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From whom? Staffing?

Checked Buchen, Marsh, Friedersdorf,
Lynn

Lynn supplied information but not in
this form --- no one claims typing it.

THE PRESIDENT HAS SEEN....

THE WHITE HOUSE

WASHINGTON

February 25, 1976

*2/25/76 - 10:45 P.M.
Talked with Frank Horton.
okay.*

MEMORANDUM FOR THE PRESIDENT

THROUGH:

FROM:

SUBJECT: H.R. 11656 and S. 5 --
"Government in the Sunshine" Bills.

This is to present a series of options which are available to you in responding to legislative initiatives on the bills noted above.

BACKGROUND

H.R. 11656 and its companion measure in the Senate, S. 5, are referred to as "Sunshine" bills. They would require that certain "multiheaded" agencies, e.g., FTC, SEC, CSC, etc., give advance notice of their meetings and hold them open to public observation unless they vote to close a session for reasons specifically enumerated in the bill. For those meetings which an agency votes to close, a verbatim transcript would have to be made.

On November 6, 1975, the Senate by a vote of 94-0 passed S.5. On January 21, the House Subcommittee on Government Information and Individual Rights reported H.R. 11656 to the full House Committee on Government Operations which placed the bill on its agenda for a meeting scheduled for February 26.

It is doubtful that final consideration by the full House Government Operations Committee can be delayed.

Aside from the problems necessarily attendant to the basic purpose of these bills, six major problems remain.

SHORTCOMINGS

First, the agencies to be covered are defined very ambiguously and uncertainly. This could lead to litigation over just which agencies are covered. It is possible that agencies which are not intended to be covered such as the

Council of Economic Advisers may fall within this expansive definition. OMB and Justice have urged that the agencies be covered by specifically listing them.

Second, the requirement for making and keeping a verbatim transcript of all closed meetings, and the judicial review thereof to insure a proper closing, may well have an inhibiting effect on the staff discussions which these agencies have. Additional problems are raised by the requirement for transcribing discussions pertaining to market-sensitive financial information.

Third, the definition of "meeting" subject to the provisions of the bill turns on what is actually discussed at the meeting, a definition which is as difficult for the agency to bear the burden of proving (as it must if challenged in court) as it is conceptually to understand.

Fourth, the bill would permit a civil action to be brought against the individual members of relevant agencies and when a plaintiff substantially prevails in such action and the members actions in violation of the bill are "intentional and repeated", attorney fees and other costs of the plaintiff may be assessed against the individual member. On the other hand, costs could go against the plaintiff when the suit was initiated "primarily for frivolous or dilatory purposes"

Fifth, the bill would amend the Freedom of Information Act to reverse a recent Supreme Court decision which held that statutes which authorize the withholding of information upon a finding as general as the public interest are valid authority to withhold information under the Freedom of Information Act.

Sixth, venue provisions set forth in the bill would authorize the filing of suit anywhere in the Nation to enforce its provisions.

So far the most vocal opponents of the bills have been the SEC and the FRB, although OMB and Justice who have been quite active and every other agency which has commented on the bill has also objected to it.

Frank Horton has drafted a substitute bill which would resolve these major shortcomings, and Pete McCloskey is prepared with a series of amendments should the substitute bill be voted down. The minority members want your position on this "Sunshine" legislation.

OPTIONS

In presenting the options below, the assumption has been made that the bill even as currently written would not have a veto sustained on a vote to override.

The options are:

1. Authorize Frank Horton and Pete McCloskey to state that you would veto the "Sunshine" bill in its current form.

PRO: If an override vote is in doubt, this would most likely result in changes to some of the most objectionable provisions.

CON: Would "escalate" the issue and posture you against "sunshine".

2. Authorize Horton and McCloskey to state that you would sign their bill in the nature of a substitute, and say nothing of a veto.

PRO: Would show that the minority had your support and permit speculation on a veto.

CON: The "sunshine" advocates may be more responsive to an express veto threat.

3. Avoid taking any position on this legislation at this time.

PRO: Avoids being publicly postured against "sunshine" and the concept of "open government".

CON: Significantly reduces the prospects of making the needed changes and would "deflate" the zeal of the minority members.

RECOMMENDATIONS:

We recommend Option 2, and also suggest that you speak to both Frank Horton and Pete McCloskey by phone, today if possible, but prior to tomorrow morning's meeting of the full House Government Operations Committee. There would not appear to be any advantage to be gained in actually meeting with Horton and McCloskey at this time.