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NINETY-THIRD CONGRESS

Congress of the United States
House of Representatives

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FOREIGN OPERATIONS AND GOVERNMENT INFORMATION SUBCOMMITTEE
OF THE
COMMITTEE ON GOVERNMENT OPERATIONS

RAYBURN HOUSE OFFICE BUILDING, ROOM B-371-B
WASHINGTON, D.C. 20515

September 23, 1974

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

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.

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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.

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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

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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.

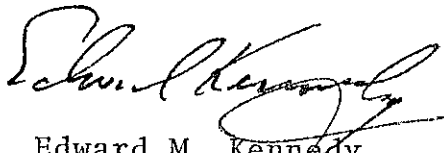
You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included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