The original documents are located in Box 12, folder "Freedom of Information Act" of the Ron Nessen Papers at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

October 25, 1974

Dear Sir:

President Ford's reasons for vetoing the freedom of information bill have received far too little attention.

It seemed to me you would be interested in a full statement explaining the President's views regarding the legislation.

I hope you find the attached paper useful and informative.

Sincerely,

Paul A. Miltich

Paul A. Miltich
Special Assistant to the President
for Public Affairs

Enclosures (2)

REASONABLE FREEDOM OF INFORMATION BILL NEEDED

President Ford is hoping that when Congress returns to Capitol Hill after the election the lawmakers will produce Freedom of Information Act legislation he can sign.

The existing Freedom of Information Act went on the books in 1966. It gives the public greater access to government documents. It empowers the Federal courts to review agency decisions to withhold information and places on the government the burden of providing that the withholding was proper.

The President recently vetoed a bill aimed at strengthening the 1966 Freedom of Information Act by providing for more prompt, efficient and complete disclosure of information. The President favored the legislation in principle, but he found certain provisions in the bill unreasonable.

In vetoing the bill, the President urged Congress to modify it along lines he was recommending and then return it to him for his signature.

The President wants stronger Freedom of Information legislation -- but he wants legislation which is workable.

Critics of the President's veto have taken the attitude that rejection of the congressionally-passed freedom of information bill is unthinkable. Well, it's true that "freedom of information" is a catch phrase. Who in a democracy is opposed to freedom of information? Better you should be against motherhood.

Let's take a good look at the President's reasons for vetoing the freedom of information bill sent him by the Congress. He took the action reluctantly.

The President found three provisions of the bill objectionable.

One would authorize any Federal judge to examine agency records privately to determine whether those records can be properly withheld under the Freedom of Information Act. This provision would reverse a 1973 Supreme Court ruling which held that judicial review of classified documents should be limited to determining whether the document was, in fact, classified -- and precluded private review by the judge focused on the reasonableness of the classification. Under the new provision, the judge could overturn the agency's classification simply because he found the plaintiff's position just as reasonable.

The President felt that this provision endangered our diplomatic relations and our military and intelligence secrets.

He said he could accept court review of classification except that "the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas where they have no particular expertise."

As the provision now reads, the President said, agency decisions dealing with classification of documents would be given less weight in the courts than agency determinations involving routine regulatory matters.

The President therefore proposes that courts be given review authority over classification of documents but that they be required to uphold the agency classification "if there is a reasonable basis to support it."

Mr. Ford's second objection to the vetoed bill was that it would permit access to additional law enforcement investigatory files.

The President objected to an invasion of the confidentiality of FBI files. He also noted that our already overburdened law enforcement agencies do not have the numbers of personnel that would be needed to make a line-by-line examination of each individual public request for such information.

The President proposed that more flexible criteria govern such information requests, so that responding to the requests would not be so heavy a burden.

Finally, the President objected that the vetoed bill set unreasonable time limits for agencies to respond to requests for documents -- 10 days to decide whether to furnish the document, and 20 days for determinations on appeal.

The time provision, Mr. Ford asserted, should provide more latitude.

The President concluded that the bill as sent to him by the Congress was unconstitutional and unworkable. But he endorsed its main objectives.

Fully cognizant of the people's right to know, the President stated in his veto message: "I sincerely hope that this legislation, which has come so far toward realizing its laudable goals, will be reenacted with the changes I propose and returned to me for signature during this session of Congress."

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FOR IMMEDIATE RELEASE October 17, 1974

Office of the White House Press Secretary

THE WHITE HOUSE

TO THE HOUSE OF REPRESENTATIVES:

I am returning herewith without my approval H.R. 12471, a bill to amend the public access to documents provisions of the Administrative Procedures Act. In August, I transmitted a letter to the conferees expressing my support for the direction of this legislation and presenting my concern with some of its provisions. Although I am gratified by the Congressional response in amending several of these provisions, significant problems have not been resolved.

First, I remain concerned that our military or intelligence secrets and diplomatic relations could be adversely affected by this bill. This provision remains unaltered following my earlier letter.

I am prepared to accept those aspects of the provision which would enable courts to inspect classified documents and review the justification for their classification. However, the courts should not be forced to make what amounts to the initial classification decision in sensitive and complex areas 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 would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable. Such a provision would violate constitutional principles, and give less weight before the courts 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 could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document.

Second, I believe that confidentiality would not be maintained if many millions of pages of FBI and other investigatory law enforcement files would be subject to compulsory disclosure at the behest of any person unless the Government could 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 could not obtain, the large number of trained and knowledgeable personnel that would be needed to make such a line-by-line examination of information requests that sometimes involve hundreds of thousands of documents, within the time constraints added to current law by this bill.

Therefore, I propose that more flexible criteria govern the responses to requests for particularly lengthy investigatory records to mitigate the burden which these amendments would otherwise impose, in order not to dilute the primary responsibilities of these law enforcement activities.

Finally, the ten days afforded an agency to determine whether to furnish a requested document and the twenty days afforded for determinations on appeal are, despite the provision concerning unusual circumstances, simply unrealistic in some cases. It is essential that additional latitude be provided.

I shall submit shortly language which would dispel my concerns regarding the manner of judicial review of classified material and for mitigating the administrative burden placed on the agencies, especially our law enforcement agencies, by the bill as presently enrolled. It is only my conviction that the bill as enrolled is unconstitutional and unworkable that would cause me to return the bill without my approval. I sincerely hope that this legislation, which has come so far toward realizing its laudable goals, will be reenacted with the changes I propose and returned to me for signature during this session of Congress.

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GERALD R. FORD

THE WHITE HOUSE,

October 17, 1974.

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THE WHITE HOUSE

WASHINGTON

October 25, 1974

Dear Mr. Speaker:

As promised in my Message returning H.R. 12471, the Freedom of Information Act amendments, to the Congress without my approval, I enclose three draft amendments to that bill which would eliminate the basis for my veto if adopted. Also enclosed is a summary and analysis explaining each of the proposed amendments.

I hope that the Congress will, upon its return on November 18, consider these amendments on an urgent basis. Enactment of H.R. 12471 with these modifications will produce truly significant and beneficial legislation.

Sincerely,

Gerald R. Ford

Honorable Carl Albert
Speaker of the
House of Representatives
Washington, D. C. 20515

Enclosures

NOTE: Identical letter to President pro tem of Senate.

Review of Classified Documents
Amendment to H.R. 12471

That Section 2(a) of H.R. 12471 be amended by adding at the end of proposed paragraph (1) contain therein the following:

"Provided: That for matters described in (A), above, a court has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records to the complainant unless it finds that there is a reasonable basis to support the classification pursuant to such Executive order. The court may examine such records in camera only if it is necessary, after consideration by the court of all other attendant material, in order to determine whether such classification is proper."

Review of Classified Documents

This amendment would, as did the provisions it replaces, permit a court to review documents classified by agencies in the interest of national defense or foreign policy and to insure the reasonableness of that classification. However, the proposed language would permit a court to review the document itself and to disclose the document only if there is no reasonable basis to support the classification. This amendment removes an unconstitutional arrangement in H.R. 12471 as vetoed whereby a highly sensitive document pertaining to our national defense would have to be disclosed even if the classification were reasonable. The new language simply provides that after a review of all the evidence pertaining to a classified document, including the document itself if necessary, the document may be disclosed unless there is a reasonable basis for the classification by the agency. The burden of proof remains upon the agency to sustain the reasonableness of the classification.

Time Limits and Costs
Amendment to H.R. 12471

That Section 1(c) of H.R. 12471 be amended by:

a. Substituting the word "thirty" for the word "ten" appearing in proposed paragraph (6)(A)(i) contained therein; and deleting the second sentence of proposed paragraph (6)(B), and substituting therefor the following sentence:

> "No such notices shall specify dates that would result in extensions with respect to a single request for more than fifteen working days."

b. Redesignating proposed paragraph (6)(C), paragraph (6)(D), and inserting as new paragraph (6)(C) the following:

> "(C) If the agency finds at any time before the filing of suit under subparagraph 552(a)(4)(B) above that the periods set forth in subparagraph (A) above and any extension available under subparagraph (B) above are insufficient, it may petition the United States District Court in the District of Columbia for such further extension or extensions as may be needed, setting forth with particularity the reasons therefor and with appropriate notification to the person making the request. The court shall grant such further extension or extensions

as are appropriate if it is persuaded that the agency has proceeded with due diligence in responding to the request and requires additional time in order to make its determinations properly."

That Section 1(b)(2) of H.R. 12471 be amended by deleting the period at the end of the second sentence of proposed paragraph (4)(A) contained therein and adding the following:

", except that the reasonable cost of reviewing and examining records may be charged where such cost is in excess of $100 for any request or related series of requests."

Time Limits and Costs

As vetoed, H.R. 12471 provides that following a request for documents an agency must determine whether to furnish the documents within ten days, and following an appeal from a determination to withhold documents, the agency is afforded twenty days to decide the appeal. In unusual circumstances an agency may obtain an additional ten days for either determination.

Time limits on agency action with regard to requested documents are important additions to the public's right to know of the operations of its Government, and several agencies have already voluntarily adopted time limits for their responses. Experience with these time limits indicates that the restrictions in H.R. 12471 are impracticable. Because of the large number of documents often requested, their decentralized location and the importance of other agency business it would often be impossible to comply with requests in the time allotted.

This amendment would provide thirty days for the initial determination and would provide an additional fifteen days in unusual circumstances. Furthermore, in exceptional circumstances, the agency would be authorized to seek additional time from a court if it could demonstrate due diligence in responding to a request. For particularly burdensome requests, an agency would also be permitted to charge for the cost of reviewing requested documents if such cost exceeded $100 for each request or each series of related requests. This provision would help to defray those unusual expenses in responding to requests for documents at a time when we are seeking to limit our Governmental expenditures. Furthermore, the additional time afforded agencies in responding to requests will lead to more responsive determinations and more efficient use of agency personnel and resources, while still providing for prompt agency response to requested documents.

Investigatory Records
Amendment to H.R. 12471

That Section 2(b) of H.R. 12471 be amended by adding after the word "that" in the second line of proposed paragraph (7) the phrase "there is a substantial possibility that"; by deleting the word "criminal" in the seventh line of proposed paragraph (7); and by adding at the end of that proposed paragraph the following sentence:

"Provided: That where the agency head, after considering the results of a preliminary examination of the files involved in the request, personally finds, in light of (1) the number of documents covered by the request, (2) the proportion of such documents which consist of reports by Federal or State investigative agents or from confidential sources, and (3) the availability of personnel of the type needed to make the required review and examination, that application of the foregoing tests on a record-by-record basis would be impracticable, the agency may apply such tests to the investigatory file as a whole or to reasonably segregable portions thereof; except that this provision shall not be applied to files which

the agency has reason to believe contain records which are not investigatory records compiled for law enforcement purposes, nor shall it protect from disclosure any records which, as a result of the preliminary examination or for any other reason, do not require further significant review or examination."

Investigatory Records

The first portion of this revision is intended to render more realistic the showing of harmful effect which the Government would have to make in order to sustain the withholding of investigatory records. It is simply not possible in most cases to establish that release "would" cause particular harm of the type described. But when what is involved is harm so enormous as depriving a defendant of the right to a fair trial, invading personal privacy, compromising our law enforcement operations, and endangering the life or physical safety of law enforcement personnel, existence of a substantial possibility that the harmful effect will ensue ought to be adequate reason for withholding the document.

The second portion broadens the bill's protection of confidential information provided to a criminal law enforcement agency to such information provided to an agency with civil law enforcement functions. There are several agencies that perform important civil law enforcement functions, and often civil law enforcement investigations directly lead to criminal investigations. In these instances it is essential that confidential information furnished only by a confidential source be protected from premature disclosure.

In the past, all records contained in investigatory files compiled for law enforcement purposes have been exempt from disclosure under the Freedom of Information Act. Although such a categorical exemption is too broad, Congress originally adopted that provision in 1966 because of special characteristics of these files which the present bill entirely disregards. First, improper release of the information they contain can be exceptionally harmful, and thus particularly careful screening is required; second, many of these files are of enormous size; and finally, the proportion of nonreleasable information they contain is typically much higher than that contained in other Government files. The combination of

these factors makes it impracticable in some situations to devote the efforts of our law enforcement personnel to a paragraph-by-paragraph screening of these files. This is so whether or not the time which these personnel take from law enforcement duties is paid for by the person making the request. While this consideration does not justify the categorical exception of all investigatory files, it cannot be entirely ignored. The amendment will enable the agency head himself to make a case-by-case finding of impracticability, on the basis of specific factors which can be reviewed by the courts. This resolution is both reasonable and not subject to uncontrolled application by the Executive branch. The last clause of the sentence also prevents this limited "investigatory files" exemption from being abused so as to protect records which are not investigatory records or which the agency knows do not qualify for any specific exemption from disclosure.