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Congress of the United States
House of Representatives
Washington, D.C. 20515

Bill
Prepare for introduction next year — also an appropriate statement

September 29, 1965

The Honorable Robert Dole
Room 243 C.H.O.B.
Washington, D. C.

Dear Colleague:

In view of the prospective action of the Republican Policy Committee criticizing the failure of the majority party to act on "Freedom of Information" legislation, you may be interested in having the attached copy of a brief memorandum on this subject prepared at my request by our Minority Counsel, J. P. Carlson.

Sincerely,

Florence P. Dwyer

FLORENCE P. DWYER

FPD/Ks

called again 1/6 should have legislation and recommended statement in next couple of days.

September 28, 1965

MEMORANDUM TO: Honorable Florence P. Dwyer

FROM: J. P. Carlson, Minority Counsel

Bills to establish a Federal public records law and to permit court enforcement of the people's right to know the facts of government were introduced February 17, 1965 by Senator Edward V. Long of Missouri and Congressman John E. Moss of California.

The legislation in question was introduced in the Senate by Mr. Long for himself, Mr. Bartlett, Mr. Bayh, Mr. Boggs, Mr. Burdick, Mr. Case, Mr. Dirksen, Mr. Erwin, Mr. Fong, Mr. Hart, Mr. Metcalf, Mr. Morse, Mr. Moss, Mr. Nelson, Mrs. Neuberger, Mr. Proxmire, Mr. Ribicoff, Mr. Smathers and Mr. Symington. (S.1160).

Identical bills (H.R. 5012, et al) have been introduced in the House by Mr. Moss, Mr. Fascell, Mr. Macdonald, Mr. Griffin, Mr. Reid of New York, Mr. Rumsfeld, Mr. Edmondson, Mr. Ashley, Mr. McCarthy, Mrs. Reid of Illinois, Mr. Gibbons, Mr. Leggett, Mr. Scheuer, Mr. Patten, Mr. Mosher, Mr. Edwards of Alabama, Mr. Widnall and Mr. Erlenborn.

These bills are based on S. 1666 which passed the Senate in the 88th Congress. There was no record vote but some measure of the breadth of the support for the measure is indicated by a list of the co-sponsors of the bill. S. 1666 was introduced by Mr. Long of Missouri

for himself and for Mr. Bartlett, Mr. Bayh, Mr. Boggs, Mr. Case, Mr. Dirksen, Mr. Gruening, Mr. Hart, Mr. Keating, Mr. Kefauver, Mr. Metcalf, Mr. Morse, Mr. Nelson, Mrs. Neuberger, Mr. Proxmire, Mr. Ribicoff, Mr. Smathers and Mr. Symington.

The Senate debate on the bill was limited to the supporting statements of Mr. Long and Mr. Dirksen. The latter described the essence of the bill as he concluded with the statement:

> "Mr. President, this bill to revise section 3 of the Administrative Procedure Act is one step along the way of our difficult journey through the labyrinth of administrative procedure. It takes some of the twists and turns and some of the blind alleys out of those procedures. It will permit the people of this country to move with greater understanding and knowledge along a less tortuous path in their dealings with the Government. This is an essential step unless we wish to perpretuate (sic) the wall which the zealous Government servants have built around their actions -- a wall which divides the people from their Government and which should be torn down." (C.R., July 28, 1964, p. 16515).

S. 1666 was a bill to amend the Administrative Procedure Act and so was referred to the Judiciary Committee where it died with the adjournment of the 88th Congress.

While H. R. 5012 is intended to have the same effect as S. 1666, it is framed so as to amend Section 161 of the Revised Statutes (5 U.S.C. 22) rather than the Administrative Procedures Act and thus in accordance with at least one recent precedent was referred to the Committee on Government Operations and thence to the Moss Subcommittee.

The recent precedent mentioned above was H.R. 2767 of the 85th Congress which became Public Law 85-619 and added the following sentence to 5 U.S.C. 22:

"This section does not authorize withholding information from the public or limiting the availability of records to the public".

The amendment was not intended to make 5 U.S.C. 22 a public records law but merely to neutralize it as statutory authority to withhold information.

H. R. 5012 would replace the foregoing "negative" sentence with a "positive" statement requiring all departments and agencies to make all records "promptly available to any person" subject to certain exceptions authorized by the bill and also would permit court enforcement of the people's right to know. Thus the proposed legislation would actually establish the section as a public records law. As Senator Long stated in the Senate debate "there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure".

The substitution of a "positive" emphasis for a "negative" one and the permission of court enforcement of the right to know should tend to provide a more salubrious climate for Freedom of Information.

The protected categories are matters:

"(1) specifically required by 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 any agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from the public and privileged or confidential;

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

(6) personnel and medical files and similar matters 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 private party; and

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

Hearings on these bills were held for five days this year -- March 30, 31, April 1, 2 and 5. Since then a pall of silence has been spread over the information activities of the subcommittee. The subcommittee staff, presumably with the advice and assistance of the Executive Department, has yet to come up with a draft which will satisfy the members of the subcommittee. Reportedly the bill has now gone through at least eight drafts none of which has met the approval of the subcommittee. From the record of the hearings one thing is clear: The Executive Branch, as might have been expected, is opposed to the bill. The basic thrust of this opposition was that it would disturb "the inherent authority of the Executive Branch to govern the disclosures and non-disclosures of its records". Apparently the subcommittee has been paralyzed by this questionable contention.

If there is such a thing as "Executive Privilege" in this regard, it is only inherent in the proper exercise of the President's Constitutional duties and is probably limited to instances where the safety of the nation is involved.

H. R. 5012 gives full recognition to this possibility when it exempts from availability to the public matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy".

While some redrafting of the legislation may be indicated, H.R. 5012 is essentially a good bill. By present policy the burden of getting information from an agency that wishes to withhold it has been on the public and the press when information sought is withheld. H. R. 5012 shifts the burden to the agency; for under this bill, it can at least be forced to make public its reasons for withholding information, on those occasions when it chooses to do so.

The proposed legislation specifically recognizes certain generally agreed upon categories of information which should be withheld while providing what Mr. Moss describes as an "enforceable right of access to the rest of the facts of government"--an objective compatible with the right of people in a democracy to knowledge about the public's business.

The need for a well-informed public, the protection of certain government information, and the right of individual privacy are all implicated. The bill seems a reasonable compromise of the conflicting views involved and the subcommittee should be urged to hold firm in the face of Executive Branch objections. The balances need not be weighted any more in the direction of Executive discretion.