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ABSTRACT

A House of Representatives bill (H.R. 12471) seeks to overcome certain major deficienceis in the administration of the Freedom of Information Act, as disclosed by investigative hearings held in 1972, in order to contribute to the fuller and faster release of information which is the basic objective of the act. The amendments provided in H.R. 12471 deal with the inadequacy of agency indexes of pertinent information, difficulties in procedures required for the requisite identification of records, Federal agency delays in responses to requests for information by the public, and the cost burden of litigation in federal courts to persons requesting information. Two additional amendments clarify the authority of the courts to examine the content of records alleged to be exempt from disclosure. New subsections are added to the Freedom of Information Act which strengthen Congressional oversight in the act's administration by requiring annual reports on information activities by every agency, and which broaden the definition of "agency" for the purposes of the Act. This pamphlet contains the text of H.R. 12471, background information, analysis and the views of the Departments of Defense and Justice on the bill. (Author/SL)

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 93-876

AMENDING SECTION 552 OF TITLE 5, UNITED STATES CODE, KNOWN AS THE FREEDOM OF INFORMATION ACT

MARCH 5, 1974.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. HOLIFIELD, from the Committee on Government Operations, submitted the following

REPORT

[To accompany H.R. 12471]

The Committee on Government Operations, to whom was referred the bill (H.R. 12471) to amend section 552 of title 5, United States Code, known as the Freedom of Information Act, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

DIVISIONS OF THE REPORT

99-006—74——1

Introduction

H.R. 12471 seeks to strengthen the procedural aspects of the Freedom of Information Act by several amendments which clarify certain provisions of the Act, improve its administration, and expedite the handling of requests for information from Federal agencies in order to contribute to the fuller and faster release of information, which is the basic objective of the Act.

The amendments to section 552(a), title 5, United States Code contained in H.R. 12471 seek to overcome certain major deficiencies in the administration of the Freedom of Information Act as disclosed by investigative hearings held in 1972 by the Foreign Operations and Government Information Subcommittee. These amendments deal with the inadequacy of agency indexes of pertinent information, difficulties in procedures required for the requisite identification of records, Federal agency delays in responses to requests for information by the public, and the cost burden of litigation in Federal courts to persons requesting information.

An additional amendment to section 552(a) clarifies language in the Freedom of Information Act regarding the authority of the courts, as part of their *de novo* determination of the matter, to examine the content of records alleged to be exempt from disclosure under any of the exemptions in section 552(b) of the Act.

An amendment is made to section 552(b)(1)—pertaining to national defense and foreign policy matters—in order to bring that exemption within the scope of matters subject to *in camera* review as provided under the amended language of section 552(a)(2). The language of the other eight exemptions would not be amended by this bill.

H.R. 12471 adds a new subsection (d) to the Act which provides a mechanism for strengthening Congressional oversight in the administration of the Act by requiring annual reports to House and Senate committees. Such reports, required from every agency, would include several types of statistical data and other information necessary for Congressional oversight. Included, for instance, are data on denials of requests under the Act, administrative appeals of denials, rules made, and fee schedules and funds collected for searches and reproduction of requested information.

H.R. 12471 also adds a new subsection (e) to the Act which broadens the definition of "agency" for the purposes of the Act.

Committee Vote

The committee considered H.R. 12471 on February 21, 1974, and ordered the bill reported by a unanimous voice vote.

Summary and Background

This committee's concern with information policies and practices of the executive branch of the Federal Government has a long history. On June 9, 1955, the Special Subcommittee on Government Information was created by the late chairman of the Government Operations

Committee, Representative William L. Dawson. In his letter appointing Representative John E. Moss as chairman of this subcommittee,[1] he observed:

> An informed public makes the difference between mob rule and democratic government. If the pertinent and necessary information on government activities is denied the public, the result is a weakening of the democratic process and the ultimate atrophy of our form of government.[2]

The chartering letter requested the subcommittee:

> * * * to study the operation of the agencies and officials in the executive branch of the Government at all levels with a view to determining the efficiency and economy of such operation in the field of information both intragovernmental and extragovernmental.
>
> With this guiding purpose your Subcommittee will ascertain the trend in the availability of Government information and will scrutinize the information practices of executive agencies and officials in the light of their propriety, fitness, and legality.
>
> * * * * *
>
> You will seek practicable solutions for such shortcomings, and remedies for such derelictions, as you may find and report your findings to the full Committee with recommendations for action.

Over the next decade, the Special Subcommittee on Government Information and its successor standing subcommittees [3] conducted extensive investigative hearings into all aspects of Government information activities; investigated numerous complaints of information withholding; compiled vast amounts of data; and prepared periodic progress reports, numerous substantive reports proposing administrative and legislative actions to improve the efficiency and economy of Government information activities, and other publications. In addition, it carried out other related types of oversight functions in this field.

In 1958, the Congress enacted the first legislative proposal reported by this committee aimed at reducing the authority of executive agencies to withhold information (H.R. 2767—P.L. 85-619). This amendment to the 1789 "housekeeping" statute, which gave Federal agencies the authority to regulate their business, set up filing systems, and keep records, provided that this authority "does not authorize withholding information from the public or limiting the availability of records to the public." [4]

Extensive investigative and legislative hearings by the subcommittee over the next eight years resulted in the enactment of P.L. 89-487—the Freedom of Information Act of 1966—which became

[1] The other two charter members were Representatives Dante B. Fascell and Clare E. Hoffman.

[2] Hearings, "Availability of Information from Federal Departments and Agencies," Special Subcommittee on Government Information, House Government Operations Committee, November 7, 1955, part 1, p. 2.

[3] 84th-87th Congress—1955-62—Special Government Information Subcommittee: Mr. Moss (chairman); 88th Congress—1963-64—Foreign Operations and Government Information Subcommittee: Mr. Moss (chairman). The subcommittee was formed from the jurisdiction of the former Special Government Information Subcommittee and part of the jurisdiction of the former Foreign Operations and Monetary Affairs Subcommittee. (Representative William S. Moorhead became subcommittee chairman at the beginning of the 92d Congress.)

[4] Previously, 5 U.S. Code, Sec. 22; now codified as section 301, title 5, U.S. Code.

effective on July 4, 1967. As originally enacted, it was in the form of an amendment to section 3 ("Public Information") of the Administrative Procedure Act of 1946.[5] This milestone law guarantees the right of persons to know about the business of their government. Subject to nine categories of exemptions, whose invocation in most cases is optional, the law provides that anyone may obtain reasonably identifiable records or other information from Federal agencies. Decisions by Government officials to withhold may be challenged in Federal court, and in such cases the burden of proof for withholding is placed on the Government. Also, the 1966 Act broadened the scope of the types of materials previously required to be available under the original language of section 3 of the Administrative Procedure Act.

In 1967, the Foreign Operations and Government Information Subcommittee undertook, as part of its general oversight responsibility, review of the Act's implementation and administration. In May 1968, a committee print was issued, compiling and analyzing the implementing regulations issued by the various Federal agencies pursuant to the new law.[6]

During the summer of 1971, the subcommittee began the first comprehensive study of Federal agencies' administration of the Act in preparation for public investigatory hearings which took place in March and April of 1972.[7] Fourteen days of hearings were held and testimony was received from more than 50 witnesses. Included were spokesmen for the Federal agencies and the media, attorneys having direct experience in Freedom of Information cases, academicians, spokesmen for interested organizations, and other informed persons. Government witnesses included representatives from the Departments of Justice, Defense, State, Transportation, Health, Education, and Welfare, Agriculture, Treasury, Interior, Labor, and Housing and Urban Development. Also, there were witnesses from the Internal Revenue Service, Environmental Protection Agency, Civil Service Commission, Selective Service System, Federal Power Commission, Federal Communications Commission, Federal Trade Commission, Navy, Air Force, and Army, and the Administrative Conference of the United States.

On September 20, 1972, this committee issued a unanimously approved investigative report based on these hearings.[8] It contained findings, conclusions, and recommendations to strengthen the operation of the Freedom of Information Act. A series of administrative recommendations to Federal agencies urged correction of certain deficiencies in their day-to-day operation. The report also set forth a list of specific legislative objectives to improve the administration of the Act. They deal with problem areas that could not be adequately remedied by administrative action.

The administrative recommendations were subsequently transmitted to each Federal department and agency head. Formal responses to the subcommittee indicate that many of them have been implemented. Bills to carry out the legislative objectives were sub-

[5] Codified as section 552, title 5, United States Code by the subsequent enactment of P.L. 90-23.
[6] "Freedom of Information Act (Compilation and Analysis of Departmental Regulations Implementing 5 U.S.C. 552)," Committee Print, House Government Operations Committee, November, 1968. 314 pp.
[7] Hearings, "U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act," Foreign Operations and Government Information Subcommittee, House Government Operations Committee, March and April, 1972, parts 4, 5, and 6.
[8] H. Rept. 92-1419, "Administration of the Freedom of Information Act," House Government Operations Committee.

sequently introduced by Subcommittee Chairman Moorhead, with 47 co-sponsors. Similar measures were introduced by the ranking Republican members of the full committee and the subcommittee, Mr. Horton and Mr. Erlenborn, respectively, with 27 additional co-sponsors.

Legislative hearings were held by the Foreign Operations and Government Information Subcommittee on H.R. 5425 and H.R. 4960 on May 2, 7, 8, 10, and 16, 1973. The administration's position on the legislation was presented by the Justice and Defense Departments. Other executive branch witnesses invited to testify declined and deferred to the Justice Department. Testimony and written statements on the bills were presented by Members of Congress, representatives of the news media, the Chairman of the Administrative Conference of the United States, the chairman of the Administrative Law Section, American Bar Association, and other witnesses.

The Foreign Operations and Government Information Subcommittee adopted a number of amendments to H.R. 5425. Several were suggested by Government and outside witnesses during the hearings. The resulting measure was reintroduced as H.R. 12471.

Discussion

This bill seeks to reach the goal of more efficient, prompt, and full disclosure of information by effecting changes in major areas discussed below: Indexes, identifiable records, time limits, attorney fees, court costs, court review, reports to Congress, and the definition of "agency."

INDEXES

The first area of change deals with the relationship of the agencies to the public. The amendment is designed to produce wider availability of Federal agency indexes which list specific types of information available such as: Final opinions and orders made in the adjudication of cases, statements of policy not published in the *Federal Register*, and administrative staff manuals.

This amendment does not envision the necessity for bound and printed indexes by every agency, recognizing that there has been little public demand for the indexes of many agencies. However, it would require that such indexes be readily available for public access in a usable and concise form suitable for distribution to requestors. Any agency index in brochure form available for distribution would be an appropriate way to meet this requirement.

The Committee recognizes that some agency indexes are now published by commercial firms. Such publications would also be able to satisfy the requirement of this proposed amendment.

Concurrent with the additional obligation to publish and distribute such indexes is a series of amendments requiring expedited consideration of requests for information by the public.

IDENTIFIABLE RECORDS

Section (1)(b) of the bill is designed to insure that a requirement for a specific title or file number cannot be the only requirement of an agency for the identification of documents. A "description" of a

requested document would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort.

TIME LIMITS

As the subcommittee's hearings clearly demonstrated, information is often useful only if it is timely. Thus, excessive delay by the agency in its response is often tantamount to denial. It is the intent of this bill that the affected agencies be required to respond to inquiries and administrative appeals within specific time limits. The testimony also indicated the ability of some Federal agencies to respond to inquiries within the time specified in the bill—ten days for original requests and twenty days for administrative appeals of denials.

It is recognized, however, that there may be exceptional circumstances where the requested information is stored in a remote location outside the country and cannot be retrieved by the agency for examination within the 10-day time period even with the most diligent effort. In such unusual cases, the committee expects that the requestor will accept the good faith assurances of the agency that the information requested will be retrieved and the request itself acted upon in the most expeditious manner possible.

It is thus the intent of this provision that the agency have a sufficient flexibility which will enable it to meet its requirement in an orderly and efficient manner.

Though the subcommittee heard reports of efforts by district courts to docket freedom of information complaints in an expeditious manner, it was found that the defendant Federal agencies as a general rule were slow in filing responses to complaints, thus inhibiting the rapid disposition of freedom of information suits.

Under the amendments in this bill, the defendant agency would be required to respond to complaints within 20 days—the same time limits specified for private litigants under the Federal Rules of Civil Procedure, rather than the present 60-day time period for Federal agency response specified in the Federal Rules of Civil Procedure. Failure to meet the new mandatory time limits would constitute exhaustion of remedies, permitting court review.

The committee believes that shorter mandatory response time need not be a burden on the agencies. Under procedures established by the Justice Department, all agencies presently are to consult with the Department's Office of Legal Counsel prior to a final denial of a request which might result in litigation.[1] This consultation takes the form of an analysis of the legal and policy implications involved in a prospective denial. Accordingly, should a denial result in litigation, the defendant agency and the Department of Justice should already know the basis of their defense, and the necessity for a 60-day response period is lessened thereby.

ATTORNEY FEES AND COURT COSTS

Together with expedition of litigation, the bill provides for a recovery of attorney fees and costs at the discretion of the courts. The allowance of a reasonable attorney's fee out of Government funds to

[1] See 38 F.R. 19123 (July 18, 1973); codified as 28 CFR 50.9.

prevailing parties in litigation has been considered desirable when the suit advances a strong congressional policy. Similar provisions have been recognized in legislation in the past.[10]

COURT REVIEW

Although the present Freedom of Information Act requires *de novo* determination of agency actions by the Federal courts, the language is ambiguous as to the extent to which courts may engage in *in camera* inspection of withheld records.

A recent Supreme Court decision held that under the present language of the Act, the content of documents withheld under section 552(b)(1)—pertaining to national defense or foreign policy information—is not reviewable by the courts under the *de novo* requirement in section 552(a)(3).[11] The Court decided that the limit of judicial inquiry is the determination whether or not the information was, in fact, marked with a classification under specific requirements of an Executive order, and that this determination was satisfied by an affidavit from the agency controlling the information. *In camera* inspection of the documents by the Court to determine if the information actually falls within the criteria of the Executive order was specifically rejected by the Court in its interpretation of section 552(b)(1) of the Act. However, in his concurring opinion in the *Mink* case, Mr. Justice Stewart invited Congress to clarify its intent in this regard.[12]

Two amendments to the Act included in this bill are aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense and other agencies under Executive order authority.

In camera review

The first of these amendments would insert an additional clause in section 552(a)(3) to make it clear that court review *may* include examination of the contents of any agency records *in camera* to determine if such records or any part thereof shall be withheld under any of the exemptions set forth in section 552(b). This language authorizes the court to go behind the official notice of classification and examine the contents of the records themselves.

National defense and foreign policy exemption

The second amendment aimed at court review is a rewording of section 552(b)(1) to provide that the exemption for information involving national defense or foreign policy will pertain to records which are "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy." The change from the language pertaining to information "required" to be classified by Executive order to information which is "authorized" to be classified under the "criteria" of an Executive order means that the court, if it chooses to undertake review of a classification determination, including examination of the records *in camera*, may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.

[10] See Civil Rights Act of 1964, title II: 42 U.S.C. sec. 2000a-3(b); Civil Rights Act of 1964, title VII: 42 U.S.C. sec. 2000e-5(k); Education Amendments of 1972, P.L. 93-318, title VII, "Emergency School Aid Act," sec. 718 (20 U.S.C. sec. 1617).

[11] *Environmental Protection Agency et al. v. Patsy T. Mink et al.*, 410 U.S. 73 (1973).

[12] Ibid., at p. 94.

Even with the broader language of these amendments as they apply to exemption (b)(1), information may still be protected under the exemption of 552(b)(3): "specifically exempted from disclosure by statute." This would be the case, for example, with the Atomic Energy Act of 1954, as amended. It features the "born classified" concept. This means that there is no administrative discretion to classify, if information is defined as "restricted data" under that Act, but only to declassify such data.

The *in camera* provision is permissive and not mandatory. It is the intent of the committee that each court be free to employ whatever means it finds necessary to discharge its responsibilities.

REPORTS TO CONGRESS

A new provision is added to the Freedom of Information Act, setting forth requirements for annual reports by the affected agencies to the Committees on Government Operations of the House and Senate, and to the Senate Judiciary Committee, which has jurisdiction over the Freedom of Information Act.

These annual reports should detail the information necessary for adequate Congressional oversight of freedom of information activities. They would also include the number of each agency's determinations to deny information, the number of appeals, the action on appeals with the reasons for each determination, and a copy of all rules and regulations affecting this section. Also to be included is a statement of fees collected under this section, plus other matter regarding information activities indicative of the agency's efforts under this Act.

DEFINITION OF "AGENCY"

For the purposes of this section, the definition of "agency" has been expanded to include those entities which may not be considered agencies under section 551(1) of title 5, U.S. Code, but which perform governmental functions and control information of interest to the public. The bill expands the definition of "agency" for purposes of section 552, title 5, United States Code. Its effect is to insure inclusion under the Act of Government corporations, Government controlled corporations, or other establishments within the executive branch, such as the U.S. Postal Service.

The term "establishment in the Executive Office of the President," as used in this amendment, means such functional entities as the Office of Telecommunications Policy, the Office of Management and Budget, the Council of Economic Advisers, the National Security Council, the Federal Property Council, and other similar establishments which have been or may in the future be created by Congress through statute or by Executive order.

The term "Government corporation," as used in this subsection, would include a corporation that is a wholly Government-owned enterprise, established by Congress through statute, such as the St. Lawrence Seaway Development Corporation, the Federal Crop Insurance Corporation (FCIC), the Tennessee Valley Authority (TVA), and the Inter-American Foundation.

The term "Government controlled corporation," as used in this subsection, would include a corporation which is *not* owned by the

Federal Government, such as the National Railroad Passenger Corporation (Amtrak) and the Corporation for Public Broadcasting (CPB).

Information to Congress

As stated above, the purpose of these amendments to section 552 is to facilitate increased availability of information to the public. In no sense should any of the amendments be interpreted as affecting the availability of information to Congress under section 552(c), since H.R. 12471 makes no change in that subsection.

That this bill amends subsections (a) and (b), but not (c), of section 552 should in no way be construed as approval by this committee of the Justice Department's or any other agency's regulations or practices of withholding information from Congress. (See, for example, H. Rept. 92-1333, pp. 30-42.)

Cost Estimate

In accordance with rule XIII, clause 7 of the Rules of the House of Representatives, the committee finds with respect to fiscal year 1974 and each of the five fiscal years following that potential costs directly attributable to this bill should, for the most part, be absorbed within the operating budgets of the agencies.

This legislation merely revises information procedures under the Freedom of Information Act but does not create costly new administrative functions. Thus, activities required by this bill should be carried out by Federal agencies with existing staff, so that significant amounts of additional funds will not be required. It may be necessary, however, for some agencies to reassign personnel, shift administrative responsibilities, or otherwise restructure certain offices to achieve a higher level of efficiency.

In accordance with section 483a of title 31, U.S. Code and Office of Management and Budget Circular A-25, user fees are applicable to requests for information and may be assessed for production of copies and time spent by agency employees in search of requested information. Agency regulations currently provide for such fees, and this legislation does not change the status of those existing provisions.

The possible assessment of attorney fees and court costs authorized under section (1)(e) of this bill is at the discretion of the court. The cost to the Government of such assessments must depend upon the amount of litigation, the character of the litigants, the issues involved, and action of the courts. While no precise estimate of such possible assessments can be made in view of these variables, a subcommittee staff investigation has indicated that a typical freedom of information case requires about 40 hours of billable time, including initial conference, preparation of pleadings and briefs, and court arguments. At an average rate of $35 per hour, it is estimated that fees in the amount of $1,400 per case would not be unreasonable.

The provision added by this bill to subsection 552(a) of the Act, requiring that such agency indexes be published and distributed should not represent an appreciable added cost to the Government. Present commercial publications will be able to meet this requirement for some agencies, and those agencies having to develop in-house publications can, by the provisions of the bill, sell the indexes at prices consistent with cost recovery.

Although expenditures for these purposes may be minimal, the committee estimates that additional costs that may be required by this legislation should not exceed $50,000 in fiscal year 1974 and $100,000 for each of the succeeding five fiscal years.

Agency Views

Witnesses representing the Departments of Defense and Justice who testified at the subcommittee's hearings on Freedom of Information Act amendments contained in the original bills (H.R. 5425 and H.R. 4960) uniformly opposed virtually every proposal to strengthen and clarify the present law, just as Federal agency witnesses had opposed the legislation which created the Freedom of Information Act during subcommittee hearings almost a decade earlier.

The views of those departments on H.R. 12471 are set forth in letters to the committee included in appendix 1.

Section-by-Section Analysis

Section (1)(a) amends section 552(a)(2) of the Freedom of Information Act by adding a provision that the presently required indexes be promptly published and distributed by sale or otherwise.

Section (1)(b) substitutes for the term "identifiable records" a new requirement that a request be one which "reasonably describes" the records requested.

Section (1)(c) sets definitive time limits for agency action on original requests and on appeals. A limit of 10 working days is set for a determination on original requests, and a limit of 20 days is set for a determination on appeals. In the case of a determination to deny an original request, the denial must include the reasons therefor and notice of the right of appeal.

This section also states that failure to meet the specified time limitations constitutes an exhaustion of administrative remedies by the requestor.

Section (1)(d) clarifies the requirement for *de novo* court determination under the Freedom of Information Act by stating that the court may conduct an *in camera* investigation of any record withheld from disclosure by an agency under any of the exemptions in section 552(b).

Section (1)(e) provides that the United States agency or officer against whom a Freedom of Information Act complaint is filed must respond within 20 days. This response need not necessarily be affirmative in nature; it may be a motion other than an answer.

This is in furtherance of the policy in the original Act for expediting action by giving cases under the Act precedence on the court docket.

Section (1)(e) also allows the assessment of attorney fees and costs against the agency on behalf of a litigant. The assessment of fees and costs is at the option of the court.

Section 2 amends section 552(b)(1) to provide that the exemption for information involving national defense or foreign policy will pertain to records which are "authorized under the criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy." The intent is that the court may look at the reasonableness or propriety of the determination to classify the records under the terms of the Executive order.

Section 3 adds a new provision to the Act requiring a range of information in annual reports to specified committees of Congress.

Another provision in section 3 of the bill expands the definition of "agency" for purposes of section 552, title 5, United States Code, to insure inclusion of Government corporations, Government controlled corporations, or other establishments within the executive branch.

Section 4 provides that these amendments will become effective 90 days after enactment of the bill.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

TITLE 5, UNITED STATES CODE

* * * * * * *

Chapter 5—Administrative Procedure

* * * * * * *

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

* * * * * * *

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to

resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain [and make available for public inspection and copying], *promptly publish, and distribute (by sale or otherwise) copies of* a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, [on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,] *upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,* shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, *and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b)*, and the burden is on the agency to sustain

its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. *Notwithstanding any other provision of law, the United States or the officer or agency thereof against whom the complaint was filed shall serve a responsive pleading to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed.*

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(5) Each agency, upon receipt of any request for records made under this subsection, shall—

(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the date of such receipt whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(B) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of such appeal.

Any person making a request to an agency for records under this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the person making such request.

(b) This section does not apply to matters that are—

(1) [specifically required by] *authorized under criteria established by an* Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the 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 a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files 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 party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations and the Committee on the Judiciary of the Senate. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(5)(B), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) a copy of every rule made by such agency regarding this section;

(4) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(5) such other information as indicates efforts to administer fully this section.

(e) Notwithstanding section 551(1) of this title, for purposes of this section, the term "agency" means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

* * * * * * *

APPENDIXES

Appendix 1.—Agency Views

Department of Justice,
Washington, D.C., February 20, 1974.

Hon. Chet Holifield,
Chairman, Committee on Government Operations,
House of Representatives, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Justice on H.R. 12471, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act."

H.R. 12471 is designed to improve the administrative procedures for handling requests by the public under the Freedom of Information Act for access to government documents, sets rigid time limits upon the agencies for responding to information requests, shortens substantially the time for the government to file its pleadings in Information Act suits, and authorizes the award of attorneys' fees to successful plaintiffs in such suits. In addition, each agency is required to submit an annual report to Congress evaluating its performance in administering the Act and "agency" is defined to include the Executive Office of the President.

Department spokesmen have repeatedly agreed that administrative compliance with the Act's present provisions needs improvement. It is our view, however, that H.R. 12471 as now drafted is far too inflexible in application to be of significant use in solving many of these administrative problems. Equally important, certain aspects of the bill present serious questions of constitutionality. Before turning to our specific objections, detailed below, we believe it is also important to note that our Department has recently initiated a comprehensive study of ways to improve administrative compliance with the Act. One of the principal purposes of the study is to analyze the costs of implementing the various methods suggested for improving administration. At the present time, concrete cost evaluations do not exist and only the roughest estimates of the varying cost factors can be made.

Since results of the study, from which constructive and concrete proposals can be developed, are expected next year, the Department of Justice suggests delay of extensive amendment of the Act until that evaluation is completed. At that time, we would be in a better position to advise Congress on the feasibility, cost, and desirability of proposals to amend the Act.

Apart from these general observations on the utility of enacting legislation such as H.R. 12471 at this time, the Department has the following specific comments and recommendations concerning the provisions of the bill.

1. Section 1(a) of H.R. 12471 would amend the indexing provisions in subsection (a)(2) of the Act. This provision now requires every agency to maintain and make available for public inspection and copying indexes of those documents having precedential significance. The proposed amendment would go further and compel all agencies to publish and distribute such indexes. We believe that imposition of this requirement on a government-wide basis would be unduly expensive and essentially unnecessary.

Under the existing indexing scheme, persons who ask to use the indexes are permitted to do so. However, a large segment of the public may never have the interest or the need to use them. Thus, the considerable expense of preparing for publication, publishing, and keeping current indexes that are not oriented to a demonstrated public need would be unjustified. Even where an index does meet a need, such as a card catalogue in a library, it does not appear that the expense of publishing would be warranted.

In these cases, it is generally more practical, economical, and satisfactory to the outside person seeking information to give him direct personal assistance that fits his existing knowledge and information, rather than referring him to some index which may be largely incomprehensible because it was compiled by specialists for their own use, or to tell him to buy a published index. Moreover, private concerns publish agency materials and indexes in substantial quantities. For example, Commerce Clearing House and Prentice-Hall publish fully indexed tax services. To require the government to index and publish the same material would be an inefficient and expensive duplication of function.

In this respect, two additional points warrant discussion. First, compliance with this provision will in all likelihood require agencies to hire indexing specialists not only to index the voluminous existing records, but also to establish indexing systems for future use. All of this will cost the taxpayers money. Second, before the indexing process can begin it is essential that agencies know exactly the types of records the Act requires to be indexed. A number of recent court decisions have thrown this whole area of indexing into great confusion.

We recommend that this amendment not be adopted until all affected agencies have had an opportunity to determine its probable impact on their staffs and budgets in relation to estimated public benefits, or until possible alternative devices which may be more effective, simpler to use, more easily kept up-to-date and less costly have been considered.

2. Section 1(b) of the bill would amend Subsection a(3) of the Act so that requests for records would no longer have to be "for identifiable records," requiring instead that a request for records "reasonably describes such records." We view this change to be essentially a matter of semantics and thus unnecessary. The Senate Report in explaining the use of the term "identifiable" in the present Act, stated: "records must be identifiable by the person requesting them, *i.e.*, a reasonable description enabling the Government employee to locate the requested records."

Because it does alter the wording of the statute, this amendment might lead to confusion as well as to unwarranted withholding of requested records. An unsympathetic official might reject a request which would have to be processed today, on the new ground that the

request is not reasonably descriptive. Also, this amendment could subject agencies to severe harassment, as where a requester adequately described the Patent Office records he sought, but his request was for about 5 million records scattered through over 3 million files. A court, presumably unable to accept anything so unreasonable, held that the request was not for "identifiable records." *Irons* v. *Schuyler*, 465 F. 2d 608 (D.C. Cir. 1972). Accordingly, we conclude that this change would not be desirable at this time.

3. Section 1(c) of the bill would amend the Act by imposing time limits of 10 working days for an agency to determine whether to comply with any request for records, and 20 working days to decide an appeal from any denial. The purpose of imposing these deadlines is to expedite agency action on requests for information. The time limits are exact and no extensions are permitted. Certainly, agencies should respond to such requests as expeditiously as possible; however, this amendment is too rigid for permanent and government-wide application and is likely to be counter-productive to the ultimate goal of optimizing disclosure by discouraging the careful and sympathetic processing of requests. Accordingly, we strongly oppose enactment of this amendment.

Often files cannot be obtained within ten days either because the filing systems are impervious to the description of the information requested or because the files are located in centers distantly located from the office receiving the request. Occasionally it is even necessary for an agency to consult other agencies, organizations, or foreign governments in order to determine the propriety of releasing or withholding information. Also, many requests are complex and unique. Inflexible deadlines encourage, indeed compel, hasty denials in such cases. No agency should be required to adhere to a rigid 10 to 20 day limit at the cost of denying requests, in a spirit of caution, that might with more study and time be granted in whole or part. Finally, there is the very real problem of spreading available resources too thin. For example, to meet the deadlines imposed by this amendment, it may frequently be necessary to pull personnel off matters within the primary mission of the agency to handle an Information Act request. Strict time limits ignore considerations of priority. For example, FBI personnel should not be required to process every request within the prescribed time limits when their attention is urgently needed for such things as investigating hi-jackings or bombings of public buildings or other emergencies.

To avoid these and other problems inherent in rigid time constraints, yet provide for expeditious treatment of information requests, we suggest that our revised departmental regulations, which follow the recommendations of the Administrative Conference, serve as a more practical working model. Our regulations provide for 10 and 20 day deadlines but permit extension of time under prescribed circumstances. We use the term "working model" advisedly, for even within our own Department an exception from these regulations was created for the Immigration and Naturalization Service because of the voluminous nature of its records, and we are rarely able to process an appeal within 20 days. Similar exceptions may need to be created, or some may be eliminated as more experience in administering the Act is gained. In any event, rigid time limits for all agencies would be impracticable and would serve only to frustrate the purposes of the Act.

4. Section 1(d) of H.R. 12471 deals with *in camera* inspection by the courts of agency records. It provides that a court "*may* examine *in camera* the contents of any agency records to determine whether such records should be withheld in whole or in part under any of the exemptions set forth in the Act." With respect to exemptions 2 through 9 of the Act, this amendment appears only to codify the rule relating to *in camera* inspections announced by the Supreme Court in *Environmental Protection Agency* v. *Mink*, 93 S.Ct. 827 (1973). There, the Court construed the Act as vesting in the courts, in cases other than those in which the documents are classified, the *discretion* to determine whether an *in camera* inspection is necessary to the resolution of the case. Accordingly, we have no objection to the enactment of this measure as it relates to cases where one or more of exemptions 2 through 9 are involved. However, we oppose any legislative attempt to overrule the Supreme Court's decision in *Mink* with respect to classified (exemption 1) documents.

In *Mink*, the Supreme Court found that judicial review did not extend to "Executive security classifications . . . at the insistence of anyone who might seek to question them." 93 S.Ct. at 833. We oppose this overruling attempt simply because the courts, as they themselves have recognized, are not equipped to subject to judicial scrutiny Executive determinations that certain documents if disclosed would injure our foreign relations or national defense. As the Court of Appeals said in *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970), cert. denied, 398 U.S. 965 (1970), "the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with." In *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103 (1948), the Supreme Court was more explicit:

"[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry."

5. Section 1(e) would reduce the present 60-day period which the Government normally has to answer complaints against it in federal court to 20 days for all suits under the Act. It would also provide for an award of attorneys' fees to the plaintiff in any such suit in which the government "has not prevailed," leaving it unclear what might happen in cases where the government prevails on part of the records in issue but does not prevail on the rest.

We oppose both features of this section. When a suit is filed under the Act, the local U.S. Attorney ordinarily consults the Department of Justice. The Department in turn must consult the agencies whose records are involved, and frequently that agency must coordinate internally among its headquarters components or its field offices, and sometimes externally with other agencies. Because the federal government is larger and more complex, and bears more crucial public interest responsibilities than any other litigant, it needs more time to develop and evaluate its positions, especially if they may affect

agencies other than the one sued. A 20-day rule would require that decisions be made without ample time for inquiry, consultation, and study, and consequently the incidence of positions that would later be reformulated would increase, causing unnecessary work for the parties on both sides and for the courts.

Furthermore, in a type of litigation which can be initiated by anyone without the customary legal requirements of standing or interest or injury, the award of attorneys' fees is particularly inappropriate. It is difficult to understand why there should be departure in this area of law from the traditional rule, applied in virtually every other field of Government litigation that attorneys' fees may not be recovered against the Government.

Although the Act has been used successfully by public interest groups to vindicate the public's right to know, not all litigants fit that category. Instead, the plaintiff may well be a businessman using the Act to gain information about a competitor's plans or operations. Or he may be someone seeking a list of names for a commercial mailing list venture. In all such cases, the obvious end result if attorneys' fees were awarded would be that the taxpayers would pay for litigating both sides of the dispute. This expense could become quite substantial considering that well over 200 suits have been filed to date and that number is ever increasing.

6. Section 2 of the bill would amend section 552(b)(1) of the Act to exempt from disclosure material "authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy". Section (b)(1) presently excepts material specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy. This provision is intended to be read in conjunction with the *in camera* provisions of section 1(d). It would, in effect, transfer the decision as to whether a document should be protected in the interests of foreign policy or national defense from the Executive Branch to the courts. While we firmly share the view that classification abuses cannot be tolerated, and in this respect it is important to note that the existing classification order provides for sanctions in such cases, we are constrained to oppose this amendment for the same reasons noted in our comments on section 1(d).

7. Section 3 of H.R. 12471 is divided into two parts. The first part would require each agency to submit an annual report to Congress containing a statistical evaluation of the duties executed in administering the Act. Congress certainly has an interest and responsibility to keep informed on how the Act is being administered. Accordingly, we support the general objectives of this amendment. Nevertheless, we do not believe that legislation is necessary to accomplish this end. In the past, agencies have appeared before committees of both houses of Congress on numerous occasions and discussed their administrative operations. Statements, complete with statistical information, have been submitted on those occasions for congressional review. Similar information as that proposed to be included in the annual reports was obtained by the House Committee on Government Operations in 1971 by means of a questionnaire. These methods have the obvious advantage of flexibility and enable Congress to receive the information it needs without being locked into a fixed system of reporting requirements. For this reason, this provision seems undesirable.

The second part of section 3 redefines an agency for purposes of the Act to include executive and military departments, Government owned or controlled corporations, any independent regulatory agency, or other establishment in the Executive Branch including the Executive Office of the President. We cannot determine from this language whether or not the Act would be extended to include groups such as: the American National Red Cross, the Girl Scouts of America, National Academy of Sciences, the Veterans of Foreign Wars, or the Daughters of the American Revolution. Some clarification would seem appropriate.

Moreover, in our opinion, the last provision involves a direct attack on the separation of powers system established by the Constitution and is therefore unconstitutional. The Executive Office of the President has traditionally included elements that are a mere extension of the President himself. Persons performing such functions are among a President's most trusted advisors and the need for those persons to speak candidly on highly confidential matters is obvious. Of course, the principle of separation of powers does not preclude the promulgation of freedom of information regulations applicable to particular units within the Executive Office. But, just as Congress has seen fit not to extend the Freedom of Information Act to itself or its staff on the ground that to do so would violate its constitutional prerogatives, neither can it be imposed on the President's staff.

In view of the foregoing, the Department of Justice recommends against the enactment of this legislation in its present form.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

MALCOLM D. HAWK,
Acting Assistant Attorney General.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE,
Washington, D.C., February 20, 1974.

Hon. CHET HOLIFIELD,
Chairman, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Reference is made to your recent request for the views of the Department of Defense on H.R. 12471, 93d Congress, a bill "To amend section 552 of title 5, United States Code, known as the Freedom of Information Act (FOIA)."

The purpose of the bill is to require Federal agencies to adhere to several new administrative requirements devised to enhance responsiveness to FOIA requests. More specifically, the bill provides for the following:

1. That the current index of opinions, statements of policy, and administrative staff manuals be published and distributed, rather than simply made available for public inspection and copying.

2. That the requirement for "identifiable records" be modified to a requirement for a reasonable description of the records requested.

3. That agencies determine the availability of a record within 10 days after receipt of an initial request, and make determinations for initially denied records within 20 days after receipt of an appeal.

4. That courts be given authority to examine *in camera* any records which the agencies have denied a requester who has brought legal action to force their release.

5. That the United States file a responsive pleading in litigation initiated by the requester of a record within 20 days after service upon the United States Attorney of the pleading in which the complaint is made, rather than the current 60-day period for responding to such pleadings.

6. That the Court may assess against the United States reasonable attorney fees and other litigation costs where the Court has found against the United States in its efforts to withhold the record.

7. That the exemption of classified information shall be evaluated on the basis of the criteria established by the Executive Order.

8. That each agency shall file with the Committee on Government Operations of the House of Representatives and the Committees on Government Operations and on the Judiciary in the Senate, a detailed annual report concerning denials of requests for agency records, appeals of those denials, regulations governing FOIA requests, fee schedules imposed when requesters are charged for records provided, and other information concerning administration of the FOIA.

9. That the term "agency" be specifically defined in section 552 of title 5, United States Code, by indicating the kinds of organizations that come within its scope.

First, it should be noted that H.R. 12471 is a vast improvement over some of the earlier bills to amend the FOIA considered by the Subcommittee on Foreign Operations and Government Information of the Committee on Government Operations. On May 8, 1973, the former General Counsel of the Department of Defense, Mr. J. Fred Buzhardt, testified on H.R. 5425 and H.R. 4960, both of which contained a number of provisions which he found highly objectionable to the Department of Defense. We are pleased that a number of these problems have been overcome in H.R. 12471. Although there are other provisions of H.R. 12471 that we do not consider particularly desirable, these comments are confined to those aspects of the bill which we believe will create serious difficulties for the Department of Defense.

Our single greatest problem in implementing this bill, if it should pass, would relate to the time limitations imposed for responding to requests for records and in providing the necessary information for responding to complaints filed in court as a result of the denial of records. Although it may be possible in the vast majority of cases to respond within 10 days to an initial request for a simple record that can be easily located and readily evaluated, it will not be possible in the case of so-called "categorical requests" for voluminous records, or for individual records which cannot be located and evaluated readily. In an agency the size of the Department of Defense, records are located all over the world, and old records are stored in warehouses where their exact location is often difficult to determine in a short time. Until a requested record is located, no determination can be made of its availability to the requester, or whether it comes within an exemption that should be invoked to serve a legitimate public interest.

Although 20 working days may seem an adequate time for evaluating appeals of denied records, this may not be true in cases in which voluminous or complicated records must be forwarded for evaluation by high-level or technically specialized officials whose time must be divided between a multitude of competing priorities. If additional staff must be added for the purpose of creating a capability to respond within the time limit, the cost of this provision alone may go into the millions of dollars. Even additional staff, however, cannot eliminate demands upon the time of expert officials who must respond to other priorities.

Even more important, however, is our view that such rigid time limitations may prove counterproductive from the standpoint of public access. It is often true that records which technically fall within one of the exemptions of the Act are released after careful evaluation by responsible officials who find that no substantial legitimate purpose will be served by their withholding. If there is inadequate time for these evaluations, denials are likely to be more frequent and requesters will be forced to resort to judicial action at great expense to themselves and to the United States. Moreover, it should be noted that the court's role in evaluating a complaint based on the denial of a record is to determine whether an exemption applies. If so, the record is properly denied. Thus, records that might otherwise be released on a discretionary basis may be denied to the public because of artificial time constraints that make careful agency evaluation impossible.

In this regard, we would commend to the Committee's attention the views of the Administrative Conference of the United States with respect to time limitations as they are found in Recommendation 71-2 (formerly designated Recommendation Number 24), dated May 7, 1971. After painstaking study and evaluation by the distinguished members of the Administrative Conference, guidelines were prepared for agency implementation to set forth several carefully circumscribed bases for delaying the response to requests for agency records beyond the normal 10 days for the initial determination and 20 days for an appeal. Such delays are authorized for the following reasons:

a. The requested records are stored in whole or part at other locations than the office having charge of the records requested.

b. The request requires the collection of a substantial number of specified records.

c. The request is couched in categorical terms and requires an extensive search for the records responsive to it.

d. The requested records have not been located in the course of a routine search and additional efforts are being made to locate them.

e. The requested records require examination and evaluation by personnel having the necessary competence and discretion to determine if they are: (a) exempt from disclosure under the Freedom of Information Act and (b) should be withheld as a matter of sound policy, or revealed only with appropriate deletions.

When extensions are permitted under these criteria, the agency is required to acknowledge the request in writing within a 10-day period following initial request explaining the reasons for the delay. Further, on appeal from an initial denial failure to make a response within 20 days can be justified only under extraordinary circumstances.

We believe that the Administrative Conference recommendation offers a realistic approach to dealing with the problem of undue delay by agencies in responding to requests for records under the FOIA. Either the adoption of this recommendation in legislative form, or better yet, a simple amendment of section 552 requires that agencies include time limitations in their regulations would be far preferable to the present inflexible language of H.R. 12471. A comment in the report on a bill that the Administrative Conference model should be followed, would seem to be sufficient direction to the agencies if a simple requirement for time limitations in the agency regulations was imposed by the statute.

Under the language of H.R. 12471, failure by an agency to meet the time limit for response to a request for a record is deemed an exhaustion by the requester of his administrative remedies. This language can be read as meaning that an agency's failure to answer the initial inquiry within 10 days lays sufficient foundation for initiating litigation even though no appeal is taken. It will, therefore, behoove an agency to automatically respond with a letter of denial for any initial request it has not had adequate time to evaluate and thereby preserve its right to consider further the request at an appellate level within the 20 working days available. This will cause an undue escalation of the request in many cases, and may actually delay a response to the requester. If, on the other hand, the actual intent of the bill is simply to permit the requester to have the option of making a final appeal when his initial request has not been answered within 10 days, the language of the bill requires clarification.

From the standpoint of the Department of Defense the 20-day limit on the Justice Department for answering complaints is extremely disturbing. Learning of the existence of litigation in the large number of district courts in which such litigation may be initiated under the FOIA is often a problem that consumes a good portion of the 20 days. Present experience indicates that obtaining expert views from competent sources is often difficult to achieve within the 60-day period now available. By reducing that time by two-thirds, the task of supplying necessary information to Justice Department representatives attempting to respond intelligently to a complaint filed under the authority of 5 United States Code 552 will prove almost impossible. Yet, there is no assurance that despite this inadequate time for preparing an answer to the complaint that the plaintiff will receive prompt consideration of that complaint by the court. We, therefore, strongly recommend that this requirement for the filing of a responsive pleading within 20 days be deleted from the bill.

We view with some concern the effort in section (d) of this bill to authorize the court to examine *in camera* the contents of any agency records to determine whether an exemption has been properly applied. This could prove particularly troublesome if it is interpreted as an encouragement to the courts to second-guess security classification decisions made pursuant to an Executive Order. We urge that the report on this bill make it clear that it is the intention of Congress to simply permit the court, where it has some reason to doubt the validity of an affidavit supporting a security classification, to examine the classified record solely for the purpose of determining that the

authorized official of the Executive Branch has exercised his classification authority in good faith and in basic conformity with the criteria of the Executive Order. No system of security classification can work satisfactorily if judges are going to substitute their interpretations of what should be given a security classification for those of the Government officials responsible for the program requiring classification.

The Office of Management and Budget advised that from the standpoint of the administrative program, there is no objection of the presentation of this report for the consideration of the Committee.

Sincerely yours,

L. NIEDERLEHNER,
Acting General Counsel.

APPENDIX 2.—TEXT OF BILL

93D CONGRESS
2D SESSION

H. R. 12471

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1974

Mr. MOORHEAD of Pennsylvania (for himself, Ms. ABZUG, Mr. ALEXANDER, Mr. ERLENBORN, Mr. GUDE, Mr. HORTON, Mr. MCCLOSKEY, Mr. MOSS, Mr. REGULA, Mr. JAMES V. STANTON, Mr. THONE, and Mr. WRIGHT) introduced the following bill; which was referred to the Committee on Government Operations

A BILL

To amend section 552 of title 5, United States Code, known as the Freedom of Information Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. (a) The fourth sentence of section 522 (a) (2) of title 5, United States Code, is amended by striking out "and make available for public inspection and copying" and inserting in lieu thereof ", promptly publish, and distribute (by sale or otherwise) copies of".

(b) Section 552 (a) (3) of title 5, United States Code, is amended by striking out "on request for identifiable records made in accordance with published rules stating the time,

place, fees to the extent authorized by statute, and procedure to be followed," and inserting in lieu thereof the following: "upon any request for records which (A) reasonably describes such records, and (B) is made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed,".

(c) Section 552(a) of title 5, United States Code, is amended by adding at the end thereof the following new paragraph:

"(5). Each agency, upon receipt of any request for records made under this subsection, shall—

"(A) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the date of such receipt whether to comply with the request and shall immediately notify the person making the request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

"(B) make a determination with respect to such appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the date of receipt of such appeal.

"Any person making a request to an agency for records under this subsection shall be deemed to have exhausted his

administrative remedies with respect to such request if the agency fails to comply with subparagraph (A) or (B) of this paragraph. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to the person making such request."

(d) The third sentence of section 552 (a) (3) of title 5, United States Code, is amended by inserting immediately after "the court shall determine the matter de novo" the following: ", and may examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b),".

(e) Section 552 (a) (3) of title 5, United States Code, is amended by adding at the end thereof the following new sentence: "Notwithstanding any other provision of law, the United States or the officer or agency thereof against whom the complaint was filed shall serve a responsive pleading to any complaint made under this paragraph within twenty days after the service upon the United States attorney of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown. The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the United States or an officer or agency thereof, as litigant, has not prevailed."

SEC. 2. Section 552 (b) (1) of title 5, United States Code, is amended to read as follows:

"(1) authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy;".

SEC. 3. Section 552 of title 5, United States Code, is amended by adding at the end thereof the following new subsections:

"(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Committee on Government Operations of the House of Representatives and the Committee on Government Operations and the Committee on the Judiciary of the Senate. The report shall include—

"(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

"(2) the number of appeals made by persons under subsection (a) (5) (B), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

"(3) a copy of every rule made by such agency regarding this section;

"(4) a copy of the fee schedule and the total

amount of fees collected by the agency for making records available under this section; and

"(5) such other information as indicates efforts to administer fully this section.

"(e) Notwithstanding section 551 (1) of this title, for purposes of this section, the term 'agency' means any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."

SEC. 4. The amendments made by this Act shall take effect on the ninetieth day beginning after enactment of this Act.

O