

Calendar No. 798

89TH CONGRESS
1st Session

SENATE

REPORT
No. 813CLARIFYING AND PROTECTING THE RIGHT OF THE
PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES

OCTOBER 4 (legislative day, OCTOBER 1), 1965.—Ordered to be printed

Mr. Long of Missouri, from the Committee on the
Judiciary, submitted the following

REPORT

[To accompany S. 1160]

The Committee on the Judiciary, to which was referred the bill (S. 1160) to clarify and protect the right of the public to information, and for other purposes, having considered the same, reports favorably thereon, with amendments and recommends that the bill as amended do pass.

AMENDMENTS

Amendment No. 1: On page 3, line 8, before "staff manuals" insert "administrative."

Amendment No. 2: On page 4, line 4, strike "Every" and insert in lieu thereof "Except with respect to the records made available pursuant to subsections (a) and (b), every."

Amendment No. 3: On page 4, line 4, after the comma insert "upon request for identifiable records made."

Amendment No. 4: On page 4, line 5, before "and" insert "fees to the extent authorized by statute."

Amendment No. 5: On page 4, line 6, strike "all its" and insert in lieu thereof "such."

Amendment No. 6: On page 4, lines 11 and 12, strike "and information"; and on line 13, strike "or information."

Amendment No. 7: On page 5, line 10, strike "the public" and insert in lieu thereof "any person."

Amendment No. 8: On page 5, lines 11 and 12, strike "dealing solely with matters of law or policy" and insert in lieu thereof "which would not be available by law to a private party in litigation with the agency"

Amendment No. 9: On page 5, line 17, strike the word "and"; and on page 5, line 20, strike the period and insert in lieu thereof "; and (9) geological and geophysical information and data (including maps) concerning wells."

PURPOSE OF AMENDMENTS

Amendment No. 1: The limitation of the staff manuals and instructions affecting the public which must be made available to the public to those which pertain to administrative matters rather than to law enforcement matters protects the traditional confidential nature of instructions to Government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action.

Amendment No. 2: This is a technical amendment to emphasize that the agency records made available by subsections (a) and (b) are not covered by subsection (c) which deals with other agency records.

Amendment No. 3: The purpose of this amendment is to require that requests of inspection of agency records identify the particular records requested. It is contemplated by the committee that the standards of identification applicable to the discovery of records in court proceedings would be appropriate guidelines with respect to the identification of agency records, especially as the courts would have jurisdiction to determine any allegations of improper withholding.

Amendment No. 4: It is contemplated that, where authorized by statute, an agency will require reasonable fees to be paid in appropriate cases.

Amendment No. 5: This is a technical amendment to require that the only records which must be made available are those for which a request has been made.

Amendment No. 6: This is a technical amendment to delete the term "information" which is included within the term "agency records" to the extent that it is in the form of a record.

Amendment No. 7: It was pointed out in statements to the committee that agencies may obtain information of a highly personal and individual nature. To better convey this idea the substitute language is provided.

Amendment No. 8: The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency. This would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.

Amendment No. 9: The purpose of clause (9) is to protect from disclosure certain information which is highly valuable to several important industries and which should be kept confidential when it is contained in Government records.

PURPOSE OF BILL

In introducing S. 1666, the predecessor of the present bill, Senator Long quoted the words of Madison, who was chairman of the committee which drafted the first amendment to the Constitution:

Knowledge will forever govern ignorance, and a people who mean to be their own governors, must arm themselves

with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both.

Today the very vastness of our Government and its myriad of agencies makes it difficult for the electorate to obtain that "popular information" of which Madison spoke. But it is only when one further considers the hundreds of departments, branches, and agencies which are not directly responsible to the people, that one begins to understand the great importance of having an information policy of full disclosure.

Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information. Many witnesses have testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute.

Section 3 of the Administrative Procedure Act, that section which this bill would amend, is full of loopholes which allow agencies to deny legitimate information to the public. Innumerable times it appears that information is withheld only to cover up embarrassing mistakes or irregularities and the withholding justified by such phrases in section 3 of the Administrative Procedure Act as—"requiring secrecy in the public interest," or "required for good cause to be held confidential."

It is the purpose of the present bill to eliminate such phrases, to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld. It is important and necessary that the present void be filled. It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting information policies. Standards such as "for good cause" are certainly not sufficient.

At the same time that a broad philosophy of "freedom" of information is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.

HISTORY OF LEGISLATION

After it became apparent that section 3 of the Administrative Procedure Act was being used as an excuse for secrecy, proposals for change began.

The first of these proposals, S. 2504, 84th Congress, introduced by Senator Wiley and S. 2541, 84th Congress, by Senator McCarthy, arose out of recommendations by the Hoover Commission Task

Force. These were quickly followed in the 85th Congress by the Henning's bill, S. 2148, and by S. 4094, introduced by Senators Ervin and Butler, which was incorporated as a part of the proposed Code of Federal Administrative Procedure.

S. 4094 was reintroduced by Senator Hennings in the 86th Congress as S. 186. This was followed in the second session by a slightly revised version of the same bill, numbered S. 2780. Senators Ervin and Butler reintroduced S. 4094 which was designated S. 1070, 86th Congress.

More recently, Senator Carroll introduced S. 1567, cosponsored by Senators Hart, Long, and Proxmire. Also introduced in the 87th Congress were the Ervin bill, S. 1887, its companion bill in the House, H.R. 9926, S. 1907 by Senator Proxmire, and S. 3410 introduced by Senators Dirksen and Carroll.

Although hearings were held on the Hennings bills, and considerable interest was aroused by all of the bills, no legislation resulted.

In the last Congress, the Senate passed S. 1666, upon which this bill is based, on July 31, 1964, but sufficient time did not remain in that Congress for its full consideration by the House. The present bill is substantially S. 1666, as passed by the Senate, with amendments reflecting suggestions made to the committee in the course of the hearings.

INADEQUACY OF PRESENT LAW

The present section 3 of the Administrative Procedure Act, which would be replaced by S. 1160, is so brief that it can be profitably placed at this point in the report:

PUBLIC INFORMATION

Section 3: Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public; but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) *Opinions and orders.*—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) *Public records.*—Save as otherwise required by statute, matters of official record shall in accordance with published rule be made

available to persons properly and directly concerned except information held confidential for good cause found.

The serious deficiencies in this present statute are obvious. They fall into four categories:

(1) There is excepted from the operation of the whole section "any function of the United States requiring secrecy in the public interest * * *." There is no attempt in the bill or its legislative history to delimit "in the public interest," and there is no authority granted for any review of the use of this vague phrase by Federal officials who wish to withhold information.

(2) Although subsection (b) requires the agency to make available to public inspection "all final opinions or orders in the adjudication of cases," it vitiates this command by adding the following limitation: "* * * except those required for good cause to be held confidential * * *."

(3) As to public records generally, subsection (c) requires their availability "to persons properly and directly concerned except information held confidential for good cause found." This is a double-barreled loophole because not only is there the vague phrase "for good cause found," there is also a further excuse for withholding if persons are not "properly and directly concerned."

(4) There is no remedy in case of wrongful withholding of information from citizens by Government officials.

PRESENT SECTION 3 OF ADMINISTRATIVE PROCEDURE ACT IS
WITHHOLDING STATUTE, NOT DISCLOSURE STATUTE

It is the conclusion of the committee that the present section 3 of the Administrative Procedure Act is of little or no value to the public in gaining access to records of the Federal Government. Indeed, it has had precisely the opposite effect: it is cited as statutory authority for the withholding of virtually any piece of information that an official or an agency does not wish to disclose.

Under the present section 3, any Government official can under color of law withhold almost anything from any citizen under the vague standards—or, more precisely, lack of standards—in section 3. It would require almost no effort for any official to think up a reason why a piece of information should be withheld (1) because it was in the "public interest," or (2) "for good cause found," or (3) that the person making the request was not "properly and directly concerned." And, even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available.

WHAT S. 1160 WOULD DO

S. 1160 would emphasize that section 3 of the Administrative Procedure Act is not a withholding statute but a disclosure statute by the following major changes:

(1) It sets up workable standards for what records should and should not be open to public inspection. In particular, it avoids the use of such vague phrases as "good cause found" and replaces them with specific and limited types of information that may be withheld.

(2) It eliminates the test of who shall have the right to different information. For the great majority of different records, the public as a whole has a right to know what its Government is doing.

There is, of course, a certain need for confidentiality in some aspects of Government operations and these are protected specifically; but outside these limited areas, all citizens have a right to know.

(3) The revised section 3 gives to any aggrieved citizen a remedy in court.

DETAILED DESCRIPTION OF BILL

Description of subsection (a)

Subsection (a) deals entirely with publication of material in the Federal Register. This subsection has fewer changes from the existing law than any other; primarily because there have been few complaints about omission from the Federal Register of necessary official material. In fact, what complaints there have been have been more on the side of too much publication rather than too little.

The principal change in subsection (a) has been to deal with the exceptions to its provisions in a single subsection, subsection (e).

There are a number of minor changes which attempt to make it more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests.

There is also a provision, suggested by a number of agencies, for incorporation of other publications by reference in the Federal Register. This may be helpful in reducing the bulky present size of the Register.

The new sanction imposed for failure to publish the matters enumerated in section 3(a) was added to expressly provide that a person shall not be adversely affected by matters required to be published and not so published. This gives added incentive to the agencies to publish the required material.

The following technical changes were also made with regard to subsection 3(a):

The phrase "* * * but not rules addressed to and served upon named persons in accordance with law * * *" was stricken because section 3(a) as amended only requires the publication of rules of general applicability.

"Rules of procedure" was added to remove an uncertainty. "Description of forms available" was added to eliminate the need of publishing lengthy forms.

The new clause (E) is an obvious change, added for the sake of completeness and clarity.

Description of subsection (b)

Subsection (b) of S. 1160 (as subsec. (b) of sec. 3 of the Administrative Procedure Act) deals with agency opinions, orders, and rules. This Administrative Procedure Act subsection is replaced by a detailed subsection, specifying what orders, opinions, and rules must be made available. The exceptions have again been moved to a single subsection, subsection (e), dealing with exceptions.

Apart from the exemptions, agencies must make available for public inspection and copying all final opinions (including concurring and dissenting opinions); all orders made in the adjudication of cases; and those statements of policy and interpretations which have been adopted by the agency and are not required to be published in the

Federal Register; and administrative staff manuals and instructions to staff that affect any member of the public.

There is a provision for the deletion of certain details in opinions, statements of policy, interpretations, staff manuals and instructions to prevent "a clearly unwarranted invasion of personal privacy." The authority to delete identifying details after written justification is necessary in order to be able to balance the public's right to know with the private citizen's right to be secure in his personal affairs which have no bearing or effect on the general public. For example, it may be pertinent to know that unseasonably harsh weather has caused an increase in public relief costs; but it is not necessary that the identity of any person so affected be made public.

Written justification for deletion of identifying details is to be placed as preamble to "* * * the opinion, statement of policy, interpretation or staff manual or instruction * * *" that is made available.

Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it. However, considerations of time and expense cause this indexing requirement to be made prospective in application only.

Many agencies already have indexing programs, e.g., the Interstate Commerce Commission. Such indexes satisfy the requirements of this bill insofar as they achieve the purpose of the indexing requirement. No other special or new indexing will be necessary for such agencies.

Subsection (b) contains its own sanction that orders, opinions, etc., which are not properly indexed and made available to the public may not be relied upon or cited as precedent by an agency.

There are also a number of technical changes in section 3(b):

The phrase "* * * and copying * * *" was added because it is frequently of little use to be able to inspect orders or the like unless one is able to copy them for future reference. Hence the right to copy these matters is supplemental to the right to inspect and makes the latter right meaningful.

The addition of "* * * concurring and dissenting opinions * * *" is added to insure that, if one or more agency members dissent or concur, the public and the parties should have access to these views and ideas.

The enumeration of orders, etc., defines what materials are subject to section 3(b)'s requirements. The "unless" clause was added to provide the agencies with an alternative means of making these materials available through publication.

Description of subsection (c)

Subsection (c) deals with "agency records" and would have almost the reverse result of present subsection (c) which deals with "public records." Whereas the present subsection 3(c) of the Administrative Procedure Act has been construed to authorize wide-spread withholding of agency records, subsection 3(c) of S. 1160 requires their disclosure.

The records must be identifiable by the person requesting them, i.e., a reasonable description enabling the Government employee to locate the requested records. This requirement of identification is not to be used as a method of withholding records.

Subsection (c) contains a specific court remedy for any alleged wrongful withholding of agency records by agency personnel. The aggrieved person can bring an action in the district court where he resides, has his place of business, or in which the agency records are situated. The court may require the agency to pay costs and reasonable attorney's fees of the complainant as in other cases.

That the proceeding must be de novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion.

Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it. The private party can hardly be asked to prove that an agency has improperly withheld public information because he will not know the reasons for the agency action.

The court is authorized to give actions under this subsection precedence on the docket over other causes. Complaints of wrongful withholding shall be heard "at the earliest practicable date and expedited in every way."

Description of subsection (d)

This subsection provides that a record be kept of all final votes by agency members in every agency proceeding and that this record of votes be available to the public.

Agency practice in this area varies. This change makes the publication of final votes of agency members a uniform practice and provides the public with a very important part of the agency's decisional process.

Description of subsection (e)

Subsection (e) deals with the categories of matters which are exempt from disclosure under the bill. Exemption No. 1 is for matters specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. The change of standard from "in the public interest" is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase "public interest" in section 3(a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations, and it has served in many cases to defeat the very purpose for which it was intended—the public's right to know the operations of its Government. Rather than protecting the public's interest, it has caused widespread public dissatisfaction and confusion. Retention of such an exception in section 3(a) is, therefore, inconsistent with the general objective of enabling the public readily to gain access to the information necessary to deal effectively and upon equal footing with Federal agencies.

Exemption No. 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like.

Exemption No. 3 deals with matters specifically exempt from disclosure by another statute.

Exemption No. 4 is for "trade secrets and commercial or financial information obtained from any person and privileged or confidential." This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. It would also include information customarily subject to the doctor-patient, lawyer-client, lender-borrower, and other such privileges. Specifically it would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

Exemption No. 6 contains an exemption for "personnel and medical files, and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, etc., have great quantities of files, the confidentiality of which has been maintained by agency rule but without statutory authority. There is a consensus that these files should not be opened to the public, and the committee decided upon a general exemption rather than a number of specific statutory authorizations for various agencies. It is believed that the scope of the exemption is held within bounds by the use of the limitation of "a clearly unwarranted invasion of personal privacy."

The phrase "clearly unwarranted invasion of personal privacy" enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information. The application of this policy should lend itself particularly to those Government agencies where persons are required to submit vast amounts of personal data usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

Exemption No. 7 deals with "investigatory files compiled for law enforcement purposes." These are the files prepared by Government agencies to prosecute law violators. Their disclosure of such files, except to the extent they are available by law to a private party, could harm the Government's case in court.

Exemption No. 8 is directed specifically to insuring the security of our financial institutions by making available only to the Government agencies responsible for the regulation or supervision of such institutions the examination, operating, or condition reports prepared by or on behalf of, or for the use of such agencies.

Description of subsection (f)

The purpose of this subsection is to make it clear beyond doubt that all *materials* of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in subsection (e). Further, it is made clear that, because this section only refers to the public's right to know, it cannot, therefore, be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public.

Description of subsection (g)

This subsection provides a definition of the term "private party" which is not presently defined in the act being amended by this bill.

Description of subsection (h)

The 1-year period before this act goes into effect is to allow ample time for the agencies to conform their practices to the requirements of this act.

CONCLUSION

The committee feels that this bill, as amended, would establish a much-needed policy of disclosure, while balancing the necessary interests of confidentiality.

A government by secrecy benefits no one.

It injures the people it seeks to serve; it injures its own integrity and operation.

It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty.

For these reasons, the committee reports the bill with the recommendation that it be adopted, as amended.

CHANGES IN EXISTING LAW

Inasmuch as S. 1160 is new law, the provisions of subsection (4) of rule XXIX of the Standing Rules of the Senate are not applicable.