C. SECTION ACTION ON CONFERENCE REPORT, OCTOBER 1, 1974; PP. S17828–S17830 AND S17971–S17972

FREEDOM OF INFORMATION ACT AMENDMENTS—CONFERENCE REPORT
(REPT. No. 93–1200)

Mr. KENNEDY. Mr. President, I am pleased to send to the desk the conference report on the Freedom of Information Act Amendments—Report No. 98–1380, on H.R. 12471. The House and Senate conferees met on four occasions last month to discuss and debate a number of the provisions of this significant legislation, and I firmly believe that our final product strikes the proper balance between the rights of the public to know what their Government is doing and the needs of the executive branch and independent agencies to keep certain information confidential. The legislation will promote both faster and freer public access by the public to Government files and records.

During our conference on this bill, I received a letter from President Ford voicing his concern over portions of our proposed amendments. He identified five specific problems, and at the next conference session the conferees discussed each problem and adopted language—either for the bill or for the statement of managers—designed to respond to those concerns. Last week I replied to the President's letter, along with House Conference Chairman William Moorhead, observing that our legislation "would provide support for your own policy of 'open government' which is so desperately needed to restore the public's confidence in our National Government." I ask unanimous consent that President Ford's letter and our reply be printed in the Record at the end of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See exhibit 1)

Mr. KENNEDY. I believe it is significant to note that the conferees approached this legislative effort in a bipartisan spirit. We attempted to accommodate at each turn the needs of the Government agencies affected by our bill. I was pleased that each major issue requiring a final rollcall vote on the part of the Senate conferees was resolved by a unanimous vote. The participation of our ranking minority member, Senator Hruska, in the conference was most constructive, and his contributions extremely helpful. It is because of the active give and take of the conferees on both sides, with continued advice from the executive branch, that we achieved a final product that I believe can and should be enacted without delay.

I hope that our failure to get our senior minority members to sign the conference report does not reflect a decision on the part of the White House to veto this significant legislation. Openness is supposed to be the watchword of the present administration. So far, however, it has been more of a slogan than a practice. A veto of this bill would reflect

a hostility to just the kind of Government openness and accountability which the public must have to regain a full measure of confidence in our National Government.

The legislation approved by our conference committee contains the following major provisions:

Federal courts are empowered to review the validity of agency classification of documents and may examine those documents in determining whether they were properly classified.

Individual Government officials who act arbitrarily or capriciously in withholding information from the public are subjected to disciplinary procedures, to be initiated by the Civil Service Commission.

Investigatory files, which are exempt from mandatory disclosure under present law, are required to be disclosed unless their release will cause some specific harm enumerated in the bill.

Agencies are given definite time limits to respond to requests for information: 10 days for an initial response, 20 days to determine an appeal, with an additional 10 days in unusual circumstances.

A person who must sue to obtain access to information may recover attorneys' fees if he prevails in court.

The Freedom of Information Act, passed by Congress in 1966, guaranteed the public judicially enforceable access to Government information, subject to specific exceptions defined in the law. Hearings before my Subcommittee on Administrative Practice and Procedure last year brought out numerous abuses by Government agencies in administering the act, and in October 1973 I introduced a bill to strengthen the Freedom of Information Act, which has in large part been incorporated into the final conference report filed today.

Our present legislative effort finds support from many quarters. Representatives of the media have strongly advocated adoption of these amendments. The American Bar Association has resolved that Congress move forward with the kinds of reforms contained in our legislation. The American Civil Liberties Union has advocated adoption of this bill and has found it consistent with privacy rights which must also be protected. The American Federation of Government Employees has determined that the sanction provision is acceptable as fair and consistent with Civil Service safeguards. And the American Political Science Association has indicated the special interest of scholars in seeing this bill enacted.

These amendments to the Freedom of Information Act, contained in our conference report, will help open the decisions and actions of Government to the light of public review and understanding. Without them, the Freedom of Information Act will remain a toothless tiger, and the executive branch will continue to be able to delay, resist, and obstruct public access to Government information. With them, the Freedom of Information Act becomes truly worthy of its name.

EXHIBIT 1

THE WHITE HOUSE,
Washington, D.C., August 20, 1974.

DEAR TED: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound

and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government, and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all seek to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective.

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without (a) reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him. Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to his kind of personal liability for the performance of his official duties. Any potential harm to successful complaints is more appropriate, rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations, is in fact, properly classified, following an *in camera* inspection of the document by the court. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof. My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security. The Constitution commits this responsibility and authority to the President.

I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security. Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This amendment could have that effect if the sources of information or the information

itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime. I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is *clearly unwarranted*. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

FOREIGN OPERATIONS AND
GOVERNMENT INFORMATION SUBCOMMITTEE,
Washington, D.C., September 23, 1974.

Hon. GERALD R. FORD,
President of the United States,
The White House, Washington, D.C.

DEAR MR. PRESIDENT: We were most pleased to receive your letter of August 20 and to know of your personal interest in the amendments to the Freedom of Information Act being considered by the House-Senate conference committee. And we appreciate your recognition of the fundamental purposes of this milestone law and the importance you attach to these amendments. They of course would provide support for your own policy of "open government" which is so desperately needed to restore the public's confidence in our national government.

When we received your letter, all of the members of the conference committee agreed to your request for additional time to study the amendments and have given serious consideration and careful deliberation to your views on each of the major concerns you raised. The staffs of the two committees of jurisdiction have had several in-depth discussions with the responsible officials of your Administration. Individual Members have also discussed these points with Justice Department officials.

At our final conference session we were able to reopen discussion on each of the major issues raised in your letter. We believe that the ensuing conference actions on these matters were responsive to your concerns and were designed to accommodate further interests of the Executive branch.

You expressed concern in your letter about the constitutionality and wisdom of court-imposed penalties against Federal employees who withhold information "without a reasonable basis in law." This provision has been substantially modified by conference action.

At our last conference meeting, after extensive debate and consideration, a compromise sponsored by Representative McCloskey and modified by Senate conferees was adopted. This compromise leaves to the Civil Service Commission the responsibility for initiating disciplinary proceedings against a government official or employee in appropriate circumstances—but only after a written finding by the court that there were "circumstances surrounding the withholding (that) raise

questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding." The actual disciplinary action recommended by the Commission, after completion of its standard proceedings, would actually be taken by the particular agency involved in the case.

We feel that this is a reasonable compromise that basically satisfies your objections to the original Senate language.

You expressed fear that the amendments afford inadequate protection to truly important national defense and foreign policy information subject to *in camera* inspection by Federal courts in freedom of information cases. We believe that these fears are unfounded, but the conference has nonetheless agreed to include additional explanatory language in the Statement of Managers making clear our intentions on this issue.

The legislative history of H.R. 12471 clearly shows that the *in camera* authority conferred upon the Federal courts in these amendments is *not mandatory, but permissive* in cases where normal proceedings in freedom of information cases in the courts do not make a clear-cut case for agency withholdings of requested records. These proceedings would include the present agency procedure of submitting an affidavit to the court in justification of the classification markings on requested documents in cases involving 552(b)(1) information.

The amendments in H.R. 12471 do not remove this right of the agency, nor do they change in any way other mechanisms available to the court during its consideration of the case. The court may still request additional information or corroborative evidence from the agency short of an *in camera* examination of the documents in question. Even when the *in camera* review authority is exercised by the court, it may call in the appropriate agency officials involved to discuss any portion of the information or affidavit furnished by the agency in the case.

The conferees have agreed to include language in the Statement of Managers that reiterates the discretionary nature of the *in camera* authority provided to the Federal courts under the Freedom of Information Act. We will also express our expectation that the courts give substantial weight to the agency affidavit submitted in support of the classification markings on any such documents in dispute.

Thus, Mr. President, we feel that the conference committee has made an effort to explain our intentions so as to respond to your objections on this important area of the amendments, operating as we must within the scope of the conference authority because of the virtually identical language in both the House and Senate versions of H.R. 12471.

The conference committee has also acted affirmatively to satisfy your major objections to the proposed amendments to subsection (b) (7) of the Freedom of Information Act, dealing with specific criteria for the withholding of Federal investigatory records in the law enforcement area.

The conference committee had already added an additional provision, not contained in the Senate-passed bill, which would permit withholding of information that would "endanger the life or physical safety of law enforcement personnel." This made it substantially identical to the language recommended by then Attorney General Richardson during Senate hearings on the bill and endorsed by the Administrative Law Section of the American Bar Association.

After reviewing the points made in your letter on this point, the conference committee also agreed to adopt language offered by Senator Hruska to permit the withholding of the *information* provided by a confidential source to a criminal law enforcement authority during the course of a criminal or "lawful national security intelligence investigation." The Federal agency may, in addition, withhold the identification of the confidential source in *all* law enforcement investigations—civil as well as criminal.

To further respond to your suggestion on the withholding of information in law enforcement records involving personal privacy the conference committee agreed to strike the word "clearly" from the Senate-passed language.

You expressed concern that the amendments to the Freedom of Information Law authorizing the Federal courts to award attorney fees and litigation costs not be used to subsidize corporate interests who use the law to enhance their own competitive position.

The members of the conference committee completely share your concern in this connection, and the Statement of Managers will reflect mutual view that any award of fees and costs by the courts should not be automatic but should be based on presently prevailing judicial standards, such as the general public benefit arising from the release of the information sought, as opposed to a more narrow commercial benefit solely to the private litigant.

You also suggest that the time limits in the amendments may be unnecessarily restrictive. The conference adopted at its first meeting the Senate language allowing agencies an additional ten days to respond to a request or determine an appeal in unusual circumstances. Pursuant to your suggestion we included language from the Senate version making clear that a court can give an agency additional time to review requested materials in exceptional circumstances where the agency has exercised due diligence but still could not meet the statutory deadlines.

In conclusion, Mr. President, we appreciate your expression of cooperation with the Congress in our deliberations on the final version of this important legislation. In keeping with your willingness "to go more than halfway to accommodate Congressional concerns," we have given your suggestions in these five key areas of the bill renewed consideration and, we feel, have likewise gone "more than halfway" at this late stage.

We welcome your valuable input into our final deliberations and appreciate the fine cooperation and helpful suggestions made by various staff members and officials of the Executive branch. It is our hope that the fruits of these joint efforts will make it possible for the Senate and House to act promptly on the conference version of H.R. 12471 so that this valuable legislation will be enacted and can be signed into law before the end of the month.

With every good wish,

Sincerely,

EDWARD M. KENNEDY,
Chairman, Senate Conferees.
WILLIAM S. MOORHEAD,
Chairman, House Conferees.

FREEDOM OF INFORMATION ACT AMENDMENTS—CONFERENCE REPORT

Mr. KENNEDY. Mr. President, I submit a report of the committee of conference on H.R. 12471, and ask for its immediate consideration.

The PRESIDING OFFICER. The report will be stated by title.

The assistant legislative clerk read as follows:

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 12471) to amend section 552 of the United States Code, known as the Freedom of Information Act, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses this report, signed by a majority of the conferees.

The PRESIDING OFFICER. Is there objection to the consideration of the conference report?

There being no objection, the Senate proceeded to consider the report.

(The conference report is printed in the House proceedings of the Congressional Record of September 25, 1974, at page H9525.)

The PRESIDING OFFICER. The question is on agreeing to the conference report.

The report was agreed to.

Mr. HRUSKA. Mr. President, as a conferee on this bill, I have seen several significant changes made to the bill which, in my view, makes it a more workable measure. However, I do not believe that these corrections go far enough.

While we were in conference, the President sent a letter to the conferees pointing out his objections to the bill. The provision that appears to concern the executive branch the most is the section of the bill that places the burden of proof upon an agency to satisfy a court that a document because it concerns military or intelligence secrets and diplomatic relations is in fact properly classified. If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed.

Yet, while this bill transfers the authority to declassify documents from the executive branch to the courts, it provides no standards to govern the review of the documents. The judge is given the documents and then is cast upon a sea without any lighthouses or buoys to point out the shoals and rocks to make his decision whether the documents are properly classified.

No standards are created to guide a judge in reviewing the documents. He can release the documents if, in his own view, they are not properly classified, even if the Secretary of State, the Secretary of Defense, or any other agency head certifies that the documents are properly classified. This is a provision that is not only distrustful in nature; it is unreasonable.

President Ford, in his letter to the conferees cited these concerns and said:

I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof. My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security. The Constitution commits this responsibility and authority to the President.

Despite these strong words and valid concerns, the majority of the conferees refused to change the provision vesting a power in the courts to declassify documents classified by a Government agency.

Mr. President, I realize that there are some mistakes in judgment about classification and that there are some abuses of the system. But there are administrative procedures for dealing with these mistakes and abuses. If a citizen wants access to a classified document, he may request declassification under Executive Order 11652. If his request for declassification is refused, he may appeal to the head of the agency. If his request is again refused, he can appeal to the Interagency Classification Review Committee—a committee designed to correct erroneous classifications and in general, be a watchdog over the classification system.

This bill, however, ignores this administrative mechanism and vests in the courts the power to declassify documents and release them to all the world.

The President, in his letter to the conferees, said that he could not accept a provision that would risk exposure of our national defense or foreign relations secrets. I cannot accept such a provision either.

Mr. President, I ask, unanimous consent that the text of President Ford's August 20 letter be printed in the Record at this point.

There being no objection, the letter was ordered to be printed in the Record, as follows:

THE WHITE HOUSE,
Washington, D.C., Aug. 20, 1974.

Senator EDWARD KENNEDY,
U.S. Senate,
Washington, D.C.

DEAR TED: I appreciate the time you have given me to study the amendments to the Freedom of Information Act (H.R. 12471) presently before you, so that I could provide you my personal views on this bill.

I share your concerns for improving the Freedom of Information Act and agree that now, after eight years in existence, the time is ripe to reassess this profound and worthwhile legislation. Certainly, no other recent legislation more closely encompasses my objectives for open Government than the philosophy underlying the Freedom of Information Act.

Although many of the provisions that are now before you in Conference will be expensive in their implementation, I believe that most would more effectively assure to the public an open Executive branch. I have always felt that administrative burdens are not by themselves sufficient obstacles to prevent progress in Government and I will therefore not comment on those aspects of the bill.

There are, however, more significant costs to Government that would be exacted by this bill—not in dollar terms, but relating more fundamentally to the way Government, and the Executive branch in particular, has and must function. In evaluating the costs, I must take care to avoid seriously impairing the Government we all see, to make more open. I am concerned with some of the provisions which are before you as well as some which I understand you may not have considered. I want to share my concerns with you so that we may accommodate our reservations in achieving a common objective.

A provision which appears in the Senate version of the bill but not in the House version requires a court, whenever its decision grants withheld documents to a complainant, to identify the employee responsible for the withholding and to determine whether the withholding was "without (a) reasonable basis in law" if the complainant so requests. If such a finding is made, the court is required to direct the agency to suspend that employee without pay or to take disciplinary or corrective action against him.

Although I have doubts about the appropriateness of diverting the direction of litigation from the disclosure of information to career-affecting disciplinary hearings about employee conduct, I am most concerned with the inhibiting effect upon the vigorous and effective conduct of official duties that this potential personal liability will have upon employees responsible for the exercise of these judgments. Neither the best interests of Government nor the public would be served by subjecting an employee to this kind of personal liability for the performance of his official duties.

Any potential harm to successful complainants is more appropriately rectified by the award of attorney fees to him. Furthermore, placing in the judiciary the requirement to initially determine the appropriateness of an employee's conduct and to initiate discipline is both unprecedented and unwise. Judgments concerning employee discipline must, in the interests of both fairness and effective personnel management, be made initially by his supervisors and judicial involvement should then follow in the traditional form of review.

There are provisions in both bills which would place the burden of proof upon an agency to satisfy a court that a document classified because it concerns military or intelligence (including intelligence sources and methods) secrets and diplomatic relations is, in fact, properly classified, following an in camera inspection of the document by the court.

If the court is not convinced that the agency has adequately carried the burden, the document will be disclosed. I simply cannot accept a provision that would risk exposure of our military or intelligence secrets and diplomatic relations because of a judicially perceived failure to satisfy a burden of proof.

My great respect for the courts does not prevent me from observing that they do not ordinarily have the background and expertise to gauge the ramifications that a release of a document may have upon our national security.

The Constitution commits this responsibility and authority to the President. I understand that the purpose of this provision is to provide a means whereby improperly classified information may be detected and released to the public. This is an objective I can support as long as the means selected do not jeopardize our national security interests. I could accept a provision with an express presumption that the classification was proper and with *in camera* judicial review only after a review of the evidence did not indicate that the matter had been reasonably classified in the interests of our national security.

Following this review, the court could then disclose the document if it finds the classification to have been arbitrary, capricious, or without a reasonable basis. It must also be clear that this procedure does not usurp my Constitutional responsibilities as Commander-in-Chief. I recognize that this provision is technically not before you in Conference, but the differing provisions of the bills afford, I believe, grounds to accommodate our mutual interests and concerns.

The Senate but not the House version amends the exemption concerning investigatory files compiled for law enforcement purposes. I am concerned with any provision which would reduce our ability to effectively deal with crime. This

amendment could have that effect if the sources of information or the information itself are disclosed. These sources and the information by which they may be identified must be protected in order not to severely hamper our efforts to combat crime.

I am, however, equally concerned that an individual's right to privacy would not be appropriately protected by requiring the disclosure of information contained in an investigatory file about him unless the invasion of individual privacy is clearly unwarranted. Although I intend to take action shortly to address more comprehensively my concerns with encroachments upon individual privacy, I believe now is the time to preclude the Freedom of Information Act from disclosing information harmful to the privacy of individuals. I urge that you strike the words "clearly unwarranted" from this provision.

Finally, while I sympathize with an individual who is effectively precluded from exercising his right under the Freedom of Information Act because of the substantial costs of litigation, I hope that the amendments will make it clear that corporate interests will not be subsidized in their attempts to increase their competitive position by using this Act. I also believe that the time limits for agency action are unnecessarily restrictive in that they fail to recognize several valid examples of where providing flexibility in several specific instances would permit more carefully considered decisions in special cases without compromising the principle of timely implementation of the Act.

Again, I appreciate your cooperation in affording me this time and I am hopeful that the negotiations between our respective staffs which have continued in the interim will be successful.

I have stated publicly and I reiterate here that I intend to go more than halfway to accommodate Congressional concerns. I have followed that commitment in this letter, and I have attempted where I cannot agree with certain provisions to explain my reasons and to offer a constructive alternative. Your acceptance of my suggestions will enable us to move forward with this progressive effort to make Government still more responsive to the People.

Sincerely,

GERALD R. FORD.

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