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Congress of the United States
House of Representatives

Washington, D.C. 20515

January 26, 1966

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Mr. John H. Colburn
Editor and Publisher
825 East Douglas
Wichita, Kansas 67201

30-5
Dole Bill
HR 12160

Dear John:

Thanks for your letter of January 20 concerning your interest in "freedom of information" legislation I introduced on January 19. My bill, H. R. 12160 is identical to those introduced by a number of other Republican House members, the basic difference being that these House bills would amend the general statutes, while the Senate bill appears to apply only to Administrative Procedures.

I am enclosing a copy of my bill, and also a statement by Congressman Rumsfeld of Illinois, a member of the Government Operations Committee who has done intensive research on this problem. Enclosing also, other material on the subject which may be of interest.

Frankly there would be no problem whatever in getting behind the Senate-passed bill. Actually, the main purpose of so many House Members joining in to introduce bills is to try to spur action on this issue, and to try to overcome Administration opposition to this legislation.

In addition to the enclosed information, I am also obtaining the hearings to forward to you under separate cover.

Sincerely yours,

Bob Dole, M. C.

BD:wk

January 5, 1966

MEMORANDUM TO: Minority Members
Foreign Operations and Government Information
Subcommittee

FROM: J. P. Carlson

SUBJECT: Comparison of S. 1160 with H. R. 5012 and
companion bills

Senate Bill 1160 was introduced by Senator Edward V. Long (D-Mo.) and 21 co-sponsors on February 7, 1965 and referred to the Senate Committee on the Judiciary on the same day that H.R. 5012 and companion bills were introduced in the House. S. 1160 passed the Senate on October 13, 1965 and by special dispensation was referred to the House Committee on Government Operations and thence to the same Foreign Operations and Government Information Subcommittee where H.R. 5012 has been languishing ever since its introduction.

While basically to the same effect, S. 1160 and H.R. 5012 are directed at different statutes each falling within the purview of a different Congressional committee. S. 1160 would amend 5 U.S.C. 1002, the Administrative Procedure Act and H.R. 5012 would amend 5 U.S.C. 22, Section 161 Revised Statutes, the so-called "housekeeping statute" of the Federal Government. This in itself is a distinction but makes no significant difference as far as establishing a public records law is concerned. As long as it is clear that the public information section of the Administrative Procedure Act is of universal applicability, it

makes little difference whether it is in Title 5 U.S.C. 22 or in the Administrative Procedure Act.

As a matter of fact, the public's right to know would appear more appropriately served by enactment of S.1160 than by enactment of H.R. 5012. The former specifically amends a section of the Administrative Procedure Act relied upon by Federal agencies to restrict access to records. H.R. 5012, in its Section 2, would merely repeal all laws or parts of laws inconsistent with the amendment proposed in its Section 1. H.R. 5012 was, of course, tailored for referral to the Committee on Government Operations and hence could not, as ideally it should, specifically amend the Administrative Procedure Act. However, the question of jurisdiction is now academic by the grace of the powers that be and both bills repose in the same subcommittee.

The Senate bill includes, with but one change in wording, the same categories of sensitive information which would be protected from disclosure by the House bill and adds the additional exemption:

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

The purpose of the added exemption 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."

The change in wording referred to is in Exemption No. 5 which in the Senate bill reads:

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

In comparison, the wording in the House bill is:

"(5) interagency or intra-agency memoranda or letters dealing solely with matters of law or policy;"

According to the Senate report, the purpose of the reworded exemption 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.

Beyond including practically the same basic provisions as the House bill, the Senate bill makes certain technical and clarifying amendments in existing law dealing with publication of material in the Federal Register and specifies what agency orders, opinions, and rules must be made available. The Senate bill also makes clear that nothing in any of the exemptions is to be construed as authorizing the withholding of information from the Congress.

S. 1160 would replace Section 3 of the Administrative Procedure Act with the wording of the bill. In so doing, the Senate bill would transform Section 3 of the Administrative Procedure Act from one protecting the right to necessary information of persons concerned with the administrative process of an agency to a general freedom of information statute.

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Because of the imprecision of the language, the present section has left considerable leeway for administrative discretion and instead of protecting the public's right to information, it has been frequently cited as authority for withholding information from the Congress, the press and the public. The deficiencies in the section were characterized by the Senate Committee on the Judiciary as follows:

"(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-barricaded 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."

The committee reported that 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."

A detailed analysis and critique of the provisions of the Senate bill is being prepared and will be forwarded at an early date.