

THE WHITE HOUSE
WASHINGTON

August 13, 1965

TO: Bill Moyers

FROM: Lee White *lw*

For your information and any possible reaction.

*To: Lee White
I agree with
BOB's objections
and believe we should
continue to oppose
the legislation.
BW*

EXECUTIVE OFFICE OF THE PRESIDENT

BUREAU OF THE BUDGET

WASHINGTON, D.C. 20503

AUG 12 1965

MEMORANDUM FOR MR. LEE WHITE

Subject: Mr. Archibald's letter of August 2 on the Federal Public Records bill.

This bill is a revision of H.R. 5012 about which we wrote you on March 19 of this year (a copy of our memo is attached). While the revisions have improved the bill, it continues to have the same basic defects which are inherent in the bill's approach to the subject of availability of information:

1. It removes from the heads of agencies any discretion to determine what information should be withheld from publication and attempts to provide protection for certain types of information through a rigid set of exemptions. We believe that it is not possible to anticipate and deal with all the situations in which disclosure of information would be contrary to the public interest. It also removes any discretion with respect to the timing of the release of information, thus making possible the disclosure of information at a time when it would not be in the public interest. It limits the authority of the President by authorizing him to order withholding of information only in the interest of national security.

I agree with Bob on this point.

2. The free interchange of information and views among officials and agencies could be inhibited since there is no discretion in an agency head with respect to the disclosure of records for which he is responsible.

3. The requirement that information be made available to all and sundry, including the idly curious, could create serious practical problems for the agencies.

True!

Enclosed is a copy of our report to the House Government Operations Committee, which goes into some of the objections in more detail.

The Department of Justice considers the bill to be unconstitutional. At the hearings in March of this year, the Department testified as follows:

"Since H.R. 5012, by its terms, seeks to limit the Executive in the exercise of his constitutional authority to determine whether Executive documents are to be disclosed, by setting forth in subsection (c) limited exceptions to the absolute disclosure requirement of subsection (b), the bill contravenes the separation of powers doctrine and is unconstitutional. Although the provision of the bill

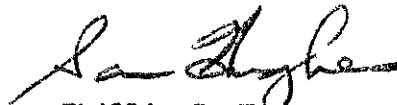
for judicial relief is unclear, if it would remove from the Executive branch to the Judicial branch the authority to determine, de novo, whether documents of the Executive are to be disclosed or not disclosed, that provision is also unconstitutional on the same ground.

"H.R. 5012 can result in a valid enactment only if it leaves undisturbed the inherent authority of the Executive branch to govern the disclosure and non-disclosure of its records.

"In sum, Mr. Chairman, we believe that H.R. 5012 is unwise in that it seeks to resolve a terribly complex problem in a too-simple way that does not recognize the complexities involved. Further, to the extent that the bill would seek to shift to the Judicial branch a constitutional prerogative of the Executive, we believe it would be unconstitutional."

Under the circumstances, we would urge continued opposition to this legislation. In this connection, the attached news story from the Washington Star may be of interest.

The letter from Mr. Archibald is returned herewith.



Phillip S. Hughes
Assistant Director for
Legislative Reference

Enclosures

MAR 19 1965

MEMORANDUM FOR MR. LEE WHITE

Subject: Public Information

Attached is a copy of H.R. 5012, which would amend section 161 of the Revised Statutes (5 U.S.C. 22) to compel wide disclosure of information by executive agencies. Hearings on the bill are scheduled to begin March 30, 1965, before the Information Subcommittee of the House Committee on Government Operations, chaired by Congressman Moss. He is the sponsor of this bill; a number of other identical bills also have been introduced in the House.

We regard this bill as threatening a serious legislative encroachment on executive power. S. 1666, containing substantially identical language, passed the Senate last year as an amendment to the Administrative Procedure Act. We understand that the Senate Subcommittee (Administrative Practice and Procedure of the Senate Committee on the Judiciary) which developed S. 1666 is not pressing its bill this year, but is awaiting the outcome of this bill in the House. Accordingly, should H.R. 5012 pass the House, despite adverse agency reports and testimony, we would anticipate prompt passage of the House bill by the Senate. Action taken to place this proposed legislation within the jurisdiction of the Moss Subcommittee rather than the House Committee on the Judiciary indicates a carefully developed strategy to achieve that objective.

A comparison of H.R. 5012 with existing law is attached. In brief, the bill would eliminate all discretionary authority of agencies to withhold information or records from any person. Likewise the President's authority and discretion would be limited to issuing Executive orders setting forth matters specifically required to be kept secret in the interest of national defense or foreign policy. H.R. 5012 would specifically authorize the withholding of certain categories of information, including matters specifically exempted from disclosure by other statutes. All laws inconsistent with H.R. 5012 would be repealed.

United States District courts would be given jurisdiction to compel the production of agency records. Cases would be tried de novo and the burden would be upon an agency to sustain its action. Failure to comply with a court order would make responsible officials liable for punishment for contempt.

A number of adverse agency reports have been cleared. While we have not had the benefit of Justice's views on interpretation, the Senate report on identical language last year makes clear the intent to leave no loopholes. We believe it is entirely unrealistic to attempt to deal with public access to the vast range of executive branch information and records through rigid statutory standards or Executive orders which leave no latitude for discretion, either as to content, timing, or the persons having right to access. In addition, except for personnel records, the proposed standards do not protect agency working papers except "memoranda or letters dealing solely with matters of law or policy" (emphasis supplied). The executive branch could not function under a standard which would require either that all factual material be excluded from letters or memoranda or that they be made "promptly available to any person." For example, most papers relating to functions of the Bureau of the Budget are now exempt from the public disclosure requirement of the Administrative Procedure Act on the ground that they relate solely to the internal management of the executive branch. This exemption would be eliminated by H.R. 5012.

As you know, "freedom of information" is such a sensitive subject that it will be difficult to deal with this proposed legislation at a hearing, especially since the Senate passed a bill containing essentially the same language last year.

We believe the matter warrants discussion with the Congressional majority leadership. It is probably too late to stop the hearings, but we suggest that the leadership be urged to assure that the bill does not come to a vote in the House.

Phillip S. Hughes
Assistant Director for
Legislative Reference

P.S. We are considering two other courses of action also, but either presents problems:

1. An alternative or amended bill which we could buy. This would not be very saleable to the Congress since it would leave us with a new statute but approximately the status quo.

2. A study commission to recommend ground rules or limits on freedom of information. A Presidential commission would probably have little status with the Congress and a congressional commission might well come out with the Moss Committee results or worse.

PSH

ATTACHMENT

H.R. 5012 IN RELATION TO PRESENT LAW

General provisions of existing law governing disclosure of information

Section 161 of the Revised Statutes (5 U.S.C. 22) provides:

"The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public."

Section 3 of the Administrative Procedure Act (60 Stat. 238; 5 U.S.C. 1002) provides:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency --

xxx

"(c) PUBLIC RECORDS. Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

Provisions of H.R. 5012

1. Section 1.

a. Subsection (a) restates section 161 of the Revised Statutes as quoted above except that the last sentence is deleted.

b. Subsection (b) provides that every agency shall make all its records promptly available to any person (see subsection (c) for exceptions). The district courts are given jurisdiction to compel the production of records, and the burden is on the agency to sustain its action. Failure to comply may be punished as contempt. "Agency" is defined to mean each authority of the United States except Congress or the courts.

c. Subsection (c) makes exceptions to the requirements of subsection (b) for matters that are "(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; (2) related solely to internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intra-agency memoranda or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

2. Section 2 repeals all laws or parts of laws inconsistent with H.R. 5012.

Effect of H.R. 5012 on current law

1. Subsection (b) of H.R. 5012 would make all records promptly available to any person (except as provided in (c)). The provisions of section 3(c) of the Administrative Procedure Act apply to "matters of official record," which has been defined by the Attorney General more narrowly than would be possible under H.R. 5012, i.e., to exclude memoranda and reports prepared by agency employees for use within the agency. (Memorandum of July 15, 1946, from the Attorney General to the heads of departments and agencies.) Likewise section 3(c) requires disclosure only "to persons properly and directly concerned." The language of H.R. 5012, "promptly available," could be interpreted to mean immediate access to agency working papers, for example, without regard to the stage of progress toward a final agency decision. No comparable provision now exists.

2. H.R. 5012 gives any person access to court. Under section 10 of the Administrative Procedure Act court review is available to "persons properly and directly concerned."

3. H.R. 5012 provides for de novo court review, and the burden of proof is on the agency. Section 10 of the Administrative Procedure Act provides for limited judicial review, chiefly on questions of law, including arbitrary or capricious action or abuse of discretion.

4. Those parts of section 3 of the Administrative Procedure Act quoted above would be repealed, thereby eliminating (1) the general exception for matters requiring secrecy in the public interest or relating solely to the internal management of an agency (interpreted to extend to internal management of the executive branch), and (2) the authority of agencies to publish rules providing for the withholding of information or records "for good cause found."

In lieu of the above, the President would be authorized to issue Executive orders specifically requiring certain matters to be withheld in the interest of national defense or foreign policy, and all other withholding would be dependent on specific statutory authorization, through H.R. 5012 or other statutes.

F6-2/65.1

Honorable William L. Dawson
Chairman, Committee on
Government Operations
House of Representatives
1501 Longworth Office Building
Washington, D. C. 20515

MAR 30 1965

Dear Mr. Chairman:

This letter responds to your request for the views of the Bureau of the Budget with respect to H.R. 5012 and a number of other identical bills "To amend section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records."

Under the provisions of H.R. 5012 every agency of the Federal Government except Congress and the courts would, in accordance with published rules stating the time, place, and procedure to be followed, be required to make all its records promptly available to any person except to the extent that records relating to certain matters are specifically exempted from disclosure under provisions of the bill. Upon complaint of withholding, a district court would have jurisdiction to compel the production of records, and the burden would be on the agency to sustain its action. Failure to comply with a court order would be punishable as contempt.

The records specifically exempted from disclosure under H.R. 5012 would be those matters that are "(1) required by Executive order to be kept secret in the interest of national defense or foreign policy; (2) related solely to the internal personnel rules and practices of any agency; (3) specifically exempted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from the public and privileged or confidential; (5) interagency or intra-agency memoranda or letters dealing solely with matters of law or policy; (6) personnel and medical files and similar matters the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a private party; and (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions."

The Bureau of the Budget is committed to the principle of freedom of information. We believe that an informed public is essential to our democratic system, and we support full disclosure of government information insofar as such disclosure is consistent with the public interest. We reluctantly conclude, however, that H.R. 5012 does not adequately protect the public interest.

Agency reports on the bill cite a variety of instances where disclosure of their records would be required contrary to the public interest. In its consideration of S. 1666, a similar bill in the last Congress, the Senate Committee gave careful consideration to the examples then cited by agencies, and amended the bill in an effort to take account of these examples. Agency reports on the current bill, however, now cite other examples, thus showing the difficulty of dealing with this problem through a series of exemptions.

Another problem is the rigidity inherent in the elimination of all discretionary authority in the heads of agencies with respect to the time at which information can appropriately be released. We do not see how legislation can be drafted to take account of rapidly changing circumstances -- circumstances which determine in many instances the time at which or the conditions under which disclosure of specific records would or would not be in the public interest. Premature disclosure in many instances would confuse, rather than enlighten, the public.

If H.R. 5012 were applicable to the Bureau of the Budget, the major adverse effects which it would have on the Bureau are discussed below:

1. Internal agency working papers are protected from disclosure only if they are "interagency or intra-agency memoranda or letters dealing solely with matters of law or policy."

Few, if any, letters or memoranda are solely limited to matters of law or policy, and many working papers which primarily involve policy issues are not prepared in the form of letters or memoranda. Furthermore it is not apparent to us how there could be worthwhile discussion of law or policy unrelated to a specific set of facts. The effect of the above language would be to require disclosure of most Bureau records, even though they relate only to internal matters of a nonpublic nature. It would also fail to recognize the confidential relationship between the Bureau and the President which is essential to serving the needs of the Presidency.

In summary, this provision does not recognize that free interchange of information and views among officials and staff of the executive branch is essential and is possible only if purely internal staff documents are protected from routine public scrutiny.

2. All agency records not exempted from disclosure would have to be made promptly available "to any person."

The Bureau makes an earnest effort to comply with individual requests for information when compliance is consistent with the broader public interest. We believe, however, that the public's right to effective, orderly, and impartial execution of the laws far outweighs any benefits which might result from having its records open indiscriminately to anyone who requests access. The provision requiring information to be made available to any person fails to recognize this over-riding public right. The practical problems involved are made graphic in considering the steps necessary to meet this requirement in a secured building like the Executive Office building. Either copies of most of the Bureau's records would have to be made available in an unsecured place or the Executive Office building would have to be opened up "to any person" seeking access to its records.

Finally, we believe that the Committee must give serious consideration to the question of whether legislation along the lines of H.R. 5012 would not violate the doctrine of separation of powers. In this connection we call your attention to a report of the Department of Justice to the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary last year with respect to comparable provisions of S. 1663. The Department stated:

"The revision [of Section 3(c) of the Administrative Procedure Act] would appear to violate the doctrine of separation of powers, since it would interfere with the constitutional responsibility of the President to preserve the confidentiality of documents and information the disclosure of which would not be in the public interest. Under the revision the standards governing disclosure would be set by Congress rather than the President, except that the President would be authorized to direct withholding of information 'required to be kept secret for the protection of the national security or foreign policy.' Such limitation of the Executive's authority in the area of public information is without basis in constitutional law.


"The issue was extensively debated 6 years ago in connection with the act of August 12, 1958, Public Law 85-619, 72 Stat. 547, amending Revised Statute 161, 5 U.S.C. section 22, the so-called 'housekeeping statute.' On that occasion the Senate recognized the power of the President under the Constitution to withhold information on the ground that its disclosure would be contrary to the public interest and that this authority rested on the constitutional principle of separation of powers."

For reasons set forth above the Bureau of the Budget strongly recommends against enactment of H.R. 5012.

Sincerely yours,

(Signed) PHILLIP S. HUGHES

Phillip S. Hughes
Assistant Director for
Legislative Reference



STW 8/19/65

White House Opposition Stalls Information Bill

By the Associated Press

A Senate-House drive to pierce government secrecy by making more records available to the public has stalled in the face of White House opposition, congressional informants said today.

One source said word had been passed from President Johnson to House leaders to jettison the bill.

The measure would not interfere with matters dealing with national security, but the administration is said to be concerned with protecting the doctrine of executive privilege and with guarding secret files such as those of the FBI.

Urged by News Media

The freedom of information bill has been urged by news media representatives as a guarantee of the citizens' right to know about their government, but opposed by the Justice Department as an attempt to oversimplify a complex problem.

Despite the opposition, two of the measure's leading congressional supporters, Rep. John E. Moss, D-Calif., and Sen. Edward V. Long, D-Mo., are portrayed as being optimistic the legislation will be approved. Moss heads the House government information subcommittee; Long heads the Senate judiciary subcommittee on administrative practice and procedure.

But the bill's chances appear dim for this year with Congress

shooting for adjournment by late next month.

Moss Cites Difficulty

In general the legislation would require federal agencies to make their records open to public inspection except for matters pertaining to security, personnel records and information private concerns must submit to the government.

The major difficulty, Moss said, is the insistence by "people at the Justice Department" that provisions be made in the bill for protection of executive privilege.

"I will not agree to any language that grants statutory recognition to executive privilege," Moss said.

The doctrine of executive privilege is used by presidents to prohibit certain records or correspondence from being made available not only to the public but also to Congress.