THE WHITE HOUSE

WASHINGTON
August 20, 1974

Dear Ted:

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 for the courts does not prevent me from observing that 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

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