

YEAS—349

Abdnor	Butler	Ellberg	Heinz	Mollohan	Skubitz
Abzug	Byron	Erlenborn	Helstoski	Montgomery	Slack
Addabbo	Camp	Esch	Henderson	Moorhead, Calif.	Smith, Iowa
Alexander	Carney, Ohio	Eshleman	Hicks	Moorhead, Pa.	Smith, N.Y.
Anderson, Calif.	Casey, Tex.	Evans, Colo.	Hillis	Morgan	Spence
Anderson, Ill.	Cederberg	Fascell	Hogan	Mosher	Staggers
Andrews, N.C.	Chamberlain	Fish	Holifield	Moss	Stanton, J. William
Andrews, N. Dak.	Chappell	Fisher	Holtzman	Murphy, Ill.	Stanton, James V.
Annunzio	Chisholm	Flood	Horton	Murphy, N.Y.	Stark
Arends	Clancy	Flowers	Howard	Myers	Steed
Ashbrook	Clark	Flynt	Huber	Natcher	Steiger, Ariz.
Ashley	Clausen, Don H.	Foley	Hungate	Nedzi	Steiger, Wis.
Aspin	Cleveland	Ford	Hutchinson	Nichols	Stephens
Badillo	Cochran	Forsythe	Ichord	Nix	Stokes
Bafalis	Collier	Fountain	Jarman	Obey	Stubblefield
Baker	Collins, Ill.	Fraser	Johnson, Calif.	O'Brien	Stuckey
Barrett	Collins, Tex.	Frelinghuysen	Johnson, Pa.	O'Hara	Studds
Bauman	Conlan	Frenzel	Jones, Ala.	Owens	Sullivan
Beard	Conte	Frey	Jones, N.C.	Parris	Talcott
Bennett	Corman	Froehlich	Jones, Tenn.	Passman	Taylor, N.C.
Bergland	Cotter	Fulton	Jordan	Patman	Thompson, N.J.
Bevill	Coughlin	Fuqua	Karth	Patten	Thomson, Wis.
Biaggi	Crane	Gaydos	Kastenmeier	Perkins	Thone
Biester	Cronin	Gettys	Kazen	Pettis	Thornton
Bingham	Culver	Gibbons	Kemp	Peyser	Traxler
Blester	Daniel, Dan	Gilman	Ketchum	Pickle	Treen
Boggs	Daniel, Robert W., Jr.	Ginn	Kluczynski	Pike	Udall
Boland	Danielson	Goldwater	Koch	Price, Ill.	Van Deerlin
Bolling	Davis, Ga.	Gonzalez	Kuykendall	Price, Tex.	Vander Jagt
Bowen	Davis, S.C.	Goodling	Kyros	Quie	Vander Veen
Brademas	Davis, Wis.	Gray	Lagomarsino	Quillen	Vanik
Bray	de la Garza	Green, Oreg.	Landrum	Railsback	Veysey
Breaux	Delaney	Green, Pa.	Latta	Randall	Vigorito
Breckinridge	Dellenback	Griffiths	Leggett	Rangel	Waggonner
Brinkley	Dellums	Gross	Lehman	Regula	Waldie
Brooks	Denholm	Grover	Lent	Reuss	Walsh
Broomfield	Dennis	Gubser	Litton	Riegle	Wampler
Brotzman	Dent	Gude	Long, La.	Rinaldo	Ware
Brown, Calif.	Derwinski	Gunter	Long, Md.	Robinson, Va.	Whalen
Brown, Ohio	Devine	Guyer	Lott	Robison, N.Y.	White
Broyhill, N.C.	Dickinson	Haley	McClory	Rodino	Whitten
Broyhill, Va.	Dingell	Hamilton	McCollister	Roe	Wiggins
Buchanan	Donohue	Hanley	McCormack	Rogers	Williams
Burgener	Downing	Hanrahan	McDade	Roncallo, Wyo.	Wilson, Bob
Burke, Fla.	Drinan	Hansen, Wash.	McEwen	Roncallo, N.Y.	Wilson, Charles H., Calif.
Burke, Mass.	Dulski	Harrington	McFall	Rooney, Pa.	Wilson, Charles, Tex.
Burlison, Mo.	Duncan	Harsha	McKay	Rose	Winn
Burton, John	du Pont	Hastings	McKinney	Rosenthal	Wolff
Burton, Phillip	Edwards, Ala.	Hawkins	McSpadden	Rostenkowski	Wright
	Edwards, Calif.	Hechler, W. Va.	Macdonald	Roush	Wyatt
			Madden	Rousselot	Wydler
			Madigan	Roybal	Wylie
			Mann	Ruppe	Wyman
			Martin, Nebr.	Ruth	Yates
			Matsunaga	Ryan	Yatron
			Mayne	St Germain	Young, Alaska
			Mazzoli	Sandman	Young, Fla.
			Meeds	Sarasin	Young, Ga.
			Melcher	Sarbanes	Young, Ill.
			Metcalfe	Satterfield	Young, Tex.
			Mezvinsky	Scherle	Zablocki
			Michel	Schneebeli	Zion
			Milford	Schroeder	
			Miller	Sebelius	
			Minish	Selberling	
			Mink	Shipley	
			Mitchell, Md.	Shriver	
			Mizell	Shuster	

NAYS—2

Burleson, Tex.	Landgrebe

NOT VOTING—83

Adams	Hanna	Powell, Ohio
Archer	Hansen, Idaho	Preyer
Armstrong	Hays	Pritchard
Bell	Hébert	Rarick
Blackburn	Hinshaw	Rees
Blatnik	Hosmer	Reid
Brasco	Hudnut	Rhodes
Brown, Mich.	Hunt	Roberts
Burke, Calif.	Johnson, Colo.	Rooney, N.Y.
Carey, N.Y.	Jones, Okla.	Roy
Carter	King	Runnels
Clawson, Del	Lujan	Shoup
Clay	Luken	Sikes
Cohen	McCloskey	Snyder
Conable	Mahon	Steele
Conyers	Mallary	Steelman
Daniel, Robert W., Jr.	Maraziti	Stratton
Daniels, Dominick V.	Martin, N.C.	Symington
Diggs	Mathias, Calif.	Symms
Dorn	Mathis, Ga.	Taylor, Mo.
Eckhardt	Mills	Teague
Evins, Tenn.	Minshall, Ohio	Tiernan
Findley	Mitchell, N.Y.	Towell, Nev.
Giaimo	Murtha	Ullman
Grasso	Nelsen	Whitehurst
Hammer-schmidt	O'Neill	Widnall
	Pepper	Young, S.C.
	Poage	Zwach
	Podell	

Mr. Rooney of New York with Mr. Dorn.
Mr. Hébert with Mr. Blatnik.
Mr. Dominick V. Daniels with Mrs. Burke of California.
Mr. Sikes with Mr. Clay.
Mr. Stratton with Mr. Mahon.
Mr. Adams with Mr. Nelsen.
Mr. Carey of New York with Mr. Minshall of Ohio.
Mr. Giaimo with Mr. Hansen of Idaho.
Mr. Mathis of Georgia with Mr. Hosmer.
Mr. Roberts with Mr. Martin of North Carolina.
Mr. Hays with Mr. Maraziti.
Mr. Conyers with Mr. Luken.
Mr. Reid with Mr. Mallary.
Mr. Diggs with Mr. Tiernan.
Mr. Teague with Mr. Cohen.
Mr. Ullman with Mr. Brown of Michigan.
Mr. Pepper with Mr. King.
Mr. Preyer with Mr. Blackburn.
Mr. Roy with Mr. Hinshaw.
Mr. Hanna with Mr. Carter.
Mrs. Grasso with Mr. Bell.
Mr. Jones of Oklahoma with Mr. Conable.
Mr. Mills with Mr. Archer.
Mr. Rarick with Mr. Robert W. Daniel, Jr.
Mr. Runnels with Mr. Del Clawson.
Mr. Eckhardt with Mr. Findley.
Mr. Evins of Tennessee with Mr. Hammerschmidt.
Mr. Murtha with Mr. Hudnut.
Mr. Symington with Mr. Lujan.
Mr. O'Neill with Mr. Hunt.
Mr. Mitchell of New York with Mr. Mathias of California.
Mr. Steelman with Mr. McCloskey.
Mr. Pritchard with Mr. Powell of Ohio.
Mr. Shoup with Mr. Rees.
Mr. Widnall with Mr. Snyder.
Mr. Symms with Mr. Steele.
Mr. Taylor of Missouri with Mr. Zwach.
Mr. Whitehurst with Mr. Towell of Nevada.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. MOORHEAD of Pennsylvania. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the Freedom of Information conference report just agreed to.

The SPEAKER. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

COMMITTEE REFORM AMENDMENTS OF 1974

Mr. BOLLING. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the further consideration of the resolution (H. Res. 988) to reform the structure, jurisdiction, and procedures of the committees of the House of Representatives by amending rules X and XI of the Rules of the House of Representatives.

The SPEAKER. The question is on the motion offered by the gentleman from Missouri (Mr. BOLLING).

The question was taken; and the Speaker announced that he was in doubt.

A recorded vote was ordered.

The vote was taken by electronic device, and there were—ayes 211, noes 121, not voting 102, as follows:

[Roll No. 575]

AYES—211

Abdnor	Gilman	Pettis
Abzug	Ginn	Peyser
Addabbo	Gonzalez	Pickle
Anderson, Calif.	Green, Pa.	Pike
Anderson, Ill.	Grover	Railsback
Andrews, N.C.	Gude	Randall
Andrews, N. Dak.	Gunter	Rangel
Ashley	Guyer	Regula
Aspin	Hamilton	Reuss
Badillo	Hanley	Riegle
Bafalis	Hanrahan	Rinaldo
Beard	Hansen, Wash.	Robinson, Va.
Bennett	Harrington	Robison, N.Y.
Bergland	Harsha	Rodino
Biester	Hastings	Roe
Bingham	Hechler, W. Va.	Rogers
Boggs	Heckler, Mass.	Roncallo, Wyo.
Boland	Heinz	Roncallo, N.Y.
Bolling	Helstoski	Rose
Breaux	Hillis	Rosenthal
Breckinridge	Holtzman	Roush
Brinkley	Horton	Roybal
Broomfield	Howard	Ruppe
Brotzman	Huber	Ruth
Brown, Calif.	Hungate	Sarasin
Brown, Ohio	Hutchinson	Sarbanes
Buchanan	Ichord	Schroeder
Burgener	Jordan	Sebelius
Burlison, Mo.	Karth	Selberling
Burton, John	Kazen	Shipley
Burton, Phillip	Kemp	Shriver
Butler	Ketchum	Smith, Iowa
Chisholm	Koch	Stanton, J. William
Clancy	Kyros	Stanton, James V.
Clausen, Don H.	Lagomarsino	Stark
Cleveland	Landgrebe	Steed
Cochran	Lehman	Steiger, Ariz.
Collins, Ill.	Lent	Steiger, Wis.
Conlan	Litton	Stephens
Conte	Long, La.	Studds
Corman	McClory	Talcott
Cotter	McCollister	Taylor, N.C.
Coughlin	McCormack	Thomson, Wis.
Cronin	McDade	Thone
Culver	McSpadden	Van Deerlin
de la Garza	Madigan	Vander Jagt
Dellenback	Mahon	Vander Veen
Dellums	Matsunaga	Vanik
Denholm	Mazzoli	Vigorito
Dennis	Meeds	Walsh
Donohue	Melcher	Wampler
Drinan	Mezvinsky	Whitten
Duncan	Milford	Wiggins
du Pont	Miller	Wilson, Bob
Edwards, Calif.	Minish	Wilson, Charles, Tex.
Eilberg	Mitchell, Md.	Winn
Erlenborn	Mizell	Wolff
Esch	Moakley	Wright
Eshleman	Mollohan	Wyatt
Fascell	Moorhead, Calif.	Wydler
Flood	Moorhead, Pa.	Wylie
Flynt	Morgan	Wyman
Foley	Mosher	Yates
Forsythe	Natcher	Yatron
Fraser	Obey	Young, Fla.
Frelinghuysen	O'Brien	Young, Ga.
Frenzel	Owens	Young, Ill.
Froehlich	Parris	Zablocki
Fuqua	Passman	Zion
Gettys	Patten	
	Perkins	

NOES—121

Alexander	Burke, Mass.	Davis, S.C.
Annunzio	Burleson, Tex.	Davis, Wis.
Arends	Byron	Delaney
Ashbrook	Camp	Dent
Baker	Carney, Ohio	Derwinski
Bauman	Casey, Tex.	Devine
Bevill	Cederberg	Dickinson
Blaggi	Chamberlain	Dingell
Bowen	Chappell	Downing
Brademas	Clark	Dulski
Bray	Collier	Evans, Colo.
Brooks	Collins, Tex.	Fisher
Broyhill, N.C.	Crane	Flowers
Broyhill, Va.	Daniel, Dan	Fountain
Burke, Fla.	Danielson	Frey
Goodling	Martin, Nebr.	Schneebeli
Green, Oreg.	Mayne	Shuster
Gross	Metcalfe	Skubitz
Haley	Michel	Smith, N.Y.
Hawkins	Mink	Spence
Henderson	Montgomery	Staggers
Hicks	Moss	Stokes
Hogan	Murphy, Ill.	Stubblefield
Hollfield	Murphy, N.Y.	Stuckey
Holt	Myers	Sullivan
Jarman	Nedzi	Thompson, N.J.
Johnson, Calif.	Nichols	Thornton
Johnson, Pa.	Nix	Treen
Jones, Ala.	O'Hara	Waggonner
Jones, N.C.	Price, Ill.	Ware
Jones, Tenn.	Price, Tex.	Whalen
Kastenmeier	Quie	White
Kluczynski	Quillen	Williams
Latta	Rooney, Pa.	Young, Alaska
Leggett	Rostenkowski	Young, Tex.
Long, Md.	Rousselot	
Lott	Ryan	

NOT VOTING—102

Adams	Hanna	Pritchard
Archer	Hansen, Idaho	Rarick
Armstrong	Hays	Rees
Barrett	Hébert	Reid
Bell	Hinshaw	Rhodes
Blackburn	Hosmer	Roberts
Blatnik	Hudnut	Rooney, N.Y.
Brasco	Hunt	Roy
Brown, Mich.	Johnson, Colo.	Runnels
Burke, Calif.	Jones, Okla.	Shoup
Carey, N.Y.	King	Sikes
Carter	Kuykendall	Sisk
Clawson, Del	Landrum	Slack
Clay	Lujan	Snyder
Cohen	Luken	Steele
Conable	McCloskey	Steelman
Conyers	McKinney	Stratton
Daniel, Robert W., Jr.	Madden	Symington
Daniels, Dominick V.	Mallary	Symms
Davis, Ga.	Mann	Taylor, Mo.
Diggs	Maraziti	Teague
Dorn	Martin, N.C.	Tiernan
Eckhardt	Mathias, Calif.	Towell, Nev.
Edwards, Ala.	Mathis, Ga.	Traxler
Evins, Tenn.	Mills	Udall
Findley	Minshall, Ohio	Ullman
Fish	Mitchell, N.Y.	Vaysey
Ford	Murtha	Waldie
Giaimo	Nelsen	Whitehurst
Grasso	O'Neill	Widnall
Gray	Patman	Wilson, Charles H., Calif.
Griffiths	Pepper	Young, S.C.
Hammer-schmidt	Poage	Zwach
	Podell	
	Powell, Ohio	
	Preyer	

So the motion was agreed to.

The result of the vote was announced as above recorded.

IN THE COMMITTEE OF THE WHOLE

Accordingly the House resolved itself into the Committee of the Whole House on the State of the Union for the further consideration of the resolution House Resolution 988, with Mr. NATCHER in the chair.

The Clerk read the title of the resolution.

The CHAIRMAN. When the Committee rose on Thursday, October 3, 1974, there were pending the amendment in the nature of a substitute offered by the gentlewoman from Washington (Mrs. HANSEN), the amendment offered as a substitute by the gentleman from Nebraska (Mr. MARTIN) for the Hansen amendment, the amendment offered by the gentleman from Florida (Mr. BENNET) to the Hansen amendment, and the amendment offered by the gentlewoman from Missouri (Mrs. SULLIVAN) to the substitute amendment offered by the gentleman from Nebraska (Mr. MARTIN).

Mr. BOLLING. Mr. Chairman, I move to strike the requisite number of words.

DRAFT:RPBedell:10/8/74

I am returning herewith H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act, without my approval. In August, I requested that the Conference Committee on this bill afford me an opportunity to review the legislation and to express any concerns that I may have with it. I was graciously afforded that opportunity and on August 20, because I believe so strongly in the need for a more open Executive branch and also for the need for an effective Executive branch, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting concerns with a few of its provisions. I stated that I would go more than halfway to accommodate Congressional concerns with this legislation, and I am very pleased that with a single exception Congress has also demonstrated the fine spirit of cooperation and accommodation that I sought to express in my letter.

In the process of this cooperation and accommodation, I stated that I would accept several provisions in the bill which will be burdensome and troublesome, and I am certain that Congress made similar adjustments. I am still concerned with the amendment to the exemption relating to law enforcement investigatory files. I believe that confidentiality can simply not be maintained if many millions of pages of FBI and other investigatory law enforcement files become subject to compulsory disclosure at the behest of any person, except as the government may be able to prove to a court--separately for each paragraph of each document--that disclosure "would" cause a type of harm specified in the amendment. Our law enforcement agencies do not have, and assuredly will not be able to obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination with respect to information requests that sometimes involve hundreds of thousands of documents.

However, it is only the most serious of concerns with a bill such as this that would constrain me to return this bill without my approval. There is only a single provision in the bill which remains unaltered following my August 20 letter which, because of its Constitutional and operational difficulties, requires the action I am taking. I understand that the Conference Committee believed that the provisions of the House and the Senate passed bills were so similar that an accommodation that I had suggested was precluded. Because of this difficulty and because we have come so far together towards providing for a more open Government, I am returning this bill without my approval so that it may be passed with the change I propose and returned to me for signature into law this Session.

As I previously stated "I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof." That provision remains unaltered.

I am prepared to accept those aspects of the provision which is designed to enable courts to inspect classified documents and review the justification for their classification. I am not, however, able to accord the courts what amounts to a power of initial decision rather than a power of review, in a most sensitive and complex area where they have no particular expertise. As the legislation now stands, a determination by the Secretary of Defense that disclosure of a document would endanger our national security must be overturned by a district judge if, even though it is reasonable, the judge thinks the plaintiff's position just as reasonable. And if the district judge's decision of equal reasonableness is based upon a determination of fact, it cannot even be undone by a higher court unless "clearly erroneous." Such a provision not only violates constitutional principles, it offends common sense. It gives less weight to an executive determination involving the protection of our most vital national defense interests than is accorded determinations involving routine regulatory matters. I propose, therefore, that where classified documents are requested the courts may review

the classification but must uphold it if there is reasonable basis to support it.

In determining the reasonableness of the classification, the courts should consider all attendant evidence prior to resorting to an in camera examination of the document.

I am submitting with this letter language which would dispel my concerns regarding the manner of judicial review of classified material.

(CONCLUSION)

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

October 11, 1974

MEMORANDUM FOR: PHIL BUCHEN

FROM: DOUG METZ DWM

SUBJECT: Freedom of Information Act Amendment

If it would be helpful to anyone, I will be glad to sit down and explain what I believe are the key issues so as to allay concern over the impact of the FOI Amendments.

Attached is a copy of my original memorandum supporting approval of the bill.

DWM/fme

Attachment

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

September 24, 1974

MEMORANDUM FOR: Mr. Stanley Ebner

FROM: Douglas W. Metz

SUBJECT: Freedom of Information Act Amendments

The President should approve this bill, which in its original form received overwhelming support in both Houses of the Congress. The Conferees, as evidenced by their letter to the President of September 23, have taken significant steps to meet the concerns raised by the President in his letter to them of August 20. There is no convincing evidence that a better bill could be obtained in a new Congress; nor is it likely that the Conferees could be persuaded to reopen their deliberations. Many in the Congress and the general public will regard the President's response to the action of the Conferees as a test of his sincere and strongly professed commitment to greater openness in government and to conciliation and compromise with the Congress.

The bill clarifies Congressional intent regarding the original Freedom of Information Act and subsequent court interpretations. The dominant Congressional concern is to make clear that agencies cannot, with impunity and without ultimate court review, withhold information simply by classifying it or including it in a law enforcement file. The amendments and the report language provide a process for court review de novo consistent with the intent of the original Freedom of Information Act. It permits the court, if necessary, to examine in camera disputed records to determine whether they are exempt under any of the nine categories of existing law. Judges, of course, like all Federal employees, are subject to criminal penalties for unauthorized disclosures of classified information. It would continue to permit exemption of CIA-type records and all other records specifically required by statute to be kept confidential. National defense and foreign policy files can be exempted as specifically authorized by criteria established by an Executive order to be kept secret and, in fact, properly classified pursuant to such Executive order. The prospect of abuses of judicial discretion with the remedy of legislative amendment and/or review via appeal appears less a risk than the danger of executive "cover-up" and abuses of power immune from public scrutiny and judicial review.

FBI-type files can also be exempted under any one of six broad criteria spelled out in the amendments. For the first time the FBI can point to a statute which expressly permits it to guarantee confidentiality of identity to informants. The necessity to evaluate particularly voluminous files in response to subsequent disclosure requests can be obviated by internal regulations which make simple changes in record-keeping and record classification practices.

The remaining provisions of the bill dealing with fees, time limits, and employee sanctions are less controversial because of changes made by the Conferees which are more acceptable to the agencies. In assessing agency comments, it should be kept in mind that agency convenience and perpetuation of poor record-keeping practices are not the objectives of the bill. Most agencies opposed the original Act.

In summary, the bill should be approved since it strikes a reasonable balance between the public's right to know and the interest of government in protecting the confidentiality of sensitive information at a time of deep public concern over actual and alleged abuses resulting from secrecy in government. More importantly, the bill assures ultimate court review, if necessary, of the actions of any agency which unlawfully withholds information from the public. No agency, without final accountability to the courts under the law, would be immune from citizen challenge of arbitrary and capricious withholding of non-confidential, non-secret information under stamps and labels of "national defense", "foreign policy", and "law enforcement".

DWM/fme

cc: Philip W. Buchen
William E. Casselman, II
Malcolm Hawk
Robert Marik
Pat O'Donnell
Geoffrey Shepard

DOMESTIC COUNCIL COMMITTEE ON THE RIGHT OF PRIVACY

WASHINGTON, D.C. 20504

October 11, 1974

MEMORANDUM FOR: Phil Buchen

FROM : Janet Miller

SUBJECT : H.R. 12471, Freedom of Information Act Amendments

The President received for his signature H.R. 12471, Freedom of Information Act Amendments, on October 8, 1974. Subsequently, the ten-day period for Presidential action will expire on October 19, 1974.

At Doug's suggestion, I have attached a copy of the conference report on H.R. 12471 and excerpts from the Manual on Legislative Procedure in the United States House of Representatives explaining veto procedure and citing precedents for the so-called "mini-pocket veto". The "mini-pocket veto" occurs when the President withholds approval of a bill during a Congressional recess, whereas the "pocket veto" exists when the President withholds approval of legislation after the Congress has adjourned sine die.

Attachments: a/s

Oct 9, 1974

93D CONGRESS 2d Session } HOUSE OF REPRESENTATIVES { REPORT No. 93-1380

FREEDOM OF INFORMATION ACT AMENDMENTS

SEPTEMBER 25, 1974.—Ordered to be printed

Mr. MOORHEAD of Pennsylvania, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany H.R. 12471]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment insert the following:

H.R. 12471—FREEDOM OF INFORMATION ACT AMENDMENTS

That (a) the fourth sentence of section 552(a)(2) of title 5, United States Code, is amended to read as follows: "Each agency shall also maintain and make available for public inspection and copying current indexes 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. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication.".

(b)(1) Section 552(a)(3) of title 5, United States Code, is amended to read as follows:

"(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, 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

(if any), and procedures to be followed, shall make the records promptly available to any person."

(2) Section 552(a) of title 5, United States Code, is amended by redesignating paragraph (4), and all references thereto, as paragraph (5) and by inserting immediately after paragraph (3) the following new paragraph:

"(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

"(B) 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, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall 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.

"(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

"(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

"(E) 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 complainant has substantially prevailed.

"(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority to the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

"(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.".

(c) 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 any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

"(i) 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, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

"(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, 'unusual circumstances' means, but only to the extent reasonably necessary to the proper processing of the particular request—

"(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

"(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

"(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

"(C) Any person making a request to any 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 the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any deter-

mination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request."

SEC. 2. (a) Section 552(b)(1) of title 5, United States Code, is amended to read as follows:

"(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;"

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

"(7) 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) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;"

(C) Section 552(b) of title 5, United States Code, is amended by adding at the end the following: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

"(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

"(5) a copy of every rule made by such agency regarding this section;

"(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

"(7) such other information as indicates efforts to administer fully this section.

"The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

"(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after the date of enactment of this Act.

And the Senate agree to the same.

CHET HOLIFIELD,
WILLIAM S. MOORHEAD,
JOHN E. MOSS,
BILL ALEXANDER,
FRANK HORTON
JOHN N. ERLENBORN,
PAUL MCCLOSKEY,
Managers on the Part of the House.

EDWARD KENNEDY,
PHILIP A. HART,
BIRCH BAYH,
QUENTIN BURDICK,
JOHN TUNNEY,
CHARLES MCC. MATHIAS, JR.,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

INDEX PUBLICATION

The House bill added language to the present Freedom of Information law to require the publication and distribution (by sale or otherwise) of agency indexes identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, which is required by 5 U.S.C. § 552(a)(2) to be made available or published. This includes final opinions, orders, agency statements of policy and interpretations not published in the *Federal Register*, and administrative staff manuals and agency staff instructions that affect the public unless they are otherwise published and copies offered for sale to the public. Such published indexes would be required for the July 4, 1967, period to date. Where agency indexes are now published by commercial firms, as they are in some instances, such publication would satisfy the requirements of this amendment so long as they are made readily available for public use by the agency.

The Senate amendment contained similar provisions, indicating that the publication of indexes should be on a quarterly or more frequent basis, but provided that if an agency determined by an order published in the *Federal Register* that its publication of any index would be "unnecessary and impracticable," it would not actually be required to publish the index. However, it would nonetheless be required to provide copies of such index on request at a cost comparable to that charged had the index been published.

The conference substitute follows the Senate amendment, except that if the agency determines not to publish its index, it shall provide copies on request to any person at a cost not to exceed the direct cost of duplication.

IDENTIFIABLE RECORDS

Present law requires that a request for information from an agency be for "identifiable records." The House bill provided that the request only "reasonably describe" the records being sought.

The Senate amendment contained similar language, but added a provision that when agency records furnished a person are demonstrated to be of "general public concern," the agency shall also make them available for public inspection and purchase, unless the agency can demonstrate that they could subsequently be denied to another individual under exemptions contained in subsection (b) of the Freedom of Information Act.

The conference substitute follows the House bill. With respect to the Senate proviso dealing with agency records of "general public interest," the conferees wish to make clear such language was eliminated only because they conclude that all agencies are presently obligated under the Freedom of Information Act to pursue such a policy and that all agencies should effect this policy through regulation.

SEARCH AND COPYING FEES

The Senate amendment contained a provision, not included in the House bill, directing the Director of the Office of Management and Budget to promulgate regulations establishing a uniform schedule of fees for agency search and copying of records made available to a person upon request under the law. It also provided that an agency could furnish the records requested without charge or at a reduced charge if it determined that such action would be in the public interest. It further provided that no fees should ordinarily be charged if the person requesting the records was an indigent, if such fees would amount to less than $3, if the records were not located by the agency, or if they were determined to be exempt from disclosure under subsection (b) of the law.

The conference substitute follows the Senate amendment, except that each agency would be required to issue its own regulations for the recovery of only the direct costs of search and duplication—not including examination or review of records—instead of having such regulations promulgated by the Office of Management and Budget. In addition, the conference substitute retains the agency's discretionary public-interest waiver authority but eliminates the specific categories of situations where fees should not be charged.

By eliminating the list of specific categories, the conferees do not intend to imply that agencies should actually charge fees in those categories. Rather, they felt, such matters are properly the subject for individual agency determination in regulations implementing the Freedom of Information law. The conferees intend that fees should not be used for the purpose of discouraging requests for information or as obstacles to disclosure of requested information.

COURT REVIEW

The House bill clarifies the present Freedom of Information law with respect to *de novo* review requirements by Federal courts under

section 552(a)(3) by specifically authorizing the court to examine *in camera* any requested records in dispute to determine whether the records are—as claimed by an agency—exempt from mandatory disclosure under any of the nine categories of section 552(b) of the law.

The Senate amendment contained a similar provision authorizing *in camera* review by Federal courts and added another provision, not contained in the House bill, to authorize Freedom of Information suits to be brought in the Federal courts in the District of Columbia, even in cases where the agency records were located elsewhere.

The conference substitute follows the Senate amendment, providing that in determining *de novo* whether agency records have been properly withheld, the court may examine records *in camera* in making its determination under any of the nine categories of exemptions under section 552(b) of the law. In *Environmental Protection Agency* v. *Mink, et al.*, 410 U.S. 73 (1973), the Supreme Court ruled that *in camera* inspection of documents withheld under section 552(b)(1) of the law, authorizing the withholding of classified information, would ordinarily be precluded in Freedom of Information cases, unless Congress directed otherwise. H.R. 12471 amends the present law to permit such *in camera* examination at the discretion of the court. While *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate. Before the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure. The burden remains on the Government under this law.

RESPONSE TO COMPLAINTS

The House bill required that the defendant to a complaint under the Freedom of Information law serve a responsive pleading within 20 days after service, unless the court directed otherwise for good cause shown.

The Senate amendment contained a similar provision, except that it would give the defendant 40 days to file an answer.

The conference substitute would give the defendant 30 days to respond, unless the court directs otherwise for good cause shown.

EXPEDITED APPEALS

The Senate amendment included a provision, not contained in the House bill, to give precedence on appeal to cases brought under the Freedom of Information law, except as to cases on the docket which the court considers of greater importance.

The conference substitute follows the Senate amendment.

ASSESSMENT OF ATTORNEY FEES AND COSTS

The House bill provided that a Federal court may, in its discretion, assess reasonable attorney fees and other litigation costs reasonably incurred by the complainant in Freedom of Information cases in which the Federal Government had not prevailed.

The Senate amendment also contained a similar provision applying to cases in which the complainant had "substantially prevailed," but

added certain criteria for consideration by the court in making such awards, including the benefit to the public deriving from the case, the commercial benefit to the complainant and the nature of his interest in the Federal records sought, and whether the Government's withholding of the records sought had "a reasonable basis in law."

The conference substitute follows the Senate amendment, except that the statutory criteria for court award of attorney fees and litigation costs were eliminated. By eliminating these criteria, the conferees do not intend to make the award of attorney fees automatic or to preclude the courts, in exercising their discretion as to awarding such fees, to take into consideration such criteria. Instead, the conferees believe that because the existing body of law on the award of attorney fees recognizes such factors, a statement of the criteria may be too delimiting and is unnecessary.

SANCTION

The Senate amendment contained a provision, not included in the House bill, authorizing the court in Freedom of Information Act cases to impose a sanction of up to 60 days suspension from employment against a Federal employee or official who the court found to have been responsible for withholding the requested records without reasonable basis in law.

The conference substitute follows the Senate amendment, except that the court is authorized to make a finding whether the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding. If the court so finds, the Civil Service Commission must promptly initiate a proceeding to determine whether disciplinary action is warranted against the responsible officer or employee. The Commission's findings and recommendations are to be submitted to the appropriate administrative authority of the agency concerned and to the responsible official or employee, and the administrative authority shall promptly take the disciplinary action recommended by the Commission. This section applies to all persons employed by agencies under this law.

ADMINISTRATIVE DEADLINES

The House bill required that an agency make a determination whether or not to comply with a request for records within 10 days (excepting Saturdays, Sundays, and legal public holidays) and to notify the person making the request of such determination and the reasons therefor, and the right of such person to appeal any adverse determination to the head of the agency. It also required that agencies make a final determination on any appeal of an adverse determination within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of the appeal by the agency. Further, any person would be deemed to have exhausted his administrative remedies if the agency fails to comply with either of the two time deadlines.

The Senate amendment contained similar provisions but authorized certain other Administrative actions to extend these deadlines for another 30 working days under specified types of situations, if requested

by an agency head and approved by the Attorney General. It also would grant an agency, under specified "unusual circumstances," a 10-working-day extension upon notification to the person requesting the records. In addition, an agency could transfer part of the number of days from one category to another and authorize the court to allow still additional time for the agency to respond to the request. The Senate amendment also provided that any agency's notification of denial of any request for records set forth the names and titles or positions of each person responsible for the denial. It further allowed the court, in a Freedom of Information action, to allow the government additional time if "exceptional circumstances" were present and if the agency was exercising "due diligence in responding to the request."

The conference substitute generally adopts the 10- and 20-day administrative tme deadlines of the House bill but also incorporates the 10-working-day extension of the Senate amendment for "unusual circumstances" in situations where the agency must search for and collect the requested records from field facilities separate from the office processing the request, where the agency must search for, collect, and examine a voluminous amount of separate and distinct records demanded in a single request, or where the agency has a need to consult with another agency or agency unit having a substantial interest in the determination because of the subject matter. This 10-day extension may be invoked by the agency only once—either during initial review of the request or during appellate review.

The 30-working-day certification provision of the Senate amendment has been eliminated, but the conference substitute retains the Senate language requiring that any agency's notification to a person of the denial of any request for records set forth the names and titles or positions of each person responsible for the denial. The conferees intend that this listing include those persons responsible for the original, as well as the appellate, determination to deny the information requested. The conferees intend that consultations between an agency unit and the agency's legal staff, the public information staff, or the Department of Justice should not be considered the basis for an extension under this subsection.

The conference substitute also retains the Senate language giving the court authority to allow the agency additional time to examine requested records in exceptional circumstances where the agency was exercising due diligence in responding to the request and had been since the request was received.

NATIONAL DEFENSE AND FOREIGN POLICY EXEMPTION (B)(1)

The House bill amended subsection (b)(1) of the Freedom of Information law to permit the withholding of information "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy."

The Senate amendment contained similar language but added "statute" to the exemption provision.

The conference substitute combines language of both House and Senate bills to permit the withholding of information where it is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense for foreign

policy" and is "in fact, properly classified" pursuant to both procedural and substantive criteria contained in such Executive order.

When linked with the authority conferred upon the Federal courts in this conference substitute for *in camera* examination of contested records as part of their *de novo* determination in Freedom of Information cases, this clarifies Congressional intent to override the Supreme Court's holding in the case of *E.P.A.* v. *Mink, et al.*, supra, with respect to *in camera* review of classified documents.

However, the conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse affects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making *de novo* determinations in section 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.

Restricted Data (42 U.S.C. 2162), communication information (18 U.S.C. 798), and intelligence sources and methods (50 U.S.C. 403 (d)(3) and (g)), for example, may be classified and exempted under section 552(b)(3) of the Freedom of Information Act. When such information is subjected to court review, the court should recognize that if such information is classified pursuant to one of the above statutes, it shall be exempted under this law.

INVESTIGATORY RECORDS

The Senate amendment contained an amendment to subsection (b)(7) of the Freedom of Information law, not included in the House bill, that would clarify Congressional intent disapproving certain court interpretations which have tended to expand the scope of agency authority to withhold certain "investigatory files compiled for law enforcement purposes." The Senate amendment would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with enforcement proceedings, deprive a person of a right to a fair trial or an impartial adjudication, constitute a clearly unwarranted invasion of personal privacy, disclose the identity of an informer, or disclose investigative techniques and procedures.

The conference substitute follows the Senate amendment except for the substitution of "confidential source" for "informer," the addition of language protecting information compiled by a criminal law enforcement authority from a confidential source in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, the deletion of the word "clearly" relating to avoidance of an "unwarranted invasion of personal privacy," and the addition of a category allowing withholding of information whose disclosure "would endanger the life or physical safety of law enforcement personnel."

The conferees wish to make clear that the scope of this exception against disclosure of "investigative techniques and procedures" should not be interpreted to include routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly known techniques. Nor is this

exemption intended to include records falling within the scope of subsection 552(a)(2) of the Freedom of Information law, such as administrative staff manuals and instructions to staff that affect a member of the public.

The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred. Under this category, in every case where the investigatory records sought were compiled for law enforcement purposes—either civil or criminal in nature—the agency can withhold the names, addresses, and other information that would reveal the identity of a confidential source who furnished the information. However, where the records are compiled by a criminal law enforcement authority, *all* of the information furnished only by a confidential source may be withheld if the information was compiled in the course of a criminal investigation. In addition, where the records are compiled by an agency conducting a lawful national security intelligence investigation, all of the information furnished only by a confidential source may also be withheld. The conferees intend the term "criminal law enforcement authority" to be narrowly construed to include the Federal Bureau of Investigation and similar investigative authorities. Likewise, "national security" is to be strictly construed to refer to military security, national defense, or foreign policy. The term "intelligence" in section 552(b)(7)(D) is intended to apply to positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by governmental units which have authority to conduct such functions. By "an agency" the conferees intend to include criminal law enforcement authorities as well as other agencies. Personnel, regulatory, and civil enforcement investigations are covered by the first clause authorizing withholding of information that would reveal the identity of a confidential source but are not encompassed by the second clause authorizing withholding of all confidential information under the specified circumstances.

The conferees also wish to make clear that disclosure of information about a person to that person does not constitute an invasion of his privacy. Finally, the conferees express approval of the present Justice Department policy waiving legal exemptions for withholding historic investigatory records over 15 years old, and they encourage its continuation.

SEGREGABLE PORTIONS OF RECORDS

The Senate amendment contained a provision, not included in the House bill, providing that any reasonably segregable portion of a record shall be provided to any person requesting such record after the deletion of portions which may be exempted under subsection (b) of the Freedom of Information law.

The conference substitute follows the Senate amendment.

ANNUAL REPORTS BY AGENCIES

The House bill provided that each agency submit an annual report, on or before March 1 of each calendar year, to the Speaker of the House

and the President of the Senate, for referral to the appropriate committees of the Congress. Such report shall include statistical information on the number of agency determinations to withhold information requested under the Freedom of Information law; the reasons for such withholding; the number of appeals of such adverse determinations with the result and reasons for each; a copy of every rule made by the agency in connection with this law; a copy of the agency fee schedule with the total amount of fees collected by the agency during the year; and other information indicating efforts to properly administer the Freedom of Information law.

The Senate amendment contained similar provisions and added two requirements not contained in the House bill, (1) that each agency report list those officials responsible for each denial of records and the numbers of cases in which each participated during the year and (2) that the Attorney General also submit a separate annual report on or before March 1 of each calendar year listing the number of cases arising under the Freedom of Information law, the exemption involved in each such case, the disposition of the case, and the costs, fees, and penalties assessed under the law. The Attorney General's report shall also include a description of Justice Department efforts to encourage agency compliance with the law.

The conference substitute incorporates the major provisions of the House bill and two Senate amendments. With respect to the annual reporting by each agency of the names and titles or positions of each person responsible for the denial of records requested under the Freedom of Information law and the number of instances of participation for each, the conferees wish to make clear that such listing include those persons responsible for the original determination to deny the information requested in each case as well as all other agency employees or officials who were responsible for determinations at subsequent stages in the decision.

EXPANSION OF AGENCY DEFINITION

The House bill extends the applicability of the Freedom of Information law to include any executive department, military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of Government (including the Executive Office of the President), or any independent regulatory agency.

The Senate amendment provided that for purposes of the Freedom of Information law the term agency included any agency defined in section 551(1) of title 5, United States Code, and in addition included the United States Postal Service, the Postal Rate Commission, and any other authority of the Government of the United States which is a corporation and which receives any appropriated funds.

The conference substitute follows the House bill. The conferees state that they intend to include within the definition of "agency" those entities encompassed by 5 U.S.C. 551 and other entities including the United States Postal Service, the Postal Rate Commission, and government corporations or government-controlled corporations now in existence or which may be created in the future. They do not intend to include corporations which receive appropriated funds but

are neither chartered by the Federal Government nor controlled by it, such as the Corporation for Public Broadcasting. Expansion of the definition of "agency" in this subsection is intended to broaden applicability of the Freedom of Information Act but it is not intended that the term "agency" be applied to subdivisions, offices or units within an agency.

With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie* v. *David*, 448 F. 2d. 1067 (C.A.D.C. 1971). The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

EFFECTIVE DATE

Both the House bill and the Senate amendment provided for an effective date of 90 days after the date of enactment of these amendments to the Freedom of Information law.

The conference substitute adopts the language of the Senate amendment.

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