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February 14, 1964

MEMORANDUM

TO: Senator

FROM: Legislative Department (C.F.N.)

SUBJECT: New Draft Version of S. 1666 (Bill to Amend the Administrative Procedure Act, 1946, Sec.3).

BASIC PROPOSED CHANGES

A new draft of S. 1666 will be considered by the Subcommittee on Administrative Practice and Procedure at a meeting Thursday, February 27, 10 A.M., 3107 NSOB. This version has been prepared by staff in light of the hearings last October and comments by Government agencies.

Major substantive alterations are aimed at preventing the release of information vital to national security or which might invade personal privacy of individuals. Also, foreign policy matters could by Executive Order be excluded from the public. In addition, such items as trade secrets, personnel files, medical files and investigatory files can be kept secret in agency files.

The language has been tightened up in several places, which should help in lessening room for misunderstanding. For instance, the insertion of the phrase "of general applicability" as modifiers of the words "rules" and "interpretations" are of this nature.

Judicial enforcement powers have been strengthened by authorizing the district court, in cases of non-compliance, to punish officers for contempt and by giving these proceedings precedence over all other causes.

SPECIFIC SECTIONAL CHANGES

Sec. 3(a)--Publication in the Federal Register.

This still requires publication in the Register of organizational descriptions, functional methods and substantive rules. The new draft also requires listing of the officers from whom and the places where information and forms may be obtained.

The substantive rules and interpretations which must be published are restricted in the new version to those which have general applicability.

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Whereas, the original bill provided that no person would be bound by any regulation, etc. which, although required to be, had not been published in the Register, the new draft makes this apply only to those who have not had actual notice of the terms thereof.

A major change in this section is provided in the definition of material which can be exempt from publication. U.S. functions requiring secrecy are redefined from those which are "in the public interest" to those which are for the protection of the national security.

Sec. 3(b) -- Agency Opinions, Orders, Rules.

Foreign policy matters are added to the list of purposes which the Executive is authorized to order secrecy for agency opinions, orders and rules.

The power of agencies to delete identifying details from publications is clarified and to some extent broadened by permitting deletions to prevent a clearly unwarranted invasion of personal privacy in addition to the original phrase, "to protect the public interest."

Sec. 3(c) -- Agency Records

The requirement that agency records must be made available to the public is modified in the following ways:

For clarification and emphasis, the adjective all is inserted before "records".

Several additional kinds of records are listed among those which agencies do not have to make available to the public, including the following:

- (1) specifically ordered by the Executive to be secret because of foreign policy;
- (2) trade secrets
- (3) intra-agency or inter-agency memoranda or letters dealing solely with matters of law or policy;
- (4) personnel files, medical files, etc., which might be unwarranted invasion of personal privacy;
- (5) investigatory files until certain actions have transpired.

The district court, upon complaint, is empowered to enjoin agencies from further withholding of agency records as well as to order the production of records and information.

If there is non-compliance with the court's order, a new sentence specifically authorizes punishment of officers for contempt.

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Judicial proceedings under this subsection are given precedence (unless the court deems other matters more important) on the district court docket over all other causes and must be assigned for earliest practicable hearing.

RECOMMENDATION

Although in several respects the new version would tend to enlarge to some extent the kinds and amount of material which could be suppressed, the basic guarantee of open access to public information would still be retained. The new limitations seem entirely reasonable, perhaps even desirable, and clarification of phraseology should be beneficial. I would recommend approval of the revised version of S. 1666.

CFN:egm