



DEPARTMENT OF STATE

Washington, D.C. 20520

OCT 15 1974

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

Dear Mr. Ash:

Mr. Rommel's enrolled bill request of October 9, 1974, asked for the views of the Department of State on H.R. 12471, to amend the Freedom of Information Act, Title 5 United States Code, section 552.

For the reasons specified in the enclosed memorandum of October 9, 1974, from the Acting Legal Adviser, and the enclosed memorandum of October 3, 1974, from Assistant Attorney General Scalia, the Department of State recommends veto of H.R. 12471 and supports the veto message proposed by Mr. Scalia modified as suggested in the memorandum from the Acting Legal Adviser.

Cordially,

Linwood Holton  
Assistant Secretary  
for Congressional Relations

Enclosures:

1. October 9 memo
2. October 3 memo



October 9, 1974

MEMORANDUM FOR GEOFFREY SHEPARD  
Assistant Director, Domestic Council

SUBJECT: Veto of Freedom of Information Act  
Amendments

The Department of State wishes to confirm its previous recommendation that the President veto H.R. 12471, a bill to amend the Freedom of Information Act.

The reason for this recommendation is stated on the first page of the proposed veto message transmitted to you on October 3 by Assistant Attorney General Scalia. The Department of State could support legislation authorizing judicial review of security classifications established by the Executive Branch to determine whether the Executive Branch has acted arbitrarily or whether its determination lacks reasonable basis. However, in our view it would be unsound and of doubtful constitutionality to authorize the courts to determine whether the disclosure of foreign relations information would adversely affect the national security. Classification should remain the responsibility of the Executive Branch.

We agree that the positive tone of the draft veto message is the correct approach and believe that the message could be strengthened further if it identified more specifically the purposes of the amendments supported by the Administration. It might be helpful, for example, to emphasize that the Administration is prepared to support judicial review of classified material in camera as necessary to insure that the classification system is not used to conceal illegal or other improper actions not involving national security. While we would wish to retain and improve the legislative history indicating that courts may rely on affidavits and need not examine classified documents unless clearly necessary, we do not believe this point needs to be addressed in the veto message.



We also believe that it would serve the public interest and demonstrate the Administration's commitment to the purposes of the Freedom of Information Act if the President were to balance a veto of these amendments with an announcement of affirmative steps to strengthen Executive Branch action in this area. Such possible steps could include:

(i) Designation of a respected person of national stature as permanent chairman of the Interagency Classification Review Committee with a mandate and resources to strengthen that agency's ability to carry out its responsibilities under E.O. 11652. Such proposals are in an advanced stage of study in the ICRC;

(ii) A commitment to work with the responsible committees of Congress on legislation establishing a new agency within the Executive Branch to supervise and report on the operation of the classification system to provide continuing assurance that the system is functioning effectively and is not abused. Assistant Attorney General Rakestraw made a proposal on these lines to Congressman Moorhead's Subcommittee on Government Operations in July.

The Department of State is prepared to work with other agencies in developing specific wording on these points for the veto message.

George H. Aldrich  
Acting Legal Adviser

**Drafted:**

L/M:KEMalmborg:L:MBFeldman:lhs  
x22350 x22001 10/9/74

cc: OMB - Mr. Stan Ebner  
Justice - Mr. Scalia  
H - Mrs. Waskewich

**Clearances:**

PA - Mr. Blair  
H - Mr. Goldberg



OCT 3 1974

MEMORANDUM FOR GEOFFREY SHEPARD  
Assistant Director, Domestic Council

Re: Proposed Veto Message to the Freedom of  
Information Act Amendments

Attached is a proposed veto message that could be applied to the Freedom of Information Act amendments. I think it makes a strong case, and one that should be readily understandable by the public. I hope serious consideration will be given to what a veto message might look like before a veto is ruled out as entirely impracticable.

Antonin Scalia  
Assistant Attorney General  
Office of Legal Counsel



MEMORANDUM

AMENDMENTS TO FREEDOM OF INFORMATION ACT

DRAFT VETO MESSAGE

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 burdens 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 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 regarding 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. Individual privacy demands that the second-hand, unevaluated aspersions 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. 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 these 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 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 about 100,000 requests a year for information contained in over 12,000,000 files kept at 67 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. 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.



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 segregable 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 only 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 detract in any way from the basic features of this legislation, which I endorse. They can accurately be described as technical changes, which enable the basic 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. 13471, with the minor but important changes I have discussed above. I hope that bill will receive the wide support it deserves.

