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DEPARTMENT OF STATE

WASHINGTON

JUN 23 1966

Dear Mr. Schultze:

I refer to Mr. Hughes' request for the views of the Department of State on the enrolled bill S. 1160, "To amend section 3 of the Administrative Procedure Act ... to clarify and protect the right of the public to information and for other purposes."

The concern of the Department with regard to the application of this bill to its various operations was recently expressed in a memorandum, dated April 29, 1966, from the Legal Adviser to the Assistant Attorney General, Office of Legal Counsel, Department of Justice. A copy of this memorandum is enclosed.

The Department of State is informed that the possibility of veto of this bill is improbable. For this reason, a preliminary consideration has been given to the sections of S. 1160 as they would affect the Department.

The Department is of the view that through careful amendments to the Presidential Directive of March 13, 1948, Executive Orders 10450 and 10501, by interpreting and applying the "foreign policy" exemption in section 3(e) in a judicious manner, and through a new published rule governing the availability of records to the public, the provisions of S. 1160 can be made somewhat compatible with the functions and activities of the Department. It is hoped the Department of Justice will provide prompt and sympathetic attention to the amendment of the Executive Orders and Directive referred to above, and will vigorously defend these necessary restrictions on availability

The Honorable
Charles L. Schultze, Director,
Bureau of the Budget.

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of information to the public to the extent that foreign affairs activities of this Department are concerned.

The Department of State recommends that after S. 1160 becomes law, an early study be made of desirable modifications based upon actual experience in its implementation.

Sincerely,

Douglas MacArthur II
Assistant Secretary for
Congressional Relations

Enclosure:

From The Legal Adviser to the
Assistant Attorney General,
Office of Legal Counsel,
dated April 29, 1966.

THE SECRETARY OF DEFENSE
WASHINGTON

June 28, 1966

Honorable Charles L. Schultze
Director, Bureau of the Budget
Washington, D. C. 20503

Dear Charlie:

This is in response to your request for the views of the Department of Defense on the enrolled enactment of S. 1160 - "To amend section 3 of the Administrative Procedure Act, chapter 324, of the Act of June 11, 1946 (60 Stat. 238), to clarify and to protect the right of the public to information and for other purposes."

The stated purpose of the Act is to require the availability, to any member of the public, of all of the executive branch records described in its requirements, except those involving matters which are within nine stated exemptions. It grants jurisdiction to the U. S. district courts to order the production of agency records adjudged improperly withheld.

The Department of Defense concurs in the recommendation of the Department of Justice that the President sign the Act and issue a "signing statement" reasserting the Executive's prerogatives. This Department concurs in the recommendation for approval because of the great sensitivity of the subject matter of the Act, public information. However, this Department shares the concerns of the Department of Justice that the Act raises a serious constitutional issue, threatens severe administrative burdens, and in some respects is imprecisely drafted.

S. 1160 represents a challenge to the constitutional prerogatives of the President. For more than 175 years of our nation's history the constitutional principle of the separation of powers has been interpreted as assigning to the Executive Branch, under the direction of the President, responsibility for the care, custody and public release of its records and information. The effect of S. 1160 is to shift this responsibility in substantial part from the Executive Branch to the Judicial Branch, where U. S. District Courts throughout the nation will be charged, upon filing of suit, with the responsibility of reviewing de novo, decisions by the Executive Branch to withhold agency records and information from public disclosure.

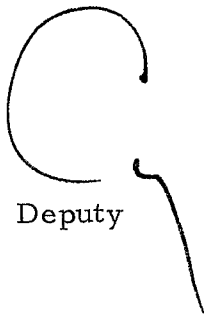
Wide variation in the interpretation of the Act by the U. S. District Courts, many of which are located in areas other than the location of the agency or location of the records concerned, seems inevitable in view of the ambiguity of the exemption provisions of the Act. Thus, it will be difficult for the executive departments and agencies to know with any reasonable degree of certainty which of its records remain protected from public disclosure under the exemptions of the Act. Although a claim of Executive Privilege may still be asserted by the President, even if information is interpreted by a court as not coming within one of the exemptions prescribed in S. 1160, this will impose a great burden on the President and may force judicial considerations of the doctrine of Executive Privilege under unfavorable factual circumstances.

House Report No. 1497 purports to clarify the meaning of some of the more ambiguous provisions of S. 1160. It is not possible, however, to determine the extent to which this House report will influence the courts in interpreting Senate-initiated legislation. Unfortunately, some of the interpretations by the House Committee find little support in the plain language of the Act. For example, the House Report indicates a desire to exempt from public disclosure any information given in confidence by a citizen to the Government. Yet, the language of S. 1160 restricts this exemption to "trade secrets and commercial or financial information obtained from any person and privileged or confidential." Whether such information is "privileged or confidential" is, of course, the issue, not a basis for determining privilege or confidentiality. Further, the exemption which purports to protect intra-agency memoranda is based upon the criterion of availability in litigation. There is a certain redundancy in this language which could result in a very narrow interpretation of the exemption, limited to such traditional areas of doctor-patient, lawyer-client, and priest-penitent. This result seems possible because availability of discovery in litigation is based upon "standing" and relevance and the whole purpose of the Act appears to be to grant "standing" to anyone and to eliminate the criterion of relevance which was present in the former Administrative Procedure Act in the language "properly and directly concerned."

If the Act is approved in its present form, this Department particularly concurs in the recommendations of the Department of Justice that Executive Order 10501 be revised in order to broaden its

provisions to the full scope of national defense and foreign policy permitted by the first exemption, and that the Department of Justice with the assistance of the Executive Departments and Agencies prepare a manual to provide guidance in interpreting the new law. The Department of Defense will be pleased to cooperate in this effort.

Sincerely,



Deputy