

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON, D.C. 20503

JUN 29 1966

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 1160 - Disclosure of Government information
Sponsors - Sen. Long (D) Missouri, and 18 others

Last Day for Action

July 4, 1966 - Monday

Purpose

Amends section 3 of the Administrative Procedure Act to (1) establish specific standards governing executive branch agencies in making information public and in permitting access to their records, and (2) authorize court review of agency decisions to withhold information, with the burden on the agencies to sustain their actions.

Agency Recommendations

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| Bureau of the Budget | Approval |
| Civil Aeronautics Board | Approval |
| Department of Defense | Approval |
| Department of Justice | Does not urge withholding of approval (Signing statement attached) |
| Atomic Energy Commission | No objection |
| Department of Commerce | No objection |
| Department of Housing and Urban Development | No objection |
| Department of the Treasury | No objection |
| Department of Health, Education, and Welfare | Disapproval would best serve public interest |
| Department of Agriculture | No recommendation |
| Federal Power Commission | No recommendation |
| National Labor Relations Board | No recommendation |
| Securities and Exchange Commission | No recommendation |
| Department of State | No recommendation |

Discussion

S. 1160 makes far-reaching changes in section 3 of the Administrative Procedure Act, which now contains the general statutory provisions governing public access to executive branch information as distinguished from specific provisions in other statutes applicable to a single agency or program.

At present, the purpose of section 3 is to make needed information available to persons properly and directly concerned. Matters involving any function which require secrecy in the public interest or which relate solely to internal management of an agency are entirely exempted. Other records may, at the discretion of an agency, be held confidential for good cause.

S. 1160 eliminates agency discretion with respect to publishing information or granting access to records. It provides for full disclosure to any person of any agency records not specifically exempted from disclosure under the standards which it establishes. Specifically, the bill, which would take effect one year from the date of enactment, would:

1. Eliminate the general exemptions in existing law for matters requiring secrecy in the public interest or relating solely to internal management.
2. Clarify and strengthen, without expanding, current requirements for publication in the Federal Register, and give statutory sanction to the current practice of incorporating certain materials by reference with the approval of the Director of the Federal Register.
3. Require additional materials to be published or made available for public inspection and copying, including all concurring and dissenting opinions as well as final opinions, all orders made in the adjudication of cases, statements of policy or interpretation which are not published in the Federal Register, and administrative staff manuals and instructions to staff that affect any member of the public. Permit identifying details to be deleted when necessary to prevent a clearly unwarranted invasion of personal privacy, provided that in each case the deletion is justified in writing. Require agencies to maintain an index of such materials.
4. Require agencies to make any other identifiable record available to any person upon request, in accordance with agency rules, except:
 - matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

- matters related solely to internal personnel rules and practices.
- matters specifically exempted from disclosure by other statutes.
- trade secrets and commercial or financial information obtained from any person and privileged or confidential.
- interagency or intra-agency memoranda which would not be available by law to a private party in litigation with the agency.
- personnel, medical and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- investigatory files compiled for law enforcement purposes, except to the extent available by law to a private party.
- information related to regulation and supervision of financial institutions, and
- geological and geophysical information concerning wells.

5. Provide that United States District Courts, upon a complaint, may enjoin an agency from withholding of records and order the agency to produce records improperly withheld. Gives the Courts the right to determine the case de novo and places the burden on the agency to sustain its action.

During congressional consideration of S. 1160, the agencies expressed much concern over the effect some provisions of the bill would have on their ability to discharge their responsibilities effectively. The executive branch sought consideration by the House Committee on Government Operations of an alternative bill without the defects of S. 1160. Although that attempt failed, the Committee did include clarifying or interpretative language in its report on the bill which was designed, as legislative history, to meet some of the major problems raised by the agencies.

The relevant portions of the House report and their intended effect on S. 1160 are described below:

1. The provision of the bill requiring publication of, or access to, staff manuals and instructions which affect any member of the public is interpreted as applying to the "case law" developed by each

agency, but not to those portions of manuals and instructions which establish guidelines or criteria for audits, inspections, or the selection and handling of cases. If upheld in court, this interpretation would permit withholding of staff instructions which could assist individuals in evading the law or give them unfair advantage in their dealings with the Government.

2. The report lists many specific examples of trade secrets or financial information which are exempted from disclosure by a specific provision of the bill and states that the exemption is intended to include information which is given to an agency in confidence or which is customarily privileged.

3. The report contains the following very significant comment on the bill's provision which exempts from disclosure certain inter-agency or intra-agency memorandums or letters:

"Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose...information...before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public."

This language does not eliminate all the ambiguities and uncertainties in this provision of S. 1160, but it is intended to provide broader protection for the internal working papers of executive agencies.

4. The bill's exemption of "investigatory files compiled for law enforcement purposes" is interpreted as granting exemption for "investigatory files related to enforcement of all kinds of laws, labor and security laws as well as criminal laws." The report also states that "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings."

5. In discussing the bill's elimination of the current general exemption of matters related solely to internal management, the report cites specific instances of abuse, presumably to justify dropping the general exemption, and adds:

"On the other hand, in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure, and S. 1160 is designed to permit nondisclosure in such cases."

Although this comment in the House report is not addressed to a specific section of the bill, the apparent intention is to permit agencies some discretion as to the time of disclosure of information rather than to create an additional permanent exemption.

6. The report seeks to assure that court action would not be taken prior to decision by an agency head, by emphasizing the right to administrative appeal and to prompt review of a decision by subordinate officials to withhold information.

7. Finally, the report states: "It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy."

Supporting the interpretation of the bill in the House report, Congressman Moss said on the House floor:

"This measure is not intended to impinge upon the appropriate power of the Executive or to harass the agencies of Government. We are simply attempting to enforce a basic public right--the right to access to Government information. We have expressed an intent in the report on this bill which we hope the courts will read with great care."

Justice's views letter on the enrolled bill makes several major points:

1. The bill raises constitutional issues in that a strict application of its provisions could in some circumstances result in invasion of the constitutionally-derived responsibility of the Executive to protect records which in its judgment should be held confidential in the public interest and could transfer final responsibility in this respect to the courts.

2. The bill is lamentably drafted and the exemptions on which the Executive Branch must rely are vague and inadequate. As a result there is quite likely to be substantial difficulty in legitimate agency efforts to protect Executive Branch records from public disclosure. Justice attaches a memorandum dealing with some of the practical problems.

3. The bill applies to every "record" in the possession of the Executive Branch and gives any member of the public a right, without a showing of need or interest, to examine or have a copy of a record made unless the requested material is described in one of the nine limited exemptions. The first exemption covers matters determined by the President to affect the national defense or foreign policy. This exemption, however, covers only matters "specifically required by Executive order to be kept secret", with the possibility that the President's determination can be judicially examined.

4. The scope of the exempted categories is uncertain, and any person claiming that a particular record does not fall within an exemption has the right to litigate the question with the agency charged with the burden of establishing that the withholding was proper.

5. The bill deals with matters basic to Executive operation. Its attempt to apply simple word-formulas to requests for information without permitting any exercise of Executive discretion involves both difficulties and dangers which are compounded because these formulas are so poorly drafted.

6. If the courts follow the language contained in the House report, it should resolve many of the more pressing problems which could result from narrow interpretations of some of the exemptions.

Balanced against the foregoing, Justice points out, is the principle of freedom of information and minimizing secrecy in Government, which certainly deserves Executive support. After careful consideration of the factors involved and recognizing that a veto would raise serious problems, Justice does not urge that you withhold your approval of S. 1160. It hopes that a signing statement, which it recommends, together with the explanatory language in the House report and perhaps the issuance of an Attorney General's manual with respect to the bill's provisions, will clarify the purpose and application of the bill in a way which may tend to overcome many of its deficiencies.

Justice notes the basic difficulty of relying in statutory construction upon portions of the legislative history to determine the meaning of statutory provisions. In this context, it believes that the issuance

of a signing statement by you regarding the scope of the bill and the meaning attributed to its provisions by the Executive Branch would seem especially desirable. To this end, it has prepared a draft signing statement for your consideration.

In its views letter, Defense concurs in the recommendation of the Department of Justice "because of the great sensitivity of the subject matter of the Act" and recommends the issuance of a signing statement reasserting the Executive's prerogatives. It shares, however, the concerns of Justice that the bill raises a serious constitutional issue, threatens severe administrative burdens, and in some respects is imprecisely drafted.

HEW, in its views letter and in an accompanying staff memorandum, discusses in detail how the bill may cause serious problems in the conduct of its programs, including negotiations with State and local governments on grants-in-aid, review of applications for medical research grants, administration of social security benefits, and enforcement of the food and drug laws. The magnitude of these problems lead it "to conclude that the public interest would be best served if the current bill were not permitted to become law...."

Several of the other agencies reporting on the enrolled bill also express concern about the uncertainties in the bill's provisions, the difficulties inherent in relying on legislative history, and the possible damaging effects on agency operations. (See the views letters of SEC, NLRB and Agriculture, in particular)

In addition to Justice and Defense, three other agencies--NLRB, Agriculture, and HEW--suggest the desirability of a signing statement. They believe the statement should emphasize that the House report reflects your understanding of the meaning to be attached to the bill.

We share the grave misgivings of the agencies about the constitutional aspects, the operating problems, and the interpretative difficulties of S. 1160. Certain significant factors, however, tend to mitigate the bill's potential damage: (1) the legislative history incorporated in the House report, (2) the anticipation that the courts will exercise due restraint and apply the law in a constitutional manner, and (3) the expectation that Justice will prepare, in cooperation with the agencies, an interpretative manual which will help to lighten the administrative burden. Moreover, the bill provides a one-year grace period in which the agencies can carefully assess the impact of the bill on their operations and propose amendments to the Congress to correct uncertainties in the bill or make additional exemptions which can be shown to be essential to the national interest.

Because of these factors and because the principle underlying the bill is a sound one, basic to our philosophy of government, we conclude that you should not withhold approval of S. 1160. We concur in the desirability of your issuing a signing statement along the lines proposed by Justice.

Wilfred H. Rommel

Assistant Director for
Legislative Reference

Enclosures