ATTORNEY GENERAL'S MEMORANDUM
ON THE
PUBLIC INFORMATION SECTION
OF THE
ADMINISTRATIVE PROCEDURE ACT

A MEMORANDUM FOR THE
EXECUTIVE DEPARTMENTS AND AGENCIES
CONCERNING SECTION 3 OF THE
ADMINISTRATIVE PROCEDURE ACT
AS REVISED EFFECTIVE JULY 4, 1967

UNITED STATES DEPARTMENT OF JUSTICE
RAMSEY CLARK, *Attorney General*
June 1967

STATEMENT BY PRESIDENT JOHNSON
UPON SIGNING PUBLIC LAW
89-487 ON JULY 4, 1966

The measure I sign today, S. 1160, revises section 3 of the Administrative Procedure Act to provide guidelines for the public availability of the records of Federal departments and agencies.

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is -- and should be -- free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources.

Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.

I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest.

I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.

FOREWORD

If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.

Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.

Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.

Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:
-- that disclosure be the general rule, not the exception;
-- that all individuals have equal rights of access;
-- that the burden be on the Government to justify the withholding of a document, not on the person who

requests it;
-- that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;
-- that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself -- in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

". . . a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest . . . I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89-487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967.

SPECIAL NOTICE CONCERNING CODIFICATION

As this memorandum went to press, Public Law 90-23 had just been enacted. That law amends section 552 of title 5, United States Code, to codify the provisions of Public Law 89-487. While the codification does not make substantive changes from Public Law 89-487, it makes about 100 changes in language, captioning, structure, and organization designed to conform the text to the other provisions of title 5 as codified in 1966.

Since all agencies must publish regulations under the new law by July 4, 1967, no attempt has been made to adapt this memorandum to the codified text. Such adaptation also seems inadvisable for other important reasons. A principal function of this memorandum is the correlation of the text of Public Law 89-487 with its relevant legislative history. The text of that legislative history is replete with references to phraseology and subsection designations in the act which are changed in the codification. Moreover, for almost a year the act has been discussed by those dealing with it by reference to the terms of its original enactment. Use of this

memorandum by those who are charged with preparing and applying agency regulations would be hampered by shifting to the new phraseology and subsection designations in this memorandum.

Therefore, since the relevant committee reports make clear that the codification does not change the meaning of the originally enacted text, this memorandum will refer to the law in terms of the original text of Public Law 89-487. See S. Rept. No. 248, 90th Cong., 1st Sess., p. 3; H. Rept. No. 125, 90th Cong., 1st Sess., p. 1. Appendix A sets forth the full text of Public Law 90-23 in parallel column with the full text of Public Law 89-487. Appendix B in tabular form shows the relationship of their respective subsections.

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THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT

On July 4, 1966, President Johnson signed Public Law 89-487, which amends section 3, the "public information" section of the Administrative Procedure Act (the "APA").[(1)] The amendment, which

becomes effective on July 4, 1967, provides for making information available to members of the public unless it comes within specific categories of matters which are exempt from public disclosure. Agency decisions to withhold identifiable records requested under subsection (c) of the new law are subject to judicial review.

As the legislative history of the revised section 3 shows, dissatisfaction with the former section centered on the fact that it was not a general public information law and did not provide for public access to official records generally. That section, of course, was not a "public information" statute despite its title. It permitted withholding of agency records if secrecy was required either in the public interest or for good cause found. It was an integral part of the APA, and it required disclosure only to persons properly and directly concerned with the subject matter of the inquiry.

The revised section 3, on the other hand, is clearly intended to be a "public information" statute. The overriding emphasis of its legislative history is that information maintained by the executive branch should become more available to the public. At the same time it recognizes that records which cannot be disclosed without impairing rights of privacy or important operations of the Government must be protected from disclosure.

The report of the Senate Committee on the Judiciary (S. Rept. No. 813, 89th Cong., 1st Sess., p. 3)[(2)] describes the need for delicate balancing of these competing interests as follows:

> "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."

The Congress was aware that the decision to withhold or disclose particular records cannot be controlled by any detailed classification of all official records, but has to be effected through countless ad hoc judgments of agency officials, each intimately familiar with the particular segments of official records committed to his responsibility. Those executive judgments must still be made, for Congress did not attempt to provide in the revised section a complete, self-executing verbal formula which might automatically determine all public information questions. Indeed, the staggering variety of Government records makes such a formula unattainable. The revised section, instead, establishes in subsection (e) nine general categories of records which are exempt from disclosure. These categories provide the framework within which executive judgment is to be exercised in deciding which official records must be withheld.

Upon signing Public Law 89-487 the President stated:

> "I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the

language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

"I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted.

"I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest."

This is the spirit in which agency officials are expected to construe and apply the limitations of subsections (a) and (b) and the nine exemptions of subsection (e). Agencies should also keep in mind that in some instances the public interest may best be served by disclosing, to the extent permitted by other laws, documents which they would be authorized to withhold under the exemptions.

Prior to July 4, 1967, every agency should issue rules in which it describes, to the extent feasible, which of its records are within the requirements of the statute, where they may be inspected, the procedures to be followed in requesting access, the opportunities for administrative appeal, the fees to be charged, the stage at which records involved in matters in process are to be available, and whatever other considerations may be involved in achieving the statutory objectives.

STRUCTURE OF THE REVISED SECTION 3

The revised section 3 consists of a general introductory clause discussed below, followed by eight subsections, (a) through (h). Each of the first four subsections, (a) through (d), establishes specific requirements for the publication or disclosure of different kinds of documents or information. Subsection (a) lists only those materials which must be published in the Federal Register. Subsections (b) and (d) describe materials which must be made available for public inspection or copying. Subsection (c) concerns requests for "identifiable records" which must be made available upon the request of any person. Each of the first three subsections contains its own sanction for noncompliance.

Subsections (a) and (b) contain, within the description of the materials to which they apply, explicit limitations upon what must be published or made available. For example, subsection (b) (C), which requires staff manuals and instructions to staff to be made available, is limited to "administrative" manuals and instructions, and to those which "affect any member of the public."

Subsection (e) declares that none of the provisions of section 3 shall be applicable to nine listed categories of matters. In its original form, the bill (S. 1160) provided exemptions in each subsection, designed to apply only to that subsection. The Senate subcommittee found that such approach resulted in inconsistencies. After considerable effort to tailor the standards established by the exemptions to the particular subsection to which they were to apply, the subcommittee decided to consolidate all of the exemptions in subsection (e), including in the earlier subsections the several limitations referred to above to meet the special needs of the requirements of each of those subsections.

Thus the exemptions of subsection (e) apply across the board and govern all of the materials described in subsections (a), (b), (c), and (d). Accordingly, materials which are exempted under subsection (e) need not either be published in the Federal Register or made available upon request or otherwise. It is important to bear this in mind in considering the discussion which follows.

THE INTRODUCTORY CLAUSE

"Sec. 3. Every agency shall make available to the public the following information:"

AGENCIES SUBJECT TO THE ACT

By its first two words, the introductory clause of the enactment makes it clear at the outset that its requirements are to apply to every department, board, commission, division, or other organizational unit in the executive branch. This results from the definition of the term "agency" in section 2(a) of the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency,' excluding Congress, the courts, and the governments of the territories and possessions and of the District of Columbia.

ELIMINATION OF PREVIOUS GENERAL EXCEPTIONS

The introductory language of the previous section 3 established two general exceptions from all of its requirements. That language was as follows: "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 . . . ."

The revision begins instead with an affirmative direction to all agencies to make official information available to the public, thus proclaiming at the outset "a general philosophy of full agency disclosure" (S. Rept., 89th Cong., 3), and establishing the fundamental character of the revision as a "disclosure statute" rather than a "withholding statute" (S. Rept., 89th Cong., 5).

SUBSECTION (a) -- PUBLICATION IN THE FEDERAL REGISTER

> "(a) PUBLICATION IN THE FEDERAL REGISTER. -- Every agency shall separately state and currently publish in the Federal Register for the guidance of the public. . . ."

Subsection (a) concerns only materials which must be published in the Federal Register. Its general objective is to enable the public "readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies." (S. Rept., 88th Cong.,3.)

The report of the Senate committee, together with the Senate hearings on the bill, indicate that there were "few complaints about omission from the Federal Register of necessary official material." The comments received concerning Federal Register publication indicated "more on the side of too much publication rather than too little." (S. Rept., 89th Cong., 6.) Accordingly, the revised subsection contains provisions which permit incorporation by reference in the Federal Register of material "which is reasonably available" elsewhere, and avoid the necessity for "the publication of lengthy forms." It also incorporates "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." (S. Rept., 88th Cong., 11.)

The two principal changes in subsection (a) result from (1) the elimination of the previous general exceptions, and (2) the tightening of the sanction for failure to publish materials required to be published. In addition to the provision that no one shall be required to resort to materials which the agency has failed to publish, the revised subsection provides that no person shall be "adversely affected" by such materials, unless he has actual notice hereof.

SUBSTITUTION OF EXEMPTIONS FOR THE PREVIOUS EXCEPTIONS

The previous subsection (a), like the other subsections of the previous section 3, was subject to the two general exceptions for "(1) any function of the United States requiring secrecy in the public interest" and "(2) any matter relating solely to the internal management of an agency." Further, it required the publication of only those statements of general policy and interpretations which were "adopted by the agency for the guidance of the public."

The revision eliminates these exceptions and relies upon the exemptions set forth in subsection (e) to distinguish the items listed in subsection (a) which should be published from those which should not. The words "for the guidance of the public," which still appear in the subsection, now explain the purpose of Federal Register publication of all material covered by subsection (a).

The considerations involved in determining what documents should be published in the Federal Register for the guidance of the public under subsection (a) obviously are very different from the judgments required in determining whether a particular record appropriately can be disclosed to a person who requests access to it under subsection (c). In meeting the requirements of subsection (a), the problem generally is to select, from a variety of information that anyone may see, material which is useful for the guidance of the public and therefore should be published. Under subsection (c), on the other hand, the question is to determine whether disclosure will injure a public or private interest intended to be protected under the act.

The difficulties inherent in applying the subsection (e) exemptions to all of the various judgments required under subsections (a), (b), (c), and (d) not only necessitate commonsense constructions of the exemptions: they also increase the necessity for determining precisely what is to be included within each of the items listed in each of those subsections. For example, unless the limitations spelled out in subsection (a) are sensibly construed and applied, concern about the "tightened sanction" against nonpublication could lead to publication of many documents which are of no interest to the public and only serve to aggravate the problem of "too much publication."

In the case of a few agencies, national defense considerations may preclude substantial compliance with any of the requirements of subsection (a). In other cases, foreign policy considerations may limit the extent to which an agency is able to comply with the subsection (a) requirements. If in such cases classification under Executive Order 10501 or statutory or other authority does not afford an exemption from the requirements of this subsection, the agency should seek appropriate exemption by Executive order under subsection (e)(1).

The second exemption in subsection (e), for matters "related solely to the internal personnel rules and practices of any agency," is similarly important in applying the requirements of subsection (a). Its derivation from the previous internal management exception makes it clear that it is intended to relieve from the Federal Register publication requirements all matters of personnel administration. Such matters include personnel policies, interpretations respecting personnel questions, personnel administration forms and procedures, statements of the course and method by which personnel management functions are performed, regulations or general orders concerning the conduct of military personnel, and all other internal matters of personnel administration which do not involve the general public. The Senate report cites as examples "rules as to personnel's use of parking facilities or regulation of lunch hours, statements of policy as to sick leave, and the like." (S. Rept., 89th Cong., 8.)

However, it is apparent from the legislative history of exemption (2) that it is intended to relieve from the requirements of the revision -- and therefore from the publication requirements of subsection (a) -- much more than internal documents relating to matters of personnel administration. Congressman Gallagher explained on the House floor that exemption (2) is intended to protect from disclosure such documents as income tax auditors' manuals. (112 Cong. Rec. 13026, June 20, 1966). Similarly, the House report explains that although this exemption "would not cover all 'matters of internal

management' . . .," it would exempt from public disclosure such matters as "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." (H. Rept., 10.)

Thus, in discussing each of the major requirements of subsection (a), it is important to keep in mind the possible applications of each of the subsection (e) exemptions, as well as the limitations spelled out in subsection (a) itself.

DESCRIPTIONS OF AGENCY ORGANIZATION

> "Every agency shall separately state and currently publish in the Federal Register for the guidance of the public (A) descriptions of its central and field organization and the established places at which, the officers from whom, and the methods whereby, the public may secure information, make submittals or requests, or obtain decisions;"

The previous section 3(a)(1) required that every agency separately state and currently publish in the Federal Register descriptions of its central and field organization "including delegations by the agency of final authority," and descriptions of where the public can obtain information. The revision deletes the requirement that such delegations be published, leaving to each agency discretion to determine what delegations it should include in its descriptions of agency organization. The only other changes in the provision add the words "the officers from whom" and the words "or obtain decisions" to the requirement that the public be advised as to where to obtain information. In general, the amendments embodied in the revision of section 3(a)(A) should result in little, if any, change from previous practice.

The Office of the Federal Register suggests that publication of organizational information in the United States Government Organization Manual should not be regarded as a substitute for, but merely a useful supplement to, the requirement to "currently publish" such information in the Federal Register.

METHODS OF OPERATION

> "Every agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;"

This language is almost unchanged from the previous section 3 and apparently is intended to effect little change in present practice concerning the publication of statements of the general course and method by which agency functions are performed. Although the revision substitutes the exceptions in subsection (e) for the previous general exceptions to section 3, nothing in either the Senate or House reports on S. 1160 or the explanations offered on the House floor suggests any change in the functions to which this publication requirement is to apply. The reports explain that the purpose of these provisions 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." (S. Rept., 89th Cong., 6; H. Rept., 7.) These provisions are intended to make available useful information concerning agency functions which are of concern to the public.

While exemption (2) in subsection (e) excludes matters of personnel administration and operating instructions, guidelines, manuals, and other materials which are for the use of agency staff only, it does not exclude all matters of internal management. (H. Rept., 10.) With respect to the "course and method" by which internal management functions are "channeled and determined," the criterion for publication is whether the particular "course and method" is of concern to the public. For example, procurement and other public contract functions and, in some cases, surplus property disposal functions are matters in which members of the public have an interest, whereas information concerning other proprietary

functions usually would not be useful to the public. To the extent that internal management functions are of substantial interest to the public, agencies should describe in the Federal Register the methods they employ in performing those functions. Of course, functions such as adjudication, licensing, rulemaking, and loan, grant, and benefit functions, are within the publication requirement of section 3(a)(B), except as they may be exempted under subsection (e).

General course and method. -- The subsection requires agencies to disclose, in general terms designed to be realistically informative to the public, the manner in which matters for which it is responsible are initiated, processed, channeled, and determined. In the case of functions exercised so seldom that it is not practicable to prescribe a definite routine, the published information should be as complete as may be feasible, identifying at least the title of the official who has responsibility for such matters and the office to which inquiries may be directed. The provision does not require an agency to "freeze" its procedures, or to invent procedures where it has no reason to establish any fixed procedure. However, any change in published statements of course and method should be announced in the Federal Register to assure that the public is currently informed.

Formal and informal procedures available. -- Particularly in light of the revised provision governing the effect of failure to publish required materials in the Federal Register, agencies should reexamine their present published statements as to the nature and requirements of all formal and informal procedures to assure that their published materials fully apprise members of the public of their rights and opportunities. For example, if an agency provides opportunity to any member of the public for an informal conference on a matter within its jurisdiction, the fact that the practice exists should be stated in the Federal Register with a view both to serving the convenience of the public and facilitating the agency's operations. Such procedures exist widely and are known to the specialized practitioner. The general public should be informed as to their availability and how and where to take advantage of them.

(C) PROCEDURAL INFORMATION

> "Every agency shall separately state and currently publish in the Federal Register for the guidance of the public . . .(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;"

Rules of procedure. -- Although the previous section 3 made no reference to "rules of procedure," such rules had to be published in the Federal Register because that section provided that no person was to be required to resort to procedure which was not published. The new requirement that "rules of procedure" be published is therefore merely a restatement of the previous requirement. However, both the Senate and House committees found instances in which agencies had not issued necessary rules of practice and procedure, had not published rules which had been issued, and had not kept published rules up to date. Such deficiencies should be remedied.

Forms. -- To meet the problem of "too much publication," the revision relaxes somewhat the requirement concerning the publication of forms, giving the agencies broad discretion to determine what constitutes appropriate publication. Whereas the previous section 3(a)(2) required agencies to publish in the Federal Register statements of the "nature and requirements" of forms, the revised provision only requires publication of either "descriptions of forms available" or "the places at which forms may be obtained." The change is intended "to eliminate the need of publishing lengthy forms." (S. Rept., 89th Cong., 6.) However, it will usually be useful to the public to publish an up-to-date list of forms showing the heading, the number (if any) and the date of the most recent version, in addition to the place where the forms may be obtained. The subsection, of course, does not require the creation of special forms for every type of relief which might be sought.

Section 3(a)(C) concerns only rules, forms, instructions, etc., which are to be used by the public. It does not require publication in the Federal Register of internal management forms and similar materials.

(D) SUBSTANTIVE RULES, POLICIES, AND INTERPRETATIONS

> "Every agency shall separately state and currently publish in the Federal Register for the guidance of the public. . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;"

Section 3(a)(D) involves three changes. First, it applies only to substantive rules and interpretations "of general applicability." Second, it deletes the phrase "but not rules addressed to and served upon named persons in accordance with law. Third, it deletes the phrase "for the guidance of the public," which now appears at the beginning of subsection (a). Deletion of the latter phrase at this point is designed to require agencies to disclose general policies which should be known to the public, whether or not they are adopted for public guidance.

The first two changes are intended to be formal only. Ordinarily an agency would not adopt a rule or interpretation for publication in the Federal Register unless it is "of general applicability," which would exclude rules addressed to and served upon named persons. Thus, an agency is not required under subsection (a) to publish in the Federal Register the rules, policies and interpretations formulated and adopted in its published decisions. Instead, this "case law" is to be "made available under subsection (b)." (H. Rept., 7.)

Consistent with the purpose of all of subsection (a) to enable the public "to find out where and by whom decisions are made in each Federal agency and how to make submittals or requests" (H. Rept., 7), rules, policy statements, and interpretations as to matters which do not concern the general public are to be omitted from the Federal Register. For example, agency rules governing the use of employee parking facilities and agency policy relative to sick leave are outside the requirements.

To the extent that rules, policy statements, and interpretations must be kept secret in the interest of the national defense or foreign policy but are not required to be withheld by Executive order or other authority, agencies should accommodate to the statutory plan by seeking an appropriate exemption by Executive order in accordance with subsection (e)(1).

Although the Senate committee expressed the view that rules of particular applicability "such as rates" have no place in the Federal Register (S. Rept., 88th Cong., 4), there is no requirement that all rate schedules be omitted. Frequently, rates are collected by a single utility, but are paid by and therefore may be of interest to a broad spectrum of the public. In some instances an agency may find it desirable to publish such rates in the Federal Register even in the absence of any requirement.

(E) AMENDMENTS

> "Every agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . (E) every amendment, revision, or repeal of the foregoing."

"The new clause (E) is an obvious change, added for the sake of completeness and clarity." (S. Rept., 89th Cong., 6.)

FORCE AND EFFECT OF UNPUBLISHED MATERIALS

> "Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the Federal Register and not so published."

The previous subsection 3(a), like the revision, required publication in the Federal Register of substantive rules, statements of policy, and interpretations, in addition to information concerning agency organization and procedures. However, the previous provisions relating to failure to publish required materials applied only to materials concerning organization and procedure. It provided that no person shall be required "to resort to organization or procedure" not published in the Federal Register. Notwithstanding its finding that complaints with respect to Federal Register publication "have been more on the side of *too much* publication rather than *too little"* (S. Rept., 88th Cong., 11), the Senate committee decided that the revision should afford "added incentive for agencies to publish the necessary details about their official activities." Accordingly it added the provision that no person shall be "adversely affected" by any matter required to be published in the Federal Register and not so published.

In its report in the 88th Congress, the Senate committee explained with respect to this change that the "new sanction explicitly states that those matters required to be published and not so published shall be of no force or effect and cannot change or affect in any way a person's rights." (S. Rept., 88th Cong., 12.) Of course, not all rules, policy statements, and interpretations issued by Federal agencies impose burdens. The Senate committee, apparently acknowledging this fact, decided after issuing its report in the 88th Congress, that the "new sanction" should apply only to matters which impose an obligation on persons affected, and not to matters which benefit such persons. Since the provision did not, in fact, "explicitly" state that unpublished materials are to be "of no force or effect," no change in the provision was necessary to reflect the committee's revised intention. All that was needed was a change in the explanation in the Senate committee report. Accordingly, the Senate committee report issued in the 89th Congress and the House report omit any reference to the "force and effect" of unpublished materials and explain only that no person shall be "adversely affected" by such matters. (S. Rept., 89th Cong., 6; H. Rept., 7.)

From the revised explanation it is evident that the new provision enlarges upon the corresponding provision of the original section 3. It applies not only to organization and procedure, but also to the other items within the publication requirements of subsection (a) -- substantive rules, statements of policy, and interpretations. However, the new sanction operates only to relieve persons of obligations imposed in materials not published, and not to deny them benefits.

In any case, actual and timely notice cures the defect of nonpublication, and "a person having actual notice is equally bound" as a person having constructive notice by Federal Register publication. "Certainly actual notice should be equally as effective as constructive notice." (S. Rept., 88th Cong., 4.)

INCORPORATION BY REFERENCE

> "For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register."

In its report the Senate committee found that there are "many agencies whose activities are thoroughly analyzed and publicized in professional or specialized services, such as Commerce Clearing House, West publications, etc. It would seem advantageous to avoid the repetition of much of this material in the Federal Register when it can be incorporated by reference and is readily available to interested members of the public. This is one way in which the Federal register can be kept down to a manageable size." (S. Rept., 88th Cong., 4)

It should be noted, however, that incorporation by reference is not a substitute for actual publication in the Federal Register except to the extent permitted by the Director of the Federal Register. See rules of the Director, 32 F.R. 7899, June 1, 1967, 1 C.F.R. Part 20.

Standard of what is "reasonably available." -- To meet this test the material incorporated must be set forth substantially in its entirety in the public or private publication and not merely summarized or printed as a synopsis. Also, if the publication to be incorporated is a private publication, it should be readily available to the class of persons affected thereby, and not be difficult for them to locate.

Sufficiency of reference. -- For purposes of this provision, the Senate report explains that the term "incorporation by reference" contemplates "(1) uniformity of indexing, (2) clarity that incorporation by reference is intended, (3) precision in description of the substitute publication, (4) availability of the incorporated material to the public, and, most important, (5) that private interests are protected by completeness, accuracy, and ease in handling." The provision is not intended to permit the incorporation of materials the "location and scope" of which are familiar to "only a few persons having a special working knowledge of an agency's activities." (S. Rept., 88th Cong., 5.)

SUBSECTION (b) -- PUBLIC AVAILABILITY OF OPINIONS, ORDERS, POLICIES, INTERPRETATIONS, MANUALS, AND INSTRUCTIONS

> "(b) AGENCY OPINIONS AND ORDERS. -- Every agency shall, in accordance with published rules, make available for public inspection and copying . . . ."

In the previous section 3, subsection (b) related only to "final opinions or orders in the adjudication of cases." Although the heading of the revised subsection (b) is "Agency opinions and orders," it enlarges the scope of the subsection by adding "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register" and "administrative staff manuals and instructions to staff that affect any member of the public."

The extended coverage of the subsection is explained in the House report as follows:

> "In addition to the orders and opinions required to be made public by the present law, subsection (b) of S. 1160 would require agencies to make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public. This material is the end product of Federal administration. It has the force and effect of law in most cases . . . .
>
> "As the Federal Government has extended its activities to solve the Nation's expanding problems -- and particularly in the 20 years since the Administrative Procedure Act was established -- the bureaucracy has developed its own form of case law. This law is embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies. This is the materia] which would be made available under subsection (b) of S. 1160." (H. Rept., 7.)

AGENCY RULES GOVERNING AVAILABILITY

All of the materials to which subsection (b) applies are of the kinds which would ordinarily be available in a public reading room if one is provided by the agency. Some agencies may find the operation of one or more such facilities the easiest and most practicable way of complying with the requirements of subsection (b). Others may find different means of making materials available more satisfactory.

Every agency is required by the subsection to publish rules which should deal, at least, with (1) access to the items listed in the subsection, (2) deletion of identifying details, as provided in the subsection, (3) the availability of copies, and (4) the maintenance of a current index. Charges should not be made for the

normal use of reading rooms or other similar facilities for examination of information of the type required by subsection (b) to be made available for public inspection. Charges should be made, however, to recover the costs of any search of records or of duplicating, reproducing, certifying, or authenticating copies of all documents, whether the documents are located in the reading room or in storage warehouses. (S. Rept., 88th Cong., 6.)

The only charges in connection with materials on file in reading rooms and similar facilities should be the actual cost of duplicating or copying materials where copies are requested. "Subsection (b) requires that Federal agency records which are available for public inspection also must be available for copying, since the right to inspect records is of little value without the right to copy them for future reference. Presumably, the copying process would be without expense to the Government since the law (5 U.S.C. 140) already directs Federal agencies to charge a fee for any direct or indirect service such as providing reports and documents." (H. Rept., 8.)

INCLUSION OF MATERIALS NOT SUBJECT TO THE REQUIREMENTS

The basic purpose of subsection (b) is "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies." (S. Rept., 88th Cong., 12.) Yet the subsection does not require access to or the indexing of all of the materials which may be useful to further this purpose. Statements of policy and agency interpretations which are published in the Federal Register pursuant to the requirements of subsection (a) are specifically exempt from the requirements of subsection (b), including the indexing requirement of the latter subsection. In establishing procedures and facilities for making subsection (b) materials available, however, agencies should keep in mind the basic purposes of the subsection and include whatever materials may provide "essential information." A reading room, for instance, will be more useful if it provides ready reference to all rules and policy statements which have been published in the Federal Register.

(A) FINAL OPINIONS AND ORDERS

> "(b) AGENCY OPINIONS AND ORDERS. -- Every agency shall, in accordance with published rules, make available for public inspection and copying (A) all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases . . . ."

The term "order" is defined in section 2(d) of the APA as the whole or a part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in any matter other than rulemaking. Thus the term includes every final action of an agency except the issuance of a rule.

Neither the previous section 3 nor the revised section contemplates the public availability of every "order," as the word is thus defined. The expression "orders made in the adjudication of cases" is intended to limit the requirement to orders which are issued as part of the final disposition of an adjudicative proceeding.

The sanction applicable to subsection (b) is set forth in its last sentence:

> "No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof."

The scope of this sanction seems to limit the effective reach of subsection (b) to those orders which may have precedential effect. Other orders, of course, may be requested under subsection (c). However,

keeping all such orders available in reading rooms, even when they have no precedential value, often would be impracticable and would serve no useful purpose. It should also be noted that subsection (b) expressly provides that it shall not apply to any opinion or order which is "promptly published and copies offered for sale." This is to afford the agency "an alternative means of making these materials available through publication." (S. Rept., 89th Cong., 7.)

The term "opinions" relates only to those issued with and in explanation of "orders made in the adjudication of cases." The words "concurring and dissenting opinions" were added to the previous requirement "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." (S. Rept., 89th Cong., 7.)

(B) STATEMENTS OF POLICY AND INTERPRETATIONS WHICH ARE NOT PUBLISHED IN THE FEDERAL REGISTER

> "Every agency shall. ..make available for public inspection and copying. ..(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register. . .,"

Whereas subsection (a) requires publication in the Federal Register of statements of general policy or interpretations of general applicability, subsection (b) covers statements and interpretations which are not of general applicability, but which the agency may rely upon as precedents. The policy statements and interpretations included within this provision are only those which have been adopted by the agency itself, or by a responsible official to whom the agency has delegated authority to issue such policy statements and interpretations. The provision in subsection (b) respecting the deletion of "identifying details" applies to such matters.

The House report (H. Rept., 7) emphasizes, however, that under the new language of section 3(b)(B), "an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases." (H. Rept" 7.)

(C) MANUALS AND INSTRUCTIONS

> "Every agency shall . . . make available for public inspection and copying . . . (C) administrative staff manuals and instructions to staff that affect any member of the public. . . ."

Standards established in agency staff manuals and similar instructions to staff may often be, for all practical purposes, as determinative of matters within the agency's responsibility as other subsection (b) materials which have the force and effect of law. In accordance with the basic purpose of subsection (b), "to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies" (S. Rept., 88th Cong., 12), subsection 3(b)(C) requires the public availability of "administrative" staff manuals and instructions to staff if they "affect any member of the public." The exemptions of subsection (e) apply.

Limitation to "administrative" materials. -- The hearings in both the Senate and the House refer to a number of instances in which agency manuals and similar materials contain confidential instructions to agency staff which must be protected from disclosure if they are to serve the purpose for which they are intended. For example, agency instructions to contracting officers governing the outer limits of what they may concede on behalf of the Government in negotiating a contract cannot be disclosed to private contractors without rendering fair negotiation virtually impossible. Similar problems exist in connection with instructions to agency personnel as to (1) the selection of samples in making "spot investigations,"

(2) standards governing the examination of banks, the selection of cases for prosecution, or the incidence of "surprise audits," and (3) the degree of violation of a regulatory requirement which an agency will permit before it undertakes remedial action.

Congressional recognition of these goals is shown by the limitation of section 3(b)(C) to what the draftsmen have designated "administrative" manuals and instructions as distinguished from those which contain confidential instructions. The Senate report (S. Rept., 89th Cong., 2) states that "The limitation . . . to administrative 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." The House report (at pp. 7-8) explains that "an agency may not be required to make available those portions of its staff manuals and instructions which set forth criteria or guidelines for the staff in auditing or inspection procedures, or in the selection or handling of cases, such operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases."

All agencies should reexamine all manuals, handbooks, and similar instructions to staff which have been used only internally, to ascertain whether they include standards and instructions which necessarily cannot be disclosed to the public. After any confidential standards and instructions are deleted, documents containing "essential information" of the kind sought to be made available to the public by section 3(b)(C) should be included in the public index and made available for public inspection and copying, or published and offered for sale, unless they come within one of the exemptions of subsection (e).

Limitation to materials which "affect the public". - Consistent with the general purpose of subsection (b), section 3(b)(C) is not intended to apply to materials which do not concern the public. For example, manuals on property or fiscal accounting, vehicle maintenance, personnel administration, and most other "proprietary" functions of agencies which do not affect the public would be excluded from the requirement of subsection 3(b)(C).

EXCEPTION OF MATERIALS OFFERED FOR SALE

> "Every agency shall, in accordance with published rules, make available for public inspection and copying. . . unless such materials are promptly published and copies offered for sale."

To provide agencies with "an alternative means of making these materials available" (S. Rept., 89th Cong., 7), materials listed in clauses (A), (B), and (C) of subsection (b) which are "promptly published and copies offered for sale" are not subject to the requirement that they be included in a public reading room or otherwise be made available for public inspection and copying. This should not be construed to exclude materials offered for sale from the indexing requirement set forth later in subsection (b). As with materials published in the Federal Register, if a reading room is maintained, it would be helpful to the public if a copy of materials published and offered for sale were made available for examination in such a room. Of course, there would be no requirement to reproduce such materials since copies could be purchased.

DELETION OF IDENTIFYING DETAILS

> "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction: *Provided,* That in every case the justification for the deletion must be fully explained in writing."

Throughout their consideration of S. 1160, the Senate and House committees were acutely aware of the need, in enacting any public records statute, to avoid any public disclosure of information which might

result in an unwarranted invasion of privacy. At the same time, the public may need access to the statement of principles and standards, and the rationale and explanation of agency policy, set forth in agency decisions which determine private rights and obligations.

Accordingly, subsection (b) contains a special provision designed to make these matters available to the public but authorizing the deletion of "identifying details" in particular cases where disclosure of these details would result in an invasion of the privacy of the parties or other persons concerned. This special provision, as it relates to section 3(b)(A), makes a distinction between "opinions" and "orders," since it refers to the former and not the latter. The provision apparently contemplates that a statement of principles and reasoning may be set forth in an "opinion" issued with an order, and that the "order" itself is merely a summary statement of the agency's final action in the adjudication of a case. If disclosure of an order in a case file would constitute a clearly unwarranted invasion of personal privacy, the order is exempt under subsection (e)(6) from any requirement of section 3 and need not be disclosed or indexed. However, if the agency issues an "opinion" which states any principle or policy of precedential significance, the agency in publishing the opinion or making it available may delete "identifying details" to the extent necessary to prevent a clearly unwarranted invasion of personal privacy, with a full explanation in writing of the "justification" for the deletions.

The purpose of the mechanism thus embodied in the revision is ex- plained as follows in the Senate and House reports:

> "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." (S. Rept., 89th Cong., 7.)
>
> "The public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." (H. Rept., 8.)

The reference to income tax matters in the House report shows that this provision is intended to protect privacy in a person's business affairs as well as in medicine or family matters. In this connection, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, includes corporations and other organizations as well as individuals. In the context of this section, the reasons for deleting identifying details would seem as applicable to corporations as to individuals.

Explanation of "justification for the deletion. -- "Written justification for deletion of identifying details is to be placed as preamble" to documents from which such details are deleted. (S. Rept., 89th Cong., 7.) Without such explanation, the public availability of the documents with all identifying details deleted, might present more questions than it answers.

Obviously, the explanation should not defeat the purposes of the deletion by raising inferences which may be even more injurious than the invasion of privacy which the provision avoids. Agencies must exercise careful judgments to assure that they furnish as much information as they can without violating the spirit or defeating the purpose of the provision.

There are agencies with large numbers of cases involving matters which, if disclosed, would invade personal privacy. As a matter of administrative feasibility, it may be necessary for such agencies to specify fully in the rules they issue to implement subsection (b) the usual reasons for deletions, and to cite these roles in the "preamble" to each opinion or group of opinions as the justification for the

deletion, instead of attempting to set forth a complete explanation in each one of the opinions they make available.

PUBLIC INDEX

> "Every agency shall also maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after the effective date of this Act and which is required by this subsection to be made available or published. No final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by this subsection or unless that private party shall have actual and timely notice of the terms thereof."

The House report explains that the provision requiring the maintenance of a current public index of materials within subsection (b) is designed to "help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents having precedential significance . . .." (H. Rept., 8.)

The public index requirement is limited to items required to be made available by subsection (b). This excludes, for example, statements of policy and interpretations published in the Federal Register, since the Federal Register index is deemed sufficient as to them. In some cases, agencies may find it useful to include such materials in their public index in the interests of making it complete and comprehensive, even though such indexing is not required. The limitation also excludes from the requirement items exempted by subsection (e) and items outside the limits of subsection (b), such administrative staff instructions which do not affect the public. The criterion as to what constitutes "identifying information," within the meaning of this provision, "is that any competent practitioner who exercises diligence may familiarize himself with the materials through the use of the index." (S. Rept., 88th Cong., 6.)

Because "considerations of time and expense cause this indexing requirement to be made prospective in application only" (S. Rept., 89th Cong., 7; H. Rept., 8), agencies may, at any time, cite as precedent an opinion, order, policy statement, interpretation, manual, or instruction adopted by the agency prior to July 4,1967, the effective date of the requirement, irrespective of whether it is listed in the agency's public index. However, agencies should be mindful of the underlying purpose of the indexing requirement. For instance, agencies which do not maintain such an index at the present time may find it helpful to compile and make available an index of the major precedents now relied upon, even though they are outside the requirement.

Careful and continuing attention will be required to distinguish "documents having precedential significance" (H. Rept., 8) -- the only ones required to be included in the index -- from the great mass of materials which have no such significance and which would only clutter the index and detract from its usefulness. Of course, this does not mean that an agency is not free to include nonprecedential material where it considers such inclusion helpful.

To illustrate the nature of the index contemplated by this requirement, both the Senate and the House reports point out that many agencies already maintain public indexing systems which are adequate within the meaning of this requirement. (H. Rept., 8.) "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." (S. Rept., 89th Cong., 7.)

Both the Senate and House reports (S. Rept., 89th Cong., 7; H. Rept., 8) cite the present indexing system of the Interstate Commerce Commission as a system which satisfies the requirements of this provision. Decisions of that agency are reported in several sets of reports, each of which deals with a substantial segment of the Commission's jurisdiction. Railroad and water carrier cases, for example, are printed in the series entitled "Interstate Commerce Commission Reports," now some 328 volumes. Decisions arising under its more recently granted jurisdiction over motor carriers are published in a separate set, now more than 100 volumes, entitled "Interstate Commerce Commission Reports, Motor Carrier Cases." Each of these sets contains in each volume an alphabetical subject-matter index which furnishes citations to page numbers in that volume only.

In addition, the Commission publishes a series entitled "Interstate Commerce Acts Annotated" (20-odd volumes) which is a comprehensive index digest patterned generally after the United States Code Annotated. It covers all of the Interstate Commerce Act and related acts administered by the Commission, as well as other acts which affect the Commission, for example, selected sections of title 28, United States Code, relating to appeals.

It is important to note that the indexing system of the Interstate Commerce Commission, although very comprehensive, is selective and does not attempt to list all final opinions and orders made in the adjudication of cases. It includes only those opinions which are considered by the Commission to be potentially significant as precedents. Its use as a model therefore accords with the explanation in the House report (H. Rept., 7) that the indexing requirement of subsection (b) is to include all documents "having precedential significance," and with the explanation in the Senate report (S. Rept., 89th Cong., 7) 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 any agency.

ACTUAL NOTICE

Failure to index a document or to publish or make it available does not preclude using it as precedent against any party who has "actual and timely notice of the terms thereof." As assurance against defects in publication and indexing, some agencies may find it desirable to supplement their compliance with the index requirement by establishing procedures whereby all regulated interests are given actual notice of the terms of materials which may be used against them, through the use of mailing lists or otherwise. The same idea, of course, may be applied on a limited basis. If it is impracticable to afford actual notice to all interested parties subject to a particular policy or interpretation, it may be desirable to serve a copy upon those parties most interested. If such practice is adopted, it should be used in addition to rather than in lieu of the required publication and indexing, since the essential purpose of the subsection is to make available to the public the "end product" materials of the administrative process. (H. Rept., 7.)

Whereas the provision of the original section 3 relating to the effect of failure to make matters available under subsection (b) provided only that opinions and orders not made available for public inspection were not to be "cited as precedents," the corresponding language in the revision is that materials not thus available are not to be "relied upon, used or cited as precedent" against any private party who has not had actual notice of the terms thereof. The legislative history contains no explanation of the difference between the new provision and that which it replaces. The additional words may have been inserted merely for emphasis, or to preclude an agency, in making a final decision, from relying upon a precedent which has not been made public.

SUBSECTION (c) -- OTHER AGENCY RECORDS

> "(c) AGENCY RECORDS. -- Except with respect to the records made available pursuant to subsections (a) and (b), every agency shall, upon request for identifiable records made in

accordance with published rules stating the time, place, fees to the extent authorized by statute and procedure to be followed, make such records promptly available to any person."

AGENCY RECORDS TO WHICH SUBSECTION (c) APPLIES

The "Except" clause with which the provision begins is intended "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." (S. Rept., 89th Cong., 2). Whereas subsections (a) and (b) require the publication or general availability of the materials described in those subsections, the "only records which must be made available" under subsection (c) "are those for which a request has been made." (*Ibid.*)

The term "records" is not defined in the act. However, in connection with the treatment of official records by the National Archives, Congress defines the term in the act of July 7, 1943, sec. 1, 57 Stat. 380, 44 U.S.C. (1964 Ed.) 366 as follows:

> ". . . the word 'records' includes all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government in pursuance of Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data contained therein. Library and museum material made or acquired and presented solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included within the definition of the word 'records' as used in this Act."

It is evident from the emphasis in the legislative history of Public Law 89-487 upon the concept that availability shall include the right to a copy, that the term "records" in subsection (c) does not include objects or articles such as structures, furniture, paintings, sculpture, three-dimension models, vehicles, equipment, etc., whatever their historical value or value "as evidence." It is equally clear that the definition is not limited to historical documents, but includes contemporaneous documents as well.

Subsection (c) refers, of course, only to records in being and in the possession or control of an agency. The requirement of this subsection imposes no obligation to compile or procure a record in response to a request. This is evidenced by the fact that the term "information" in the bill, as introduced, was changed by the Senate to "identifiable records" and by the legislative history of that change. (S. Rept., 89th Cong., 2.)

Most requests will probably be directed to records which are the exclusive concern of the agency of which the request is made. Where a record is requested which is of concern to more than one agency, the request should be referred to the agency whose interest in the record is paramount; and that agency should make the decision to disclose or withhold after consultation with the other interested agencies. Where a record requested from an agency is the exclusive concern of another agency, the request should be referred to that other agency. Every effort should be made to avoid encumbering the applicant's path with procedural obstacles when these essentially internal Government problems arise. Agencies generally should treat a referred request as if it had been filed at the outset with the agency to which the matter is ultimately referred.

MEANING OF THE TERM "IDENTIFIABLE"

A member of the public who requests a record must provide a reasonably specific description of the particular record sought. As the Senate report stares, 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." (S. Rept., 89th Cong., 8.)

The requirement is thus not intended to impose upon agencies an obligation to undertake to identify for someone who requests records the particular materials he wants where a reasonable description is not afforded. The burden of identification is with the member of the public who requests a record, and it seems clear that Congress did not intend to authorize "fishing expeditions." Agencies should keep in mind, however, "that the standards of identification applicable to the discovery of records in court proceedings" are "appropriate guidelines," and that their superior knowledge of the contents of their files should be used to further the philosophy of the act by facilitating, rather than hindering, the handling of requests for records. See S. Rept., 89th Cong., 2.

AGENCY RULES IMPLEMENTING SUBSECTION (c)

Because of the summary nature of the disclosure requirement of subsection (c), the abbreviated form in which the exemptions of subsection (e) are stated, and the technique of providing a single set of exemptions applicable to all of the publication and disclosure requirements instead of tailoring separate exemptions to fit each requirement, it is apparent that extensive implementation by agency rules will be necessary.

In addition to the rules required under subsections (a) and (b), every agency should promulgate rules which will establish, for agency personnel and the public alike, standards governing the availability under subsection (c) of types of records in the agency's possession. The guidelines of the statute afford little more than a framework. They should be implemented by agency rules which are clear and workable. The rules should prescribe the procedures to be employed in making records available, the time when they shall be available, the charges therefor, and the procedures involved.

COPIES

A substantial problem in the practical application of subsection (c) is the physical problem of producing records, upon request, which are not available in a public reading room or similar facility. A copy of a requested record should be made available as promptly as is reasonable under the particular circumstances. Where an agency's contract with a reporting service requires that copies of transcripts be sold only by the service, the copy in the possession of the agency should be made available for inspection. If a copy of the transcript is requested, the agency may refer the applicant to the reporting service.

Techniques of records retrieval and copying are advancing rapidly. Appropriate procedures and adequate equipment may contribute as much to successful compliance with subsection (c) as thoughtful and intelligent implementation of the statutory standards in the agency's rules. Therefore, all agencies should carefully plan and equip to meet the problems of physically producing requested records.

FEES

The provision authorizing agencies to require payment of a fee with each request for records under subsection (c) makes it clear that the services performed by all agencies under the act are to be self-sustaining in accordance with the Government's policy on user charges. Congressional intent on this point is further evident in the legislative history of this act. See H. Rept., 8,9.

The law (5 U.S.C. [1964 Ed.] 140) referred to in the House Report as directing Federal agencies "to charge a fee for any direct or indirect services such as providing reports and documents" provides the

statutory foundation of the user charges program. This user charges statute begins with the following statement of purpose:

> "It is the sense of the Congress that any work, service publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, shall be self-sustaining to the full extent possible, . . ."

The statute further authorizes the head of each agency to establish any fee, price, or charge which he determines to be "fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts . . ."

Guidance in carrying out the user charges policy is contained in Bureau of the Budget Circular No. A-25, "User Charges." This circular provides that "where a service (or privilege) provides special benefits to an identifiable recipient above and beyond those which accrue to the public at large, a charge should be imposed to recover the full cost to the Federal Government of rendering that service." The circular prescribes general guidelines to be used in (1) determining the costs to be recovered, (2) establishing appropriate fees, and (3) providing for the disposition of receipts from the collection of fees and charges.

It is evident from the provisions of the user charges statute, the Bureau of the Budget circular, and the legislative history of the act that the enactment does not contemplate that agencies shall spend time searching records and producing for examination everything a member of the public requests under subsection (c) and then charge him only for reproducing the copies he decides to buy. Instead, an appropriate fee should be required for searching as distinguished from the fee for copying. Such fees should include indirect costs, such as the cost to the agency of the services of the Government employee who searches for, reproduces, certifies, or authenticates in some manner copies of requested documents. Extensive searches should not be undertaken until the applicant has paid (or has provided sufficient assurance that he will pay) whatever fee is determined to be appropriate.

By charging reasonable fees which compensate the Government for the cost of performing such special services, the agency will comply with the congressional intent to recover costs. Charging fees may also discourage frivolous requests, especially for large quantities of records the production of which would uselessly occupy agency personnel to the detriment of the proper performance of other agency functions as well as its service in filling legitimate requests for records.

JUDICIAL REVIEW UNDER SUBSECTION (c)

> "Upon complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated shall have jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant. In such cases the court shall determine the matter de novo and the burden shall be upon the agency to sustain its action. In the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt. Except as to those causes which the court deems of greater importance, proceedings before the district court as authorized by this subsection shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

Any person from whom an agency has withheld a record after proper request under subsection (c) may file a complaint in the appropriate United States district court. The agency then has the burden to justify the withholding which it can satisfy by showing that the record comes within one of the nine exemptions in subsection (e).

While it is not the purpose of this memorandum to discuss the jurisdiction of the district courts or the procedures in such cases, it should be noted that most cases arising under subsection (c) will be handled by the General Litigation Section of the Civil Division of the Department of Justice. In those cases, upon receipt of a copy of the summons and complaint served upon the Attorney General and notification of its filing by the United States Attorney (see Rule 4, Federal Rules of Civil Procedure), the General Litigation Section will request the agency to furnish a litigation report.

Since subsection (c) provides that these cases should be given a priority on the court docket, the agency should similarly accord priority to the submission of its report in order that a timely response to the complaint may be filed, thus avoiding the necessity of requesting extensions of time.

Some agencies are authorized to conduct their own litigation. Where its authority permits, the agency may decide to handle its own cases under this act. In view of the general litigation responsibility which the Department of Justice has for all other departments and agencies in the executive branch, it is important that agencies handling their own litigation under this act keep the Department of Justice currently informed of their progress and forward to the Civil Division copies of significant documents which are filed in such cases.

The House report aptly describes the district court proceeding under subsection (c) as follows (H. Rept., 9):

> "The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action."

The injunction is an equitable remedy. As the above language recognizes, in a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted. In making such determination the court can be expected to weigh the customary considerations as to whether an injunction or similar relief is equitable and appropriate, including the purposes and needs of the plaintiff, the burdens involved, and the importance to the public interest of the Government's reason for nondisclosure. See *Hecht Co. v. Bowles*, 321 U.S. 321 (1944); *United States v. Reynolds*, 345 U.S. 1 (1953); 2 POMEROY'S EQUITY JURISPRUDENCE §§ 397-104 (Symons 5th ed. 1941).

It should also be noted that district court review is designed to follow final action at the agency head level. The House report states that "if a request for information is denied by an agency subordinate the person making the request is entitled to prompt review by the head of the agency." (H. Rept., 9.) In reviewing this action, the district court is granted "jurisdiction to enjoin the agency from the withholding of agency records and to order the production of any agency records improperly withheld from the complainant." Jurisdiction of a suit against agency officers, as distinguished from the agency itself, is not explicitly granted. The subsection also provides that "in the event of noncompliance with the court's order, the district court may punish the responsible officers for contempt."

These provisions seem to assume the usual two-step procedure followed by courts of equity in contempt proceedings for violation of court orders. Following the statutory plan, the district court would presumably issue an order directed to the agency, which, under the language of the statute, is the only party defendant. In the event of noncompliance with the order --which would presumably have been served upon the head of the agency or whomever he delegated to make the final agency decision -- the court would probably issue an order to show cause directed to the responsible officer, which he would then have opportunity to answer. Subordinate officials who are not responsible for final agency action have a duty to follow the instructions of the agency head or his delegate and are probably not subject to the contempt provision. See *Touhy v. Ragen*, 340 U.S. 462 (1951).

SUBSECTION (d)-VOTING RECORDS OF AGENCY MEMBERS

> "(d) AGENCY PROCEEDINGS. -- Every agency having more than one member shall keep a record of the final votes of each member in every agency proceeding and such record shall be available for public inspection."

This subsection applies, of course, only to the votes of members of boards, commissions, etc., and not to agencies headed by a single administrator. Originally, the provision required that a public record be kept of all votes by agency members. After study, the Senate committee concluded that there might be "considerable disadvantage" in the disclosure of "preliminary votes." (S. Rept. 88th Cong., 7.) Therefore, the provision was revised to apply only to "final votes of multi-headed agencies in any regulatory or adjudicative proceeding." (H. Rept., 9.) Again, the exemptions of subsection (e) apply as well to this subsection as to the other subsections.

SUBSECTION (e) -- EXEMPTIONS

> "(e) EXEMPTIONS. -- The provisions of this section shall not be applicable to matters that are . . ."

We have noted above that subsection (e), containing the exemptions, applies to all of the various publication and disclosure requirements of the new section 3. Adoption of this structure, rather than the tailoring of specific exemptions to each of the disclosure requirements contained in subsections (a), (b), (c), and (d), inevitably creates some problems of interpretation. An appropriate exemption from the Federal Register publication requirements of subsection (a) is not necessarily an appropriate reason for keeping secret a record requested under subsection (c). Exemption (2), for example, which relieves from all of the requirements of tile act "matters that are . . . related solely to the internal personnel rules and practices of any agency," obviously is an appropriate exemption from the requirements of subsection (a) governing publication in the Federal Register. However, in the case of a request for access to a particular document under subsection (c), a strict, literal application of the language of exemption (2) frequently might produce incongruous results, shielding from disclosure matters with respect to which there can be no possible reason for secrecy, such as blank forms used by Government employees in applying for leave.

It is obvious from a reading of subsection (e) that the exemptions must be construed in such manner as to provide a set of "workable standards," achieving the desired balance which is the basic statutory objective.

(1) NATIONAL DEFENSE AND FOREIGN POLICY

> "The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;"

In a statement on the House floor when S. 1160 was presented for consideration, Congressman Dole expressed the view that the "bill gives full recognition to the fact that the President must at times act in secret in the exercise of his constitutional duties . . . ." (112 Cong. Rec. 13022, June 20, 1966.) With respect to the same problem, Chairman Moss presented the bill as one which is "not intended to impinge upon the appropriate power of the Executive . . . ," (112 Cong. Rec. 13008, June 20. 1966.)

To the extent that agencies determine that matters within their responsibility must be kept secret in the interest of the national defense or foreign policy, and are not required to be withheld by Executive order or other authority, they should seek appropriate exemption by Executive order, to come within the language of subsection (e)(1). The reference in the House report to Executive Order 10501 indicates that no great degree of specificity is contemplated in identifying matters subject to this exemption. However, in the interest of providing for the public as much information as possible, an Executive order prepared for the signature of the President in this area should define as precisely as is feasible the categories of matters to be exempted.

(2) INTERNAL PROCEDURES

> "The provisions of this section shall not be applicable to matters that are . . .(2) related solely to the internal personnel rules and practices of any agency;"

The House report explains that the words "personnel rules and practices" in subsection (e) are meant to relate to those matters which are for the guidance of agency personnel only, including internal rules and practices which cannot be disclosed to the public without substantial prejudice to the effective performance of a significant agency function. The examples cited in the House report (H. Rept., 10) are "operating rules, guidelines, and manuals of procedure for Government investigators or examiners." An agency cannot bargain effectively for the acquisition of lands or services or the disposition of surplus facilities if its instructions to its negotiators and its offers to prospective sellers or buyers are not kept confidential. Similarly, an agency must keep secret the circumstances under which it will conduct unannounced inspections or spot audits of supervised transactions to determine compliance with regulatory requirements. The moment such operations become predictable, their usefulness is destroyed.

As the examples cited in the House report indicate, the exemption in subsection (e)(2) is designed to permit the withholding of agency records relating to management operations to the extent that the proper performance of necessary agency functions requires such withholding. However, as the House report states, at page 10, "this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." It follows that the exemption should not be invoked to authorize any denial of information relating to management operations when there is no strong reason for withholding. For example, the examining, investigative, personnel management, and appellate functions of the Civil Service Commission relate solely to the internal personnel rules and practices of the Government and, as such, are covered by the exclusion in subsection (e)(2). However, the Commission now publishes all its regulations in the Federal Register, and its instructions are available to the public through the Federal Personnel Manual, which may be purchased at the U.S. Government Printing Office. This is an example of the exercise of the principle that the exemption, even though it may be literally applicable, should be invoked only when actually necessary.

(3) STATUTORY EXEMPTION

> "The provisions of this section shall not be applicable to matters that are . . . (3) specifically exempted from disclosure by statute;"

Explaining exemption (3) the House report, at page 10, notes that there are "nearly 100 statutes or parts of statutes which restrict public access to specific Government records. These would not be modified by the public records provisions of S. 1160."

The reference to "nearly 100 statutes" apparently was inserted in the House report in reliance upon a survey conducted by the Administrative Conference of the United States in 1962. This survey concluded that there were somewhat less than 100 statutory provisions which specifically exempt from disclosure, prohibit disclosure except as authorized by law, provide for disclosure only as authorized by law, or otherwise protect from disclosure. The reference therefore indicates an intention to preserve whatever protection is afforded under other statutes, whatever their terms. For examples of the variety of statement of such provisions compare 18 U.S.C. 1905; 26 U.S.C. 6103; 42 U.S.C. 2000e-8, 2161-2166; 43 U.S.C. 1398; 44 U.S.C. 397; and 50 U.S.C. 403g. For a general, but not exhaustive, compilation of relevant statutory provisions, see Federal Statutes on the Availability of Information, Committee Print, House Committee on Government Operations, 86th Congress, Second Session, March 1960.

(4) INFORMATION GIVEN IN CONFIDENCE

> "The provisions of this section shall not be applicable to matters that are . . . (4) trade secrets and commercial or financial information obtained from any person and privileged or confidential;"

The scope of this exemption is particularly difficult to determine. The terms used are general and undefined. Moreover, the sentence structure makes it susceptible of several readings, none of which is entirely satisfactory. The exemption can be read, for example, as covering three kinds of matters: i.e., "matters that are . .. . [a] trade secrets and [b] commercial or financial information obtained from any person and [c] privileged or confidential." (bracketed initials added). Alternatively, clause [c] can be read as modifying clause [b]. Or, from a strictly grammatical standpoint, it could even be argued that all three clauses have to be satisfied for the exemption to apply. In view of the uncertain meaning of the statutory language, a detailed review of the legislative history of the provision is important.

Exemption (4) first appeared in the bill (S. 1666) following full committee consideration by the Senate Committee on the Judiciary in the second session of the 88th Congress. It then provided for the exemption of "trade secrets and other information obtained from the public and customarily privileged or confidential." The Senate report explained the addition of exemption (4) as follows:

> "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, and other such privileges." (S. Rept., 88th Cong., 6).

When S. 1160 was introduced in the 89th Congress, exemption (4) differed in two respects from the previous version. The words "commercial or financial" had been substituted for the word "other," and the word "customarily" had been deleted.

While the first of these two changes could be read as narrowing the exemption, a comparison of the Senate reports in the 88th and 89th Congress indicates, rather, that it was intended to make sure that commercial and financial data submitted with loan applications would come within the exemption. The description of exemption 4 at page 9 of the Senate report in the 89th Congress is the same as that quoted above from the report in the 88th Congress, except that reference to the "lender-borrower privilege" is inserted and the following sentence is added: "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."

The Senate report in the 89th Congress thus treats the change as expanding rather than contracting the coverage of the exemption, since it not only adds the above language, but also continues to refer to the doctor-patient and lawyer-client privileges, which certainly are not "commercial or financial," and all the other material referred to as exempt in the previous report.

Deletion of the word "customarily" apparently had a different basis. While at first glance the reach of "privileged" might be considered extended by removal of the modifying word "customarily," the change also serves a narrowing function by negating the possibility of a privilege created simply by agency custom. The word "customarily" is still used in the report, but with examples of the kinds of privileges which are protected by the exemption.

The House report on this exemption generally parallels the Senate language with several additions, including such matters as disclosures or negotiation positions in labor-management mediations, and scientific or manufacturing processes or developments. The report states at page 10:

> "This exemption would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. The exemption would include business sales statistics, inventories, customer lists, scientific or manufacturing processes or developments, and negotiation positions or requirements in the case of labor- management mediations. It would include information customarily subject to the doctor-patient, lawyer-client, or lender-borrower privileges such as technical or financial data submitted by an applicant to a Government lending or loan guarantee agency. It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations."

The last two sentences, in particular, underline the protection afforded by this exemption to information given to the Government in confidence, whether or not involving commerce or finance.

It seems obvious from these committee reports that Congress neither intended to exempt all commercial and financial information on the one hand, nor to require disclosure of all other privileged or confidential information on the other. Agencies should seek to follow the congressional intention as expressed in the committee reports.

In view of the specific statements in both the Senate and House reports that technical data submitted by an applicant for a loan would be covered, and the House report's inclusion of "scientific or manufacturing processes or developments," it seems reasonable to construe this exemption as covering technical or scientific data or other information submitted in or with an application for a research grant or in or with a report while research is in progress. Lists of applicants, however, would not necessarily be covered.

In view of the statements in both committee reports that the exemption covers material which would customarily not be released to the public by the person from whom the Government obtained it, there may be instances when agencies will find it appropriate to consult with the person who provided the information before deciding whether the exemption applies.

One change was made in exemption (4) by the Senate committee in the 89th Congress: the phrase "information obtained from the public" was amended by substituting the words "any person" for "the public." It seems clear that applicability of this exemption should not depend upon whether the agency obtains the information from the public at large, from a particular person, or from within the agency. The Treasury Department, for instance, must be able to withhold the secret formulae developed by its personnel for inks and paper used in making currency.

An important consideration should be noted as to formulae, designs, drawings, research data, etc., which, although set forth on pieces of paper, are significant not as records but as items of valuable property. These may have been developed by or for the Government at great expense. There is no indication anywhere in the consideration of this legislation that the Congress intended, by subsection (c), to give away such property to every citizen or alien who is willing to pay the price of making a copy. Where similar property in private hands would be held in confidence, such property in the hands of the United States should be covered under exemption (e)(4).

(5) INTERNAL COMMUNICATIONS

> "The provisions of this section shall not be applicable to matters that are . . . (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";

The problems sought to be met by this exemption are principally the problem of prejudicing the usefulness of staff documents by inhibiting internal communication, and the problem of premature disclosure. The House report explains the exemption as follows:

> "Agency witness argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.' Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." (H. Rept., 10.)

Accordingly, any internal memorandum which would "routinely be disclosed to a private party through the discovery process in litigation with the agency" is intended by the clause in exemption (5) to be "available to the general public" (H. Rept., 10) unless protected by some other exemption. Conversely, internal communications which would not routinely be available to a party to litigation with the agency, such as internal drafts, memoranda between officials or agencies, opinions and interpretations prepared by agency staff personnel or consultants for the use of the agency, and records of the deliberations of the agency or staff groups, remain exempt so that free exchange of ideas will not be inhibited. As the President stated upon signing the new law, "officials within Government must be able to communicate with one another fully and frankly without publicity". The importance of this concept has been recognized by the courts. See *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 40 F.R.D. 318 (D.C., D.C., 1966), affirmed for the reasons stated in the district court opinion __F.2d__ (D.C. Cir. May 8,1967).

In addition to its explanation of exemption (5) quoted above, the House report in its general discussion of the bill's provisions states:

". . . in some instances the premature disclosure of agency plans that are undergoing development and are likely to be revised before they are presented, particularly plans relating to expenditures, could have adverse effects upon both public and private interests. Indeed, there may be plans which, even though finalized, cannot be made freely available in advance of the effective date without damage to such interests. There may be legitimate reasons for nondisclosure . . . in such cases." (H. Rept., 5-6.)

The above quotations make it clear that the Congress did not intend to require the production of such documents where premature disclosure would harm the authorized and appropriate purpose for which they are being used.

(6) PROTECTION OF PRIVACY

"The provisions of this section shall not be applicable to matters that are. ..(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy";

The Senate committee (S. Rept., 88th Cong., 7) explains this exemption as follows:

"In an effort to indicate the types of records which should not be generally available to the public, the bill lists personnel and medical files. Since it would be impossible to name all such files, the exception contains the wording 'and similar records the disclosure of which would constitute a clearly unwarranted invasion of personal privacy'."

The House report is to the same effect:

"Such agencies as the Veterans' Administration, Department of Health, Education, and Welfare, Selective Service, and Bureau of Prisons have great quantities of files containing intimate details about millions of citizens. Confidentiality of these records has been maintained by agency regulation but without statutory authority. A general exemption for the category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual. The exemption is also intended to cover detailed government records on an individual which can be identified as applying to that individual . . ." (H. Rept., 11.)

It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, and all private or personal information contained in other files which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person, including members of the family of the person to whom the information pertains. As was explained on page 19 above, the applicable definition of "person," which is found in section 2(b) of the Administrative Procedure Act, would include corporations and other organizations as well as individuals. The kinds of files referred to in this exemption, however, would normally involve the privacy of individuals rather than of business organizations.

Another possible area of invasion of privacy would be the furnishing of detailed information concerning Government employees or others. The House report (p. 6) notes that the Civil Service Commission has ruled that "the names, position titles, grades, salaries, and duty stations of Federal employees are public information." It seems reasonable to assume that the Congress regarded with approval the Commission ruling, which in a letter of March 17, 1966 addressed to the heads of Departments and agencies gives examples of the circumstances under which such information should be made available, and establishes

guidelines to govern the discretion to disclose such information concerning Government employees. (See Cong. Rec., March 21, 1966, pp. A 1598-1599.) To assure the privacy sought to be protected by exemption (6), similar guidelines should apply to requests concerning lists of persons who are not Government employees. It should be noted that the Commission ruling referred to above does not authorize the release of employees' home addresses. Whether such addresses are protected by this exemption would depend upon the context in which they are sought.

(7) INVESTIGATIONS

> "The provisions of this section shall not be applicable to matters that are. . .(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;"

The House report emphasizes that the term "law enforcement" is used in exemption (7) in its broadest sense, to include the enforcement not only of criminal statutes, but rather of "all kinds of laws, labor and securities laws as well as criminal laws." (H. Rept., 11.) Thus, the files compiled from investigation by Government agents into charges of unfair labor practices would be exempt as investigatory files compiled for the purpose of enforcing the labor laws. Similarly, a file compiled by the Immigration and Naturalization Service in the investigation of an application by an alien for adjustment of status, or one compiled by the Securities and Exchange Commission concerning violation of securities regulations, would be exempt as investigatory files compiled for the purpose of enforcing the immigration and securities laws respectively.

Frequently the investigations which are made reflect violations of law or circumstances requiring redress by administrative proceedings or litigation. The House report makes clear that in such cases the additional "files prepared in connection with related Government litigation and adjudicative proceedings" are included within the exemption. (H. Rept., 11.)

It should be noted that the language "except to the extent available by law to a private party" is very different from the phrase, "which would not be available by law to a private party in litigation with the agency," used in exemption (5). The effect of exemption (5) is to make available to the general public those internal documents from agency files which are routinely available to litigants, unless some other exemption bars disclosure. The effect of the language in exemption (7), on the other hand, seems to be to confirm the availability to litigants of documents from investigatory files to the extent to which Congress and the courts have made them available to such litigants. For example. litigants who meet the burdens of the Jencks statute (18 U.S.C. 3500) may obtain prior statements given to an FBI agent or an SEC investigator by a witness who is testifying in a pending case; but since such statements might contain information unfairly damaging to the litigant or other persons, the new law, like the Jencks statute, does not permit the statement to be made available to the public. In addition, the House report makes clear that litigants are not to obtain special benefits from this provision, stating that "S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." (H. Ret., 11.)

(8) INFORMATION CONCERNING FINANCIAL INSTITUTIONS

> "The provisions of this section shall not be applicable to matters that are . . .(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";

The meaning and purpose of this exemption are obvious. It is "designed to insure the security and integrity of financial institutions, for the sensitive details collected by Government agencies which regulate these institutions could, if indiscriminately disclosed, cause great harm." (H. Rept., 11.)

An earlier version of exemption (4) protected trade secrets, but made no mention of financial information and would not have protected information developed by agency investigators and examiners, as distinguished from information "obtained from the public." Exemption (4) as enacted, however, covers commercial and financial information as set forth at pp. 32-34 above. Exemption (8) emphasizes the intention of the revision to protect information relating to financial institutions which may be prepared for or used by any agency responsible for the regulation or supervision of such institutions.

(9) INFORMATION CONCERNING WELLS

> "The provisions of this section shall not be applicable to matters that are . . . (9) geological and geophysical information and data (including maps) concerning wells."

The House report explains that "this category was added after witnesses testified that geological maps based on explorations by private oil companies were not covered by the 'trade secrets' provisions of present laws. Details of oil and gas findings must be filed with Federal agencies by companies which want to lease Government-owned land. Current regulations of the Bureau of Land Management prohibit disclosure of these details only if the disclosure 'would be prejudicial to the interests of the Government' (43 CFR, pt. 2). Witnesses contended that disclosure of the seismic reports and other exploratory findings of oil companies would give speculators an unfair advantage over the companies which spent millions of dollars in exploration." (H. Rept., 11.)

It should be noted that, although the information involved in exemption (9) might not be a "trade secret" within the meaning of the earlier version of exemption (4), it would seem to constitute commercial and financial information covered by the present exemption (4), as described at pp. 32-34 above. The addition of exemption (9) is helpful in explaining the intention of the statute with respect to such information.

SUBSECTION (f) -- LIMITATION OF EXEMPTIONS

> "(f) LIMITATION OF EXEMPTIONS. -- Nothing in this section authorizes withholding of information or limiting the availability of records to the public except as specifically stated in this section, nor shall this section be authority to withhold information from Congress."

The House report explains that "the purpose of this subsection is to make clear beyond doubt that all the materials of [the executive branch] are to be available to the public unless specifically exempt from disclosure by the provisions of subsection (e) or limitations spelled out in earlier subsections. And subsection (f) restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information." (H. Rept.,11.)

SUBSECTION (g) - DEFINITION OF "PRIVATE PARTY"

> "(g) PRIVATE PARTY. -- As used in this section, 'private party' means any party other than an agency."

The word "party" is already defined by the APA as including "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding." The term "agency proceeding," in turn is defined as any agency process involving rulemaking, adjudication, or licensing. See 5 U.S.C. 551(3) and (12).

SUBSECTION (h) -- EFFECTIVE DATE

"(h) EFFECTIVE DATE. -- This amendment shall become effective one year following the date of the enactment of this Act."

The date of enactment of Public Law 89-487 was July 4, 1966. The effective date of the act, therefore, is July 4, 1967. By that date agencies should already have published their rules and procedures implementing the new statute, and these rules and procedures should then become effective.

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1. Public Law 89-487, 80 Stat. 250, revises 5 U.S.C. 552, formerly section 3 of the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1002 (1964 Ed.).

2. For the sake of brevity, the following citations are hereafter used:
"S. Rept., 88th Cong." for S. Rept. 1219, 88th Cong., 2d Sess.
"S. Rept., 89th Cong." for S. Rept. 813, 89th Cong., 1st Sess.
"H. Rept." for H. Rept. 1497, 89th Cong., 2d Sess.

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