ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

OCT 8 1974

Honorable Roy L. Ash
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Ash:

In compliance with your request, I have examined the enrolled bill (H.R. 12471), to amend section 552 of Title 5, United States Code, known as the Freedom of Information Act. Since the facsimile of the enrolled bill is not yet available, the review has been made of the bill as it appears in the conference report (Senate Report No. 93-1200 of October 1, 1974).

The enrolled bill is designed to improve the administrative procedures for handling requests by the public under the Freedom of Information Act for access to government documents. The bill makes numerous substantial changes in the present Act. While there are many provisions with which we do not disagree, there are some points upon which we take strong exception.

The attached proposed memorandum of disapproval gives general support to the principle of strengthening the Freedom of Information Act and promoting the cause of openness in government, while at the same time highlighting the defects which we see in the bill and requesting their elimination.

It is recommended that the enrolled bill not receive Executive approval and that the substance of the attached proposed memorandum of disapproval be included in the veto message.

Sincerely,

W. Vincent Rakestraw
Assistant Attorney General

MEMORANDUM

AMENDMENTS TO FREEDOM OF INFORMATION ACT

DRAFT VETO MESSAGE

MODIFIED BY THE TREASURY DEPARTMENT

(LANGUAGE TO BE DELETED ENCLOSED IN BRACKETS; LANGUAGE ADDED UNDERLINED)

With great reluctance and regret, and with my earnest request that this legislation be promptly re-enacted with the changes discussed below, I am returning H.R. 12471 without my approval. With these changes, the legislation will significantly strengthen the Freedom of Information Act and the cause of openness in government to which I am committed. But without them, it will weaken needed safeguards of individual privacy, impede law enforcement, impair the national defense and our conduct of foreign relations, diminish the ability of federal agencies to process information requests fairly and intelligently, and impose substantial additional expenses upon the taxpayers that can neither be controlled nor accurately estimated.

None of the changes discussed below would alter the objective of this legislation, nor would they eliminate any of its basic features. Some of them will give users of the Act important rights not contained in the bill as it now stands. These minor but important revisions will eliminate serious constitutional difficulties and greatly enhance the practical workability of the legislation.

First, a limited change is needed in the judicial review provisions as they would apply to classified defense and foreign policy documents. I am prepared to accept those aspects of these provisions which are 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] a responsible official of the Executive Branch 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 norms, 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, the minor but vital change that where classified documents are requested the courts may review the classification but must uphold it if there is reasonable basis to support it.

The provisions amending the 7th exemption of the Act, covering investigatory files, would seriously jeopardize individual privacy and the ability of the FBI and other law enforcement agencies to combat crime, for example. Individual privacy demands that the second-hand, unevaluated assertions about individuals contained in investigative files not be released without careful evaluation of their impact; and effective law enforcement requires confidence on the part of those who are asked to provide information about possible violations of law that their identity will be preserved inviolate.

The present bill will assure these protections only in theory--not in practice. 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. Similarly, the tax collection activities of the Internal Revenue Service could be impaired by a further liberalization of access to law enforcement files. Experience has shown that sophisticated taxpayers will utilize provisions such as those in the bill to supplement discovery in both criminal and civil proceedings with the potential of severely curtailing and delaying audit investigations and prosecutions in the tax area until the matter of access is finally resolved. This could result in a loss of tax revenues. In order to meet the Congress' legitimate concerns with the existing investigatory files exemption, I propose, instead of the unrealistic provisions contained in the present bill, the following new safeguards: (1) prohibition against placing in investigatory files records which are not investigatory records; (2) clear specification that the existing exemption does not apply to noninvestigatory records that are found in investigatory files, and (3) substitution of the tests proposed in the present bill for the investigatory files exemption when

the documents covered by the request are less than 50 pages in length, unless the agency specifically finds (subject to judicial review) that application of those tests is not feasible or not in furtherance of the purposes of the Act.

The administrative time limit provisions in the bill are aimed at a desirable goal, but are too rigid, considering the great variety in the nature, size, and difficulty of Freedom of Information requests. In their present form, they will require employees of agencies, particularly those, like the Internal Revenue Service, which have voluminous records in numerous locations, to make hasty judgments on the availability of requested records and thereby lead to unnecessary denials in some cases and to careless grants in others, sacrificing individual privacy, commercial confidentiality, and the proper performance of government functions. They make no allowance for consulting either individuals or business firms when records about them are sought; nor do they take into account the situation of an agency like the Immigration and Naturalization Service, which receives almost 100,000 requests a year for information contained in over 12,000,000 files kept at 67 locations, or the Internal Revenue Service, which maintains literally hundreds of millions of tax records at over 100 locations. I urge that the time limit provisions be changed [so as generally to reflect the recommendations of the Administrative Conference of the United States] to provide more realistic and practical limits. While it may not be essential for every agency, in my judgment, a minimum of 30 days for an initial, plus 30 days for an appellate, response is absolutely essential for agencies such as the Internal Revenue Service. The ability to extend such periods for an additional 30 days upon the personal determination of the head of the agency is also necessary. I would, moreover, propose that further extensions be

permitted for good cause shown. As safeguards against agency abuse of time extensions, I would agree to limiting any one extension to 10 working days and also giving a requester the right, which the bill does not now confer, to challenge in court an agency's justification for issuing extensions. I would also favor inclusion of a provision authorizing and encouraging specially expedited service for the news media and others with a special public interest in speed.

In many agencies, final decisions to deny information are made by presidential appointees. The bill contains provisions for disciplining those agency personnel who have acted arbitrarily and capriciously with respect to the withholding of documents. Those provisions would require a court to make written findings and the Civil Service Commission then to initiate proceedings to determine whether disciplinary action is warranted against the officer or employee who is primarily responsible for the withholding. The Civil Service Commission is to submit its findings and recommendations to the agency concerned and that agency is to take the corrective action that the Commission recommends. It is questionable whether the Civil Service Commission has jurisdiction over presidential appointees who may have made the decision to withhold. It is also questionable whether an agency may take disciplinary action against such officials. It would seem that only the President could clearly take such action. I recommend that the Congress give further consideration to this provision in light of these factors.

Finally, fairness to the taxpayer and to the persons who are the subjects of federal records calls for some changes in the closely related provisions which would prohibit any charge for examination of records regardless of the

amount of work involved, while compelling extensive editing in order to release "any reasonably segragable portion" of a record. Under the fee provision, corporate interests could require massive research in government records for their own gain at the taxpayer's expense; and that expense would be greatly inflated by the editing provision. Agencies would be under great pressure to reduce their editing work by releasing records without adequate consideration of the impact upon individuals or upon government functions. To correct these problems, I propose that fees for services other than search and duplication be permitted under the user charge statute where they exceed $100--with right to a quick and independent administrative review of the fees, and to court review. I also propose that the editing requirement be made a general but not a universal rule, that is, inapplicable in those situations in which it is found by the agency to be not reasonably practicable, not in furtherance of the goals of the Act, or not consistent with the nature and purpose of the exemption in question--again with the right to judicial review of this determination.

I again emphasize that the changes discussed above do not eliminate any of the basic features of this legislation, which I endorse. They can accurately be described as technical changes, which enable the same objectives to be achieved in a fashion which avoids adverse effects that would otherwise ensue. It is my firm belief that they would not weaken but would strengthen this legislation, because the predictable effect of the present bill's impracticable and undesirable demands upon administrators and judges will be

to diminish respect for, and reduce the careful observance of the Freedom of Information Act. I am submitting to the Congress, together with this veto message, an Administration bill which is identical to H.R. 12471, with the minor but important changes I have discussed above. I hope that bill will receive the wide support it deserves.