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OPEN COMMUNICATIONS ACT OF 1975,
S. 1289

GOVERNMENT

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HEARINGS
BEFORE THE
SUBCOMMITTEE ON
ADMINISTRATIVE PRACTICE AND PROCEDURE
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

THE OPEN COMMUNICATIONS ACT OF 1975

S. 1289

APRIL 14 AND NOVEMBER 12, 1975

Printed for the use of the Committee on the Judiciary



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APPENDIX

1. The first part of the appendix contains a list of the names of the persons who have been appointed to the various offices of the government since the year 1800. The names are arranged in alphabetical order, and the year of appointment is given in parentheses after each name.

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THE OPEN COMMUNICATIONS ACT OF 1975

(S. 1289)

MONDAY, APRIL 14, 1975

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:50 o'clock, in room 2228, Dirksen Senate Office Building, Senator Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy.

Also present: Thomas M. Susman, chief counsel, and Karen E. Buck, legal intern.

Senator KENNEDY. The subcommittee will come to order.

We have an opening statement which I will include in its entirety in the record. It reviews briefly the efforts that this subcommittee has made in recent years, particularly in the area of freedom of information to demonstrate general concern about openness in the various governmental agencies.

This morning we are looking forward to hearing from several witnesses who will be testifying on what steps are being taken by agencies to promote openness and what kind of response and reaction they are receiving.

OPENING STATEMENT OF SENATOR EDWARD M. KENNEDY

Senator KENNEDY. The Subcommittee on Administrative Practice and Procedure today opens hearings on S. 1289, the Open Communications Act of 1975. This legislation will require the logging and disclosure of communications between high-level agency officials and those seeking to influence them. It is based on the assumption that the power of secret influence is best countered by public disclosure and the belief that the public has a right to know what influences are being brought to bear on Government decisionmakers.

Corporate lobbyists deluge decisionmakers with glossy booklets and weighty binders. CAB officials are often invited on inaugural flights. FEA officials are invited to lunch by oil industry executives. FDA officials meet often with pharmaceutical company lawyers. Many of these contacts are helpful. Many are not. Most are legitimate and proper. Some are not.

The undermining of public confidence in Government, the manipulation of official decisionmaking, the privileged access given special interests all grow from the same basic cause—Government secrecy.

The disclosure of contacts between Government officials and persons

outside the Government will focus the light needed to expose improper influence and privileged access. It will not stop decisionmakers from obtaining the views and information they need to do their jobs. It will not stop anyone from engaging in legitimate communications with them. I believe that the very process of providing public awareness of agency contacts in this way will also help alert decisionmakers to the importance of listening to a variety of viewpoints, and to the dangers inherent in listening to only a few.

The need for this kind of legislation has long been recognized. Fourteen years ago, President Kennedy, in his message to Congress on ethical conduct outlined the dangers of improper contacts. He told the Congress then :

Some of the most spectacular examples of official misconduct have involved *ex parte* communication—undisclosed informal conduct between an agency official and a party interested in a matter before that official. Such covert influence on agency action often does basic injury to the fairness of agency proceedings.

Some may fear that the kind of disclosure hoped for in that message and mandated by this bill will put an unreasonable administrative burden on the agencies affected or may inhibit the free flow of useful information to the Government decisionmaker. President Kennedy himself warned that "the capacity of an agency to avail itself of information necessary to decision" must be maintained. I believe this bill does just that. Care has been taken to make its requirements clear and its burdens reasonable.

Only Government officials compensated at GS-15 and above are covered. They will have to keep records of contacts they have with persons outside the agency on matters under consideration. All Presidential appointees must keep public calendars of their meetings.

Communications regarding agency proceedings must be logged for full public disclosure. Communications regarding substantive policy matters must be logged for summary disclosure. Communications during the preadjudicative stages of a civil or criminal enforcement proceeding made by persons other than parties to the investigation must be fully disclosed to the public—with the exception of informants and members of the news media. Communications made by parties to those investigations would be recorded for internal recordkeeping purposes only.

In addition, we already know that disclosure procedures can work to everyone's benefit. In the last year, the Federal Energy Administration, the Federal Trade Commission, the Food and Drug Administration, and the Consumer Product Safety Commission have all established procedures for making records of meetings and conversations, most of which are subject to some public disclosure. Other agencies have begun to establish similar procedures.

This morning we will hear from agency officials and members of the public who agree that our Government should be more open. We will hear from the heads of those agencies which have begun to open their doors. We will find out why they are moving toward greater openness and how their new policies have affected their operations. We will also hear from members of the Commissions which have not yet adopted public disclosure procedures, and from public-interest advocates who believe that good Government means open Government.

Each year Congress enacts hundreds of laws which Government

officials must interpret, implement, and enforce. These officials must be as objective and as fair as possible. But objectivity and fairness are incompatible with a closed system that permits improper influence to sway their thinking. The bill we are considering today will do much to expose and thus eliminate such influence.

We will get started right away with Mr. Simpson of the Consumer Product Safety Commission, who was Acting Assistant Secretary of Commerce for Science and Technology prior to his appointment to the Consumer Product Safety Commission. Before joining the Commerce Department in 1969, Mr. Simpson was an executive with the Radcor Corp. in California. He has been a member of the Consumer Product Safety Commission from its creation. Under his leadership, the CPSC has forged policies and procedures of openness that stand in the forefront of the Federal Government.

We are delighted to have you here, Mr. Simpson. From everything we have read and seen about your agency, you certainly have provided extraordinary leadership in an area which we understand is complex and difficult. We look forward to finding out how these openness policies have worked in your agency and whether the lessons that have been learned could be applied to other situations.

Let me extend a warm word of welcome. We are hopeful, as we are with the other agencies, that as we go through the course of these hearings and consider legislation, we will be able to draw on you for information, judgment, and some practical experience about these different procedures. I want to thank you for coming.

A copy of the bill we are considering will be placed in the record at this point.

[The bill referred to above follows:]

94TH CONGRESS
1ST SESSION

S. 1289

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 12), 1975

Mr. KENNEDY (for himself, Mr. CLARK, Mr. PERCY, Mr. RIBICOFF, and Mr. STAFFORD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this act may be cited as the "Open Communications
4 Act of 1975".

5 SEC. 2. Subchapter II of Title 5, United States Code, is
6 amended by adding at the end thereof the following:

7 "§ 560. Maintenance of records of ex parte communications

8. "(a) For the purpose of this section, the term—

9 "(1) 'agency official' means all employees of the
10 executive branch who are compensated in grade 15 and

II

1 above under the General Schedule under section 5332 of
2 this title 5, or under the Executive Schedule under sub-
3 chapter II of chapter 53 of this title;

4 “(2) ‘person’ includes an individual, partnership,
5 corporation, association, firm, society, joint stock com-
6 pany, Member of Congress, officer or employee of the
7 executive branch, or any party to a proceeding;

8 “(3) ‘informant’ means any person who offers
9 incriminating information, under an assurance of con-
10 fidentiality, to the agency official for use in a civil or
11 criminal enforcement proceeding;

12 “(4) ‘pre-adjudicative stages of a proceeding’
13 means agency activities prior to the commencement of
14 an administrative or judicial enforcement proceeding
15 held to determine punishment for or to prevent the
16 violation of Federal law or agency regulation;

17 “(5) ‘record of communications maintained for
18 internal disclosure’ means a record of communications
19 received by the agency official which shall contain—

20 “(A) the name and position of the official who
21 received the communication;

22 “(B) the date upon which the communication
23 was received;

24 “(C) an identification, so far as possible, of
25 the person from whom the communication was

1 received and of the person on whose behalf such
2 person was acting in making the communication;

3 “(D) in the case of communications through
4 letters, documents, briefs, and other written mate-
5 rial, copies of such material in its original form;

6 “(6) ‘record of communications maintained for
7 summary disclosure’ means a record of communications
8 received by the agency official which shall contain—

9 “(A) the name and position of the official who
10 received the communication;

11 “(B) the date upon which the communication
12 was received;

13 “(C) an identification, so far as possible, of
14 the person from whom the communication was
15 received and of the person on whose behalf such
16 person was acting in making the communication;

17 “(D) a brief characterization of the subject
18 matter under discussion;

19 “(E) in the case of communications through
20 letters, documents, briefs, and other written mate-
21 rial, copies of such material in its original form. In
22 the case of materials which fall under section 552
23 (b), a summary of the communication or a copy
24 of such material with suitable deletions will suffice
25 in lieu of the original;

1 “(7) ‘record of communications maintained for full
2 disclosure’ means a record of communications received
3 by the agency official which shall contain—

4 “(A) the name and position of the official who
5 received the communication;

6 “(B) the date upon which the communication
7 was received;

8 “(C) an identification, so far as possible, of the
9 person from whom the communication was received
10 and of the person on whose behalf such person was
11 acting in making the communication;

12 “(D) a brief summary of the subject matter or
13 matters of the communication, including relevant
14 docket numbers if known;

15 “(E) : in the case of communications through
16 letters, documents, briefs, and other written mate-
17 rial, copies of such material in its original form. In
18 the case of materials which fall under section 552
19 (b), a summary of the communication or a copy of
20 such material with suitable deletions will suffice in
21 lieu of the original;

22 “(F) a brief description, when applicable, of
23 any action taken by the official in response to the
24 communication.

25 “(b) (1) Each agency official shall prepare a record of

1 communications maintained for summary disclosure for each
2 oral or written communication initiated by persons outside
3 the agency, pertaining to a substantive policy matter before
4 the agency, except any such communication from informants
5 or members of the working press. For the purpose of this
6 paragraph, a 'substantive policy matter' means any impor-
7 tant agency action or policy issue as prescribed in regula-
8 tions promulgated by the agency, except that no such regu-
9 lation shall apply to agency proceedings as defined in sec-
10 tion 551 (12) of this chapter.

11 “(2) Each agency official shall prepare a record of com-
12 munications maintained for full disclosure for each oral or
13 written communication, initiated by persons outside the
14 agency, during the pre-adjudicative stages of a proceeding
15 or pertaining to a pending agency proceeding, except (i)
16 any such communication from informants or members of the
17 working press and (ii) any such communication initiated by
18 the party to an enforcement proceeding during the pre-
19 adjudicative stage. With respect to communications initiated
20 by the party to an enforcement proceeding during the pre-
21 adjudicative stage the agency official shall prepare a rec-
22 ord of communications maintained for internal disclosure.

23 “(c) (1) Each agency shall assure that records of
24 communications maintained for summary disclosure and rec-
25 ords of communications maintained for full disclosure shall

1 be prepared and furnished for inclusion in a public file within
2 five working days of the receipt of the communication. Pub-
3 lic files containing such records shall be located in the public
4 reading room of the agency. Such records for which no pub-
5 lic file already exists shall be placed in public files located
6 in the public reading room, appropriately indexed pursuant to
7 regulations promulgated by the agency. All public files shall
8 be maintained for a period of five years, and shall be available
9 for public inspection and copying.

10 “(2) Each agency shall assure that records of communi-
11 cations maintained for internal disclosure shall be prepared
12 and furnished for permanent inclusion in the case or other
13 appropriate file and that a copy of such record shall be
14 furnished for inclusion in a centrally located file in the agency
15 within five working days of the receipt of the communication.

16 “(d) Each agency official who is compensated under
17 the Executive Schedule under this title shall provide for
18 the maintenance of his prospective and retrospective calendars
19 for public inspection in the public reading room of the agency.
20 Such materials shall be submitted, and updated, the first
21 working day of each week.

22 “(e) Any agency official who knowingly and willfully
23 falsifies, forges, or fails to file any record required by this sec-
24 tion shall be fined not more than \$1,000 or imprisoned not
25 more than one year, or both.”

- 1 (b) The analysis of chapter 5 of title 5, United States
2 Code is amended by adding after item "559" the following
3 new item:

"560. Maintenance of records of ex parte communications."

- 4 SEC. 3. One year after the effective date of this Act, the
5 Administrative Conference of the United States shall pre-
6 pare a study of the procedures established under this section
7 and offer suggestions to agencies and to Congress for their
8 modification or improvement.

- 9 SEC. 4. The amendments made by this Act shall take ef-
10 fect ninety days after the date of enactment.

Senator KENNEDY [continuing]. Our first witness this morning is Richard Simpson, who is chairman of the Consumer Product Safety Commission.

Mr. Simpson.

**STATEMENT OF RICHARD O. SIMPSON, CHAIRMAN, CONSUMER
PRODUCT SAFETY COMMISSION**

Mr. SIMPSON. Thank you, Mr. Chairman.

Mr. Chairman, I am very pleased to appear before this subcommittee today, to discuss openness in Government, and to describe how and why the Consumer Product Safety Commission arrived at its sunshine approach to regulatory life.

Our job at the Consumer Product Safety Commission is to reduce the unreasonable risks of injury to consumers from consumer products. As a Commission, we recognized at the outset that much of our success would depend upon whether the public had confidence in what we said and what we attempted to do. It is certainly no secret that public confidence in all levels of Government and business is at an alltime low. In fact, opinion research surveys verify this downward trend. People today are not only skeptical of Government, they have reached a point at which they often question the basic motivations of public officials.

We recognized at the outset that there is always the danger of any regulatory agency being captured by the special interests it was created to regulate or by those it was created to protect. Who has not heard the charge that such-and-such a Federal regulatory agency is a captive of industry? And whether those charges are true or false, I believe it is terribly naive to simply ignore the fact of life that appearances may often be as damaging as reality.

We determined at the outset that we would do everything within our power to avoid even the appearance that the Consumer Product Safety Commission could become or was a captive of any special interest group. We established formal policies to eliminate as far as possible

those situations in which the public, rightly or wrongly, could conclude that there had been arm-twisting by outside parties in the determination of any given issue. In short, we recognized that it is next to impossible to curry special favors unless there is secrecy and there are closed doors.

Senator KENNEDY. Does this apply to efforts by the Congress, by the White House or aides in the White House, too?

Mr. SIMPSON. All meetings, Mr. Chairman.

Senator KENNEDY. On the basis of your relationship with Congress and the White House, have you experienced any arm twisting by these bodies?

Mr. SIMPSON. Very little, I think, perhaps because of the policies we have adopted. We certainly have had strong views expressed.

Senator KENNEDY. When a Member of Congress calls you up, do you say, "I am going to have to list this call"?

Mr. SIMPSON. Yes; when the matter is one of substantial interest to the Commission; and I do.

Senator KENNEDY. What usually happens then? Do they continue or do they hang up?

Mr. SIMPSON. Usually they continue. Most Members of Congress, I think, now are aware, because we have been at this for almost 2 years, of the meetings policy; when we are called to a meeting or if there is a meeting in our facility, it is always open and on the public calendar. All correspondence from Members in and out is open for public scrutiny. We find that the Members do not object to it.

WHITE HOUSE CONTACTS ON BUDGET MATTERS

Senator KENNEDY. What about the White House contacts?

Mr. SIMPSON. The same thing. They are all listed. Most of our contacts with the White House are on budget matters. We have an unusual provision in our law which requires concurrent submission of our budget. In all budget sessions, all budget meetings, there is a verbatim transcript taken, and the transcript is sent to the Members of the Congress.

Senator KENNEDY. All right. Please proceed.

Mr. SIMPSON. In October 1973, just a few months after the Commission was activated, we published our "Procedural Policy on Meetings, Prior Public Notice and Records of Proceedings." This policy, which I believe is unique, requires Commission employees not only to keep records of meetings with outside parties, but to announce these meetings in advance, and to open the meetings to the public. Under this policy, the Commission uses both the Federal Register and its Public Calendar to provide advance public notice of its meetings. The Public Calendar, which I believe is also unique, lists meetings for the following 2 weeks, and is mailed weekly without cost to any interested person. There are about 20,000 on that mailing list.

Senator KENNEDY. Well, if you must have meetings and give notice, doesn't this hinder your ability to act on some policy issues? If you must have an open meeting and give 7 days' notice every time, doesn't this infringe on your flexibility?

Mr. SIMPSON. We find that it does not, Mr. Chairman. One could speculate that it would. We have a provision for holding meetings without the advance notice, but I must waive them personally. We have found that most of our meetings are in fact scheduled. There is not a problem in scheduling them in advance.

Senator KENNEDY. I see. What percent would come up in this latter category where you waive meetings?

Mr. SIMPSON. Something less than 1 or 2 percent. A very small percentage.

Senator KENNEDY. You keep records on these meetings, too?

Mr. SIMPSON. Yes. Those meetings are listed on a master calendar as a late meeting, with indication that it was an emergency meeting, and also listed in the next issue of the Public Calendar. In all meetings, those and any others, there is a meeting log kept, and the log is available to the public.

Senator KENNEDY. What kind of things arise as emergencies? Do they fall into any category?

Mr. SIMPSON. It could be certainly an emergency situation where there is a possible imminent hazard. We cannot wait on that. Sometimes it is a person who is in town who really did not plan on meeting with the agency, but something came up and he was desirous to do so. But most of our meetings are on regulatory activities, and there is plenty of time in advance. We find it not to be a problem.

Senator KENNEDY. All right.

Mr. SIMPSON. We do provide 7 days' notice, as I mentioned, except for emergency meetings, and those have to be waived by me personally. Virtually all meetings involving Commission employees are open to the public to attend. The policy generally allows closing of only those meetings, or portions of meetings, at which proprietary data might be compromised. Closing of other meetings can be authorized only by a majority vote of the Commissioners.

Senator KENNEDY. How do you do that? How do you decide? What are the procedures you follow for closing a meeting? What sort of information is generally being considered?

Mr. SIMPSON. If it is proprietary data—that is, customer lists—or formulas, if we are looking into a particular product. That kind of thing is certainly exempted, and we are mandated to keep it confidential under the Freedom of Information Act. We close very few other meetings. In other words, it really does have to be proprietary data in our opinion. I think we have only had probably two closed meetings where we had to go to a Commission vote on it. That is out of the hundred of meetings that occur.

Senator KENNEDY. Only two occasions where the Commissioner had to vote whether to keep a meeting open or closed?

Mr. SIMPSON. Where we voted to keep it closed. Otherwise they are all open. All of them are open.

CLOSED MEETINGS OF COMMISSION DECIDED BY MAJORITY VOTE

Senator KENNEDY. Do you decide by majority vote of the Commission?

Mr. SIMPSON. For a meeting to be closed, it is a majority vote of the Commission; that is right, three out of five.

Within 20 days following the scheduled meeting date on all of these meetings, the person holding or attending the meeting must file either a meeting summary, or notice of cancellation if the meeting was not held, with the Office of the Secretary. These summaries, which are sometimes verbatim transcripts, are available for public view in the Commission's public reading room.

The policy also requires summaries of telephone conversations on substantial interest matters. Further, the policy requires that employees exercise discretion in telephone conversations, to the point of terminating the conversation and suggesting a meeting at a future date, or a letter, if a meeting is not possible.

In general, responsibility for administering the Commission's policy on meetings rests with the Office of the Secretary. In practice, of course, the policy rightly places responsibility on the individuals who hold or attend meetings with outside parties. Based on experience to date, it can be concluded that the staff of the Commission not only has come to accept the requirements of the meetings policy, but also has come to understand and believe strongly in the principles behind these requirements. I believe that the Commission's policy on meetings is a strong policy and that it is working.

The Commission has further confirmed its openness policy by providing for the fullest possible disclosure of information to the public under the Freedom of Information Act. Some have said we are unique among Federal agencies in interpreting the Freedom of Information Act as precisely that—freedom rather than as a protection of information act.

In proposed and interim guidelines published August 21, 1974, the Commission indicated that full disclosure of Commission records and studies relating to all acts under our jurisdiction is the rule, not the exception. Information which may, within the discretion of the agency, be exempted from disclosure under the Freedom of Information Act will be available to the public unless the Commission by majority vote makes a finding that disclosure is not in the public interest.

I might say I think we have only declined to provide information probably in two cases in our history so far.

Senator KENNEDY. Why was that? On what basis?

Mr. SIMPSON. Proprietary data, where we decided that it was proprietary data; and in one case, a legal memorandum to the Commission which affected a case being litigated. That was a split decision, and the Commission, by a 3-to-2 vote, did not decide to release that strategy memorandum. They are the only two that I—well, one other, a request for a draft, where we were preparing five drafts of a similar nature and they were mutually contradictory. We felt it would confuse the public. But it is routine. In fact, when the new amendments came into effect, our request did not go up at all. It was flat, right throughout that period.

I want to add that we are aware of the expressed concerns the Commission's policies are causing industry, especially the members of the legal community. We recognize the concerns about adverse publicity, and we are quite aware of our responsibilities in that regard. Certainly we have both a moral and legal obligation to guard against the publication of false, improper, and unsubstantiated charges against a given

company or industry. And we accept that responsibility and actively attempt to eliminate those situations. But if one honestly weighs the advantages and disadvantages of an open agency, I believe one will conclude, as did we, that openness is the only effective way to operate in today's world.

Let me add a personal observation, based on my experience in industry. I believe what industry really wants from a Government agency is predictability, honesty, consistency, competency, and integrity. I do not believe industry wants a regulatory agency which is susceptible to either political or special interest pressures. I say that while still recognizing that many in industry as well as other groups have attempted to exert so-called political pressures on Federal agencies from time to time. In most cases, however, I suspect they are only following the rules of the game as played in Washington, and it is those rules to which I object.

THE RULES OF THE GAME

Senator KENNEDY. How would you define the rules of the game?

Mr. SIMPSON. I think that the primary rule of the game that should be played is that everybody who has an interest in the issue before a Commission should have a legitimate opportunity to be heard. Their views should be considered, and then I believe the decision should be based on the independent judgment decisions of the five expressed in majority vote in our agency. I do not think that happens often enough with commissioners in regulatory agencies. I think that sometimes special interest groups get special consideration.

Senator KENNEDY. Do you feel that your rules of the game are clear?

Mr. SIMPSON. The ones that we play by in our agency.

Senator KENNEDY. In your agency, do you think the kind of openness procedures which you follow contribute significantly to ensuring that your agency plays by the rules you outlined here?

Mr. SIMPSON. Yes. I think that the most important thing we have done in the agency is to abolish secrecy in the agency. However, I would point out and call to the attention of Government officials that the public today is better educated, more aware, and certainly more skeptical than at any time in our Nation's history. It would be a mistake to have an openness activity which is all public relations and not substance. I would further point out that rules on openness are not always easy to live with. Once in a while you will get a meeting in my office with 50 people showing up. We move into a conference room and go on with the meeting. However, our experience shows that the difficulties you may perceive with policies like this are far overestimated and in fact, they become very trivial when compared to the benefits of increased public confidence. Public confidence today is a rare commodity which is worth considerable inconvenience.

Mr. Chairman, I strongly support enactment of S. 1289, which you have introduced. This is a long overdue effort which will go a long way toward restoring public confidence in the Federal regulatory process. I would, however, suggest consideration toward expanding the provisions of the bill in certain respects. The bill provides that the requirement for maintenance of records of communications with outside parties be applicable only to Federal agency officials compensated

at GS-15 and above, and those compensated under the executive schedule. Our meetings policy does not specify, by grade or otherwise, which officers or employees are required to maintain records of communications. Instead, the policy's requirement for records of communications between Commission personnel and outside parties is dependent on the nature of the meeting. Preparation of detailed summaries is required for all meetings and telephone conversations involving matters of substantial interest before the Commission; that is, those pertaining in whole or in part to any issue that as a minimum is likely to be the subject of a regulatory or policy decision by the Commission. If a distinction is to be made in the bill as to which officers or employees are to maintain records of significant communications, the Commission suggests that such be based not on grade level, but rather on the officer or employee's role in making or recommending decisions on matters before an agency. Anyone with more than a minimal role in the decisionmaking process should be subject to the recordmaking provisions.

Senator KENNEDY. As you can understand, we established the GS-15 level with the thought that it would at least be the basis for drawing a line which was clearly definitive enough to attach to most of the policymaking decisions. Do you have other recommendations as to how we can do that better? The GS-15 limit was strictly an arbitrary judgment; we are completely open to finding the best way it can be done.

IS GS-15 LEVEL ADEQUATE TO REQUIRE LOGGING OF MEETINGS?

Mr. SIMPSON. Mr. Chairman, I would state, that we find many people in our agency who are in positions of influence below the grade 15 level. Rather than trying to define it by grade level, we define it by meeting content. We require meeting logs on all meetings that are of substantial interest to the Commission regardless of who attended the meeting. So regardless of the advice, it applies. I think certainly if you have a grade level cutoff, you should catch a majority of them; but we find many in our agency below grade 15.

Although S. 1289 requires detailed summaries of most meetings between agency officials and outside interests, the general public, if denied the opportunity to observe meetings, may not place full faith in the accuracy and completeness of any such summaries. Based on this belief, the Commission believes that consideration should be given to providing for open meetings where significant matters are discussed with necessary limitations, such as for the protection of proprietary information.

In summary, the Commission supports governmentwide implementation of openness policies with respect to meetings with outside parties and information disclosure. The opposite of openness is secrecy. And clearly, if there is any lesson to be learned from the recent past, it is the knowledge that secrecy in Government provides fertile breeding grounds for abuses of power and opportunities for corruption of our system of Government that cannot and should not be tolerated.

I appreciate the opportunity to be here today, Mr. Chairman, and to comment on this legislation and would be delighted to answer any questions you may have.

Senator KENNEDY. OK. Thank you very much for this helpful statement.

Could you give us some idea of the general reaction and response within the agency to these types of procedures? Has there been reluctance to follow them? Have employees welcomed them?

Mr. SIMPSON. When we started, there was certainly a reluctance, because it was a change. We started with approximately 500 employees who had transferred from other agencies and had not been required to follow this kind of a policy. Also, there was some confusion that we as Commissioners were questioning their integrity; they were questioning whether or not they could meet with outside parties behind a closed door and still retain their objectivity. When we explained that we were not questioning their integrity, but it was the fact that if they had nothing to hide, we felt that the businessman or the consumer group, whoever it is, also should have nothing to hide, and that as a matter of fact we wanted not to have anybody second-guess what went on in the meetings. This is the reason we desired to open them. It applies to all of us, also. In other words, we are not imposing a requirement on our staff that we are not willing to undertake ourselves.

I think that over the last period of time there has been a general understanding. Now, people are quite proud of that. People are finding that their counterparts are not questioning what went on. We find no one questioning a decision of a Commission after a series of meetings because they had the opportunity to be at the meeting, to witness what went on, and to participate in the process. I find it very, very healthy, and I think our employees also are finding it very healthy.

Senator KENNEDY. How do you respond to a point we heard often during the course of our consideration of the Freedom of Information Act: That Government employees and officials cannot do their jobs in a fishbowl?

Mr. SIMPSON. As a matter of fact, I understand, and there was speculation that that was true when we started, but in practice and experience that has not turned out to be the case.

IN 95 PERCENT OF OPEN MEETINGS NO ONE SHOWS

Let me just say that in perhaps 95 percent of the meetings that are open to the public, no one shows up. But there is no speculation and no questioning because the opportunity to show up was there. In a few of the meetings, as I said, you will find that 20 to 30 people show up. If they have that kind of interest, they would surely be skeptical if they did not have the opportunity to know what was going on. I find it very healthy, and I find it not a hindrance at all in getting my job done.

Senator KENNEDY. Can't the point be made that your agency handles different information, different material, and has different responsibilities than other agencies? Do you have investigations and enforcement responsibilities?

Mr. SIMPSON. Yes; we do.

I think we are the judge, jury, and policeman, like the complete administrative agency. Might I say that also there is a great deal of concern that in, call them negotiations, lawyer to lawyer that may lead to a settlement, that you could not possibly conduct a negotiation in the open. We find that not to be true. As a matter of fact, I think it is pre-

cisely that kind of meeting where a deal could be made. So, it is precisely that kind of meeting that we want open to the public. For instance, just under one section of our law, section 15, we have settled over 250 cases in less than 2 years, and we have not had a problem.

Senator KENNEDY. You handle trade secrets and other sensitive information as well as emergencies?

Mr. SIMPSON. Yes. Those are the kind of meetings that we close. But we find we get very little in the way of trade secrets and proprietary data in the agency. The other kinds of information which are discretionary with the agency, interagency memorandums, draft documents—as a policy matter we make those available.

Senator KENNEDY. What has been the burden on the agency? Doesn't this create an enormous amount of paperwork? Are there not a lot of top people who should be spending their time studying various questions of health and consumer interest rather than spending their time shuffling papers around?

Mr. SIMPSON. I have not kept an exact accounting on that, but my guess is there is absolutely no additional cost because, if someone is going to attend a meeting, he must communicate with someone. So, he makes a memorandum for the record. In other words, he has a meeting summary anyhow. So that part is no additional burden. We just make copies of it available to our secretary. The public calendar is handled by one person, and it is really not a great burden.

BACKSLIDING IN OPENNESS RULES AT THE CPSC

Senator KENNEDY. What is your reaction to the article that appeared in the Product Safety Newsletter last year, which suggested backsliding in the openness rules at the CPSC? It said that "attempts to circumvent policies on open meetings had been troubling agency topsiders for months."

Mr. SIMPSON. That was an early question that was raised, and I think it was raised by Professor Page at the George Washington University who did a survey. He said there are not a lot of meeting logs. We did do an investigation, and we found that there were meetings not covered by the meetings policy, meetings that were canceled where there was no communication; but we found it is not being subverted.

Also, early on, in anything like that, there is a question of interpretation. In other words, what is a meeting of substantial interest? We have defined it as anything other than a trivial matter. In other words, if someone comes in and his only interest is just general background on the agency, we would not intend that to be covered. But we found some of our employees were logging it on the public calendar, and since it did not relate to a matter of substantial interest, they were not putting in a meeting log. But there is no backsliding on openness.

Senator KENNEDY. What criteria have you used to define "substantial interest"? Is that difficult to define?

Mr. SIMPSON. It may be an overkill, but we defined it as all meetings other than those of a trivial nature. In other words, we went out on the affirmative first and said it involves all meetings where a product is or may be subject to regulatory activity, et cetera, and then we

defined the negative. It is all meetings other than those of a trivial nature.

Senator KENNEDY. How do you handle social contacts at cocktail parties?

Mr. SIMPSON. You will find a lot of those listed in the public calendar, and you will find that if there is—I think for instance myself, I will not discuss matters, and if someone presses me into a discussion, I will put in a meeting log afterwards, but you will find, for instance, a lot of those logged in our public calendar. It is not required, but a lot of people are doing it.

But you will find that the intent of the meetings policy is not being subverted because if anyone gets into a conversation at a cocktail party, it is treated like a telephone conversation, and the log is made of it.

Senator KENNEDY. Do your top people know that? Do your decision-makers understand that?

Mr. SIMPSON. Yes, yes.

Senator KENNEDY. Throughout the whole agency?

Mr. SIMPSON. I certainly hope all the way through. It is a general policing process; but yes, that is generally understood.

Senator KENNEDY. Have you had problems with employee compliance? Is there any internal monitoring of the requirements for thoroughness and accuracy?

Mr. SIMPSON. We had the original one that was raised by the study by Dr. Paige, and we found that generally was not the case. What we do now is have compliance in the agency monitored by our Office of Secretary. For all of the meetings that are logged, she assures that the meeting summary has been filed. We have no way, of course, of knowing of telephone conversations, so that is based on the individual employee himself, but, of course, it is a policy and would be subject to a personnel action if we found someone not complying with it, and we would not hesitate to proceed on it.

In the recent monitoring, we found there is a very high degree of compliance with the policy.

Senator KENNEDY. Thank you very much. You have been very helpful. We will be staying in touch with you.

Mr. SIMPSON. Thank you.

[The prepared statement of Richard O. Simpson follows:]

PREPARED STATEMENT OF RICHARD O. SIMPSON, CHAIRMAN, U.S. CONSUMER
PRODUCT SAFETY COMMISSION

I am pleased to appear before this subcommittee today, to discuss "openness in government," and to describe how and why the Consumer Product Safety Commission arrived at its "sunshine" approach to regulatory life.

Our job at the Consumer Product Safety Commission is to reduce the unreasonable risks of injury to consumers from consumer products. As a Commission, we recognized at the outset that much of our success would depend upon whether the public had confidence in what we said and what we attempted to do.

It is certainly no secret that public confidence in all levels of government and business is at an all time low. In fact, opinion research surveys verify this downward trend. People today are not only skeptical of government, they've reached a point at which they often question the basic motivations of public officials.

We recognized at the outset that there is always the danger of any regulatory agency being "captured" by the special interests it was created to "regulate" or by those it was created to "protect." Who has not heard the charge that "such-and-such" a Federal regulatory agency is a captive of industry? And whether

those charges are true or false, I believe it is terribly naive to simply ignore the fact of life that appearances may often be as damaging as reality.

We determined—at the outset—that we would do everything within our power to avoid even the appearance that the Consumer Product Safety Commission could become or was a captive of any special interest group. We established formal policies to eliminate as far as possible those situations in which the public—rightly or wrongly—could conclude that there had been “arm-twisting” by outside parties in the determination of any given issue. In short, we recognized that it is next to impossible to effectively “twist” arms in broad daylight. It is next to impossible to curry special favors unless there is secrecy and there are closed doors.

In October 1973, just a few months after the Commission was activated, we published our Procedural Policy on Meetings, Prior Public Notice and Records of Proceedings (38 FR 37214). This policy, which I believe is unique, requires Commission employees not only to keep records of meetings with outside parties, but to announce these meetings in advance, and to open the meetings to the public. Under this policy, the Commission uses both the Federal Register and its Public Calendar to provide advance public notice of its meetings. The Public Calendar, which I believe is also unique, lists meetings for the following 2 weeks, and is mailed weekly without cost to any interested person.

Except under specific and limited conditions, Commission employees are expected to provide 7-day advance notice in the Public Calendar for all meetings involving substantial interest matters. For emergency meetings, the policy authorizes the Chairman's office to waive the 7-day advance notice.

Virtually all meetings involving Commission employees are open to the public. The policy generally allows closing of only those meetings, or portions of meetings, at which proprietary data might be compromised. Closing of other meetings can be authorized only by a majority vote of the Commissioners.

Within 20 days following the scheduled meeting date, the person holding or attending the meeting must file either a meeting summary or notice of cancellation with the Office of the Secretary. These summaries, which are sometimes verbatim transcripts, are available for public view in the Commission's public reading room.

The policy also requires summaries of telephone conversations on substantial interest matters; further, the policy requires that employees exercise discretion in telephone conversations, to the point of terminating the conversation and suggesting a meeting at a future date, or a letter, if a meeting is not possible.

In general, responsibility for administering the Commission's policy on meetings rests with the Office of the Secretary. In practice, of course, the policy rightly places responsibility on the individuals who hold or attend meetings with outside parties.

Based on experience to date, it can be concluded that the staff of the Commission has not only come to accept the requirements of the meetings policy, but has come to understand and believe strongly in the principles behind these requirements. I believe that the Commission's policy on meetings is a strong policy and that it is working.

The Commission has further confirmed its openness policy by providing for the fullest possible disclosure of information to the public under the Freedom of Information Act. Some have said we are unique among Federal agencies in interpreting the “Freedom of Information Act” as that—“Freedom” rather than as a “Protection” of Information Act. In proposed and interim guidelines published August 21, 1974, the Commission indicated that full disclosure of Commission records and studies relating to all acts under our jurisdiction is the rule, not the exception. Information which may, within the discretion of the agency, be exempted from disclosure under the Freedom of Information Act will be available to the public unless the Commission determines that disclosure is not in the public interest.

I want to add that we are aware of the expressed concerns the Commission's “goldfish bowl” policies are causing industry—especially the members of the legal community. We recognize the concerns about “adverse publicity” and we are quite aware of our responsibilities in that regard.

Certainly, we have both a moral and legal obligation to guard against the publication of “false,” improper and unsubstantiated charges against a given company or industry. And we accept that responsibility and actively attempt to eliminate those situations.

But if one honestly weighs the advantages and disadvantages of an open agency, I believe one will conclude, as did we, that openness is the only effective way to operate in today's world.

Let me add a personal observation, based on my experience in industry. I believe that what industry really wants from a Government agency is predictability, honesty, consistency, competency and integrity. I do not believe industry wants a regulatory agency which is susceptible to either political or special interest pressures. I say that while still recognizing that many in industry as well as other groups have attempted to exert so-called political pressures on Federal agencies from time to time. In most cases, however, I suspect they are only following the rules of the game as played in Washington. It is those rules to which I object.

We are also aware of the criticisms of our efforts coming from some of the other Federal agencies. The criticism is more encouraging than discouraging to me—encouraging because it indicates that other Federal regulators are seriously studying the subject.

I would call to the attention of Government officials that the public today is better educated, more aware, and certainly more skeptical than at any time in our nation's history. It would be a mistake to have an "openness" activity of words without substance. I would further point out that rules on "openness" are not always easy to live with. However, our experience shows that the difficulties perceived are overestimated and become trivial when compared to the benefits of increased public confidence. Public confidence is a rare commodity which is worth considerable inconvenience.

Mr. Chairman, I strongly support enactment of S. 1289, which you have introduced. This is a long overdue effort which will go a long way toward restoring public confidence in the Federal regulatory process. I would, however, suggest consideration toward expanding the provisions of the bill in certain respects.

The bill provides that the requirement for maintenance of records of communications with outside parties be applicable only to Federal agency officials compensated at GS-15 and above and those compensated under the executive schedule. The Commission's meetings policy (39 FR 37780) does not specify, by grade or otherwise, which officers or employees are required to maintain records of communications. Instead, the policy's requirement for records of communications between Commission personnel and outside parties is dependent on the nature of the meeting. Preparation of detailed summaries is required for all meetings and telephone conversations involving "matters of substantial interest" before the Commission, i.e., those pertaining in whole or in part to any issue that as a minimum is likely to be the subject of a regulatory or policy decision by the Commission. If a distinction is to be made in the bill as to which officers or employees are to maintain records of significant communications, the Commission suggests that such be based not on grade level, but rather, on the officer or employee's role in making or recommending decisions on matters before an agency. Anyone with more than a minimal role in the decisionmaking process should be subject to the recording provisions.

As I stated earlier, the Commission's meetings policy further provides that virtually all meetings between Commission personnel and outside parties be open to the public, with the exception of those involving trade secrets or proprietary information. Meetings involving "matters of substantial interest" before the Commission must be publicized in the Commission's "Public Calendar" in advance of the scheduled meeting date. While the bill requires the maintenance for public inspection of a prospective and retrospective calendar by officials compensated under the Executive Schedule, no provision is made for publicizing the meetings or for opening significant meetings to the public.

Although S. 1289 requires detailed summaries of most meetings between agency officials and outside interests, the general public, if denied the opportunity to observe meetings, may not place full faith in the accuracy and completeness of any such summaries. Based on this belief, the Commission believes that consideration should be given to providing for "open" meetings where significant matters are discussed with necessary limitations, such as for the protection of proprietary information.

In summary, the Commission supports governmentwide implementation of "openness" policies with respect to meetings with outside parties and information disclosure. The opposite of "openness" is secrecy. And clearly, if there is any lesson to be learned from the past, it is the knowledge that secrecy in Government provides fertile breeding grounds for abuses of power and opportunities for corruption of our system of Government that cannot and should not be tolerated.

I appreciate the opportunity to comment on this legislation and would be delighted to answer any questions you may have.

[The Consumer Product Safety Commission regulations follow:]

CONSUMER PRODUCT SAFETY COMMISSION PROPOSED OPENNESS REGULATIONS

(Federal Register, vol. 39, No. 27, Oct. 24, 1974)

(16 CFR Part 1001)

MEETINGS, PRIOR PUBLIC NOTICE, AND RECORDS OF PROCEEDINGS AND INTERIM
PROPOSED AMENDED POLICY

Procedural Policy

Policy on public involvement.—The most important mission of the Consumer Product Safety Commission is to protect the public from unreasonable risks of injury associated with consumer products. To achieve its goal, the Commission requires the interest and participation of the public. Therefore, whenever practicable, the Commission will give all interested parties the opportunity to be heard and otherwise participate. At the same time, the confidentiality of trade secrets and other material protected by law will be maintained.

The Commission believes that all manufacturers, importers, distributors, and retailers, should be vitally concerned about the safety of the consumer products they make and sell. The Commission believes further that all consumers should be vitally concerned about the safety of products they purchase and use. Through a constructive association of the Commission, industry and the consuming public, the goal of significantly reducing the risk of injury associated with consumer products can be achieved.

Summary of amendments.—The Consumer Product Safety Commission in developing the proposed and interim procedures set forth below regarding public notification and disclosure of meetings, has followed the principle that the public interest is best served when regulatory affairs are open to the fullest extent possible. To that end, all Agency staff have been directed to implement procedures hereafter set forth whereby meetings and records will be open to the public unless they fall within exceptions required by law or established in this policy.

The Commission has operated under a basic regulation regarding meetings since October 1, 1973 (38 FR 27214). It is the judgment of the Commission that the soundness of this regulation has been unquestionably demonstrated through its experience with it over a period of many months. However, several areas for clarification of the regulation have been suggested by Agency staff and the public. Consequently, the Commission has added to the regulation a table of contents, definition of certain key terms, more explicit requirements for notification of meetings in the public calendar, replacement of the requirement of Federal Register notice with a requirement of public calendar notice for meetings involving Commissioners or Agency staff and outside parties on pending matters, clearly and narrowly drawn exceptions to requirements for advance public notice, clearly and narrowly drawn exceptions to the right of the public to attend meetings, and separate expanded sections dealing with the news media and telephone conversations.

The Commission has explicitly detailed exceptions to its requirements for advance public notice and its requirements that the public be permitted to attend meetings involving substantial interest matters because it is important to make clear that these and only these narrow exceptions exist relative to this policy. In addition to certain specific exceptions, the Commission acknowledges that extraordinary circumstances arise which might appear to require either that advance notice cannot be given or that the meeting be closed, or both. To ensure that no one claims the existence of extraordinary circumstances without justification, this policy requires: (1) Approval from the Chairman whenever Agency staff, other than personal staff of Commissioners, wish to hold or attend a meeting without giving advance public notice, and (2) approval from a majority of the Commission whenever Agency staff, other than personal staff of Commissioners, wish to hold or attend a closed meeting.

Because it would unduly compromise the individual independence of the Commissioners to have to obtain permission from any of their fellow Commissioners to hold or attend a meeting without giving advance public notice or to hold or

attend a closed meeting, no requirement for such permission has been included for Commissioners. Personal staff of Commissioners must obtain such permission from their respective Commissioners. It is the intention of the individual Commissioners to exercise their discretion in this regard only under extraordinary circumstances.

The requirement of Federal Register notice for meetings involving Agency staff and outside parties on pending matters has been modified because (a) the distinction between "pending" and "substantial interest" matters has been eliminated as being unnecessary, (b) the public calendar notice for meetings has generally proven to be as adequate for giving notice as the Federal Register, and (c) delay in the scheduling of meetings often results from the requirement for Federal Register notices.

The Commission concludes that the proposed amended policy should be published in the Federal Register so that the public can comment on it and that the proposed amended policy should serve as its interim policy until comments have been received and the policy finalized.

Therefore, pursuant to provisions of the Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act (15 U.S.C. 1261-1274), the Flammable Fabrics Act (15 U.S.C. 1191-1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-76), and the Refrigerator Safety Act (15 U.S.C. 1211-14), it is hereby proposed that Title 16 of the CFR be amended by adding to Chapter II an amended part 1001 containing at this time only one section as follows:

PART 1001—ADMINISTRATION, PRACTICES AND PROCEDURES

Sec.

- 1001.60 General policy considerations.
- 1001.61 Definitions.
- 1001.62 Forms of advance public notice.
- 1001.63 Types of and requirements for meetings.
- 1001.64 Recordkeeping categories.
- 1001.65 The news media.
- 1001.66 Telephone conversations.
- 1001.67 Chart summary of meetings policy.

AUTHORITY: Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act (15 U.S.C. 1261-1274), the Flammable Fabrics Act (15 U.S.C. 1191-1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-76), and the Refrigerator Safety Act (15 U.S.C. 1211-14).

Section 1001.60 General policy considerations.

(a) In order for the Consumer Product Safety Commission to properly carry out its mandate to protect the public from unreasonable risks of injury associated with consumer products, the Commission must involve the public to the fullest possible extent in its activities.

(b) To guarantee public confidence in the integrity of its decisionmaking, the Commission must, to the fullest possible extent, conduct its business in an open manner which is free from any actual or apparent impropriety.

(c) To achieve the goals set forth in paragraphs (a) and (b) of this section, the Commission believes that, wherever practicable, it should notify the public in advance of all meetings involving matters of substantial interest held or attended by its personnel and permit the public to attend such meetings. Furthermore, to ensure the widest possible exposure of the details of such meetings, the Commission should keep records of them which are freely available for inspection by the public.

Section 1001.61 Definitions.

For purposes of this regulation, the following words shall have the meanings set forth:

(a) *Agency.* The entire organization which bears the title of the Consumer Product Safety Commission.

(b) *Agency staff.* Employees of the Agency other than the five Commissioners.

(c) *Commission.* The five Commissioners of the Consumer Product Safety Commission acting in an official capacity.

(d) *Meeting.* Any face-to-face encounter in which one or more employees, including Commissioners, of the Agency discuss any subject relating to the Agency or any subject under its jurisdiction.

(e) *Outside party.* Any person not an employee or under contract to do work for the Agency. Examples of persons falling within this definition are representatives from industry, consumer groups and government. Members of the news media are not considered to be outside parties when acting in a newsgathering capacity.

(f) *Substantial interest matter.* Any matter, other than that of a trivial nature, that pertains in whole or in part to any issue that as a minimum is likely to be the subject of a regulatory or policy decision by the Commission. Pending matters, i.e., matters before the Agency in which the Agency is legally obligated to make a decision, automatically constitute substantial interest matters. Examples of pending matters are: petitions, administrative hearings, and matters published for public comment. However, employment interviews; inspection of nonconfidential Agency documents by the public; negotiations for internal Agency needs such as custodial services, office equipment, computer services, and similar "housekeeping" contracts do not constitute substantial interest matters.

Section 1001.62 Forms of advance public notice

Advance notice of Agency activities is provided to the public so that it may know of and participate in these activities to the fullest extent possible. The following two types of notices are utilized by the Agency.

(a) *Public calendar.* The public calendar is the principal means by which the Agency notifies the public of its day-to-day activities. The public calendar provides advance notice of (1) public hearings, (2) Commission meetings, (3) meetings with outside parties involving substantial interest matters, (4) selected staff meetings, (5) Advisory Committee meetings, and (6) other events such as speeches, participation in panel discussions, etc. Upon request, any person or organization will be sent the public calendar on a regular basis free of charge by writing to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. In addition, interested persons may contact the Office of the Secretary to obtain information from a master calendar kept current on a daily basis. This calendar, supplemented by meeting summaries, is intended to serve the requirements of section 27(j) (8) of the Consumer Product Safety Act. Commissioners and Agency staff are responsible for reporting meeting arrangements to the Office of the Secretary at least 7 days in advance. Such reports shall include the following information:

- (i) Probable participants;
- (ii) Subject of the meeting (as fully and precisely designated as possible);
- (iii) Who requested the meeting;
- (iv) Whether the meeting involves matters of substantial interest;
- (v) Notice that the meeting is open or reason why the meeting or any portion of the meeting is closed (e.g., discussion of trade secrets);
- (vi) The date of the meeting;
- (vii) The place of the meeting.

(b) *FEDERAL REGISTER.* The Federal Register is the publication through which official notifications, including formal rules and regulations of the Agency, are made. Because the public calendar is the primary device through which the Agency notifies the public of its routine, daily activities, the Federal Register will be utilized only when required by law or when the Agency believes that the additional coverage it can provide is necessary to assist in notification to the public of important meetings.

Section 1001.63 Type of and requirements for meetings.

For the purpose of implementing the Agency's meeting policy, meetings which involve Agency staff or the Commissioners shall be classified in the following categories, and shall be held according to the procedures outlined within each category.

(a) *Hearings.* Hearings are public inquiries held by direction of the Commission for the purpose of fact finding or to comply with statutory requirements. The Office of the Secretary is responsible for preparing transcripts of the hearings. Where possible, notice of forthcoming hearings will be published in the public calendar and the Federal Register at least 30 days before the date of said hearings.

(b) *Meetings of the Commission.* Meetings of the Commission are held for the purpose of conducting the formal business of the Agency including the rendering

of official decisions, and for the gathering of information by the Commission. Such meetings may be of the following types:

(1) *Executive sessions.* Executive sessions are sessions at which policy and regulatory decisions are made by the Commission. They are attended solely by the Commissioners and are held by majority vote of the Commission and without prior notice. Formal minutes are the responsibility of the Commission.

(2) *Closed sessions.* Closed sessions are generally attended only by the Commissioners and members of the Agency staff. Closed sessions may be held at the direction of a majority vote of the Commission and without prior notice. The Office of the Secretary is responsible for the minutes.

(3) *Open sessions.* Open sessions are attended by the Commissioners, the Agency staff, and any other individual or group desiring to observe. Members of the public desiring to attend an open session are encouraged to conduct the Office of the Secretary at least one day prior to the meeting. Notice of an open session will usually be furnished through the public calendar at least 7 days prior to the session. The Office of the Secretary is responsible for the minutes.

(c) Meetings between Commissioners or Agency staff and Outside Parties. The following set of requirements shall apply to meetings between Commissioners or Agency staff and outside parties whether hosted or attended at Agency premises or at the premises of outside parties:

(1) Notice. Notice of meetings with outside parties involving substantial interest matters shall be furnished through the public calendar at least 7 days in advance. Any Agency employee planning to host or attend such a meeting must notify the Office of the Secretary immediately upon making arrangements for such meeting. Once notification has been made, those subsequently desiring to attend the meeting need not notify the Office of the Secretary. When there is no opportunity to give 7 days advance notice of a meeting, Agency staff (other than the personal staff of Commissioners) who desire to hold or attend such meeting must obtain the approval of the Office of the Chairman. Personal staff of Commissioners must obtain the approval of their respective Commissioners. If such approval is obtained, the Office of the Secretary must be notified in advance of the meeting to record the meeting on the master calendar. The Office of the Secretary shall publish notice of the meeting as an addendum to the succeeding public calendar. Because it could unduly compromise the independence of individual Commissioners, they need not obtain the permission of the Chairman to hold or attend an emergency unscheduled meeting. Listing of the meeting in the master calendar is still required.

(i) Exceptions. The notice requirement shall not apply to:

(a) Meetings with outside parties not involving substantial interest matters (although such meetings should be listed where the public interest would be served),

(b) Initial notifications pursuant to section 15(b) of the Consumer Product Safety Act, and

(c) Discussions held in the normal course of field surveillance inspection and investigation of a person or company. However, advance notice is required for any negotiations leading to settlement of individual cases.

(4) Attendance by the public. Any person or organization may attend any meeting listed in the master calendar unless that meeting has been listed as a closed meeting. Generally, all meetings between Agency employees and outside parties are open to the public for the purpose of observation or participation subject only to space limitations. Participation by the public may be permitted by the meeting chairperson. A person or organization desiring to attend should give at least one day of advance notice to the Office of the Secretary or the employee holding or attending such meeting wherever feasible.

(i) The following meetings are not open to the public:

(a) Meetings, or, if possible, portions of meetings at which proprietary data 552(4) are to be discussed in such a manner as to imperil its confidentiality.

(b) Meetings held by outside parties at which limits on attendance are imposed by lack of space need not be open: Provided, That such meetings are open to the press or other news media.

(c) Initial notifications pursuant to section 15(b) of the Consumer Product Safety Act. All subsequent meetings shall be open.

(d) Meetings held during the normal course of field surveillance, inspection, or investigation of a person or company. The public may, however, attend negotiations leading to settlement of individual cases.

(e) Meetings held with other government officials where said government officials request that the meeting be closed, and, in the opinion of the Agency employee, extraordinary circumstances warrant closing the meeting.

(f) Meetings with contractors in connection with the negotiation of competitive contracts. Also, all meetings with contractors required in the administration of Agency contracts and with contractors regarding "housekeeping" functions of the Agency.

(g) Meetings between Agency staff (other than Commissioners and their personal staff) and an outside party, when, by majority vote of the Commission, it is determined that extraordinary circumstances require the meeting be closed. In such a case, the reasons for closing the meeting or a portion of the meeting shall be detailed in the public calendar.

(h) Meetings between a Commissioner, his or her personal staff, and an outside party, when in the opinion of the Commissioner extraordinary circumstances require that the meeting be closed. In such case the reasons for closing the meeting or portion of a meeting, shall be detailed in the public calendar.

(d) *Staff meetings.* Staff meetings are attended only by members of the Agency as a general rule. At the discretion of the participants, such meetings may be listed on the public calendar and attendance by the public may be permitted. Recordkeeping is at the discretion of the participants.

(e) *Advisory Committee meetings.* Meetings of the Agency's Advisory Committees are scheduled by the Commission. Notice will be given both by the public calendar and the Federal Register. Advisory Committee meetings serve as a forum for discussion of matters relevant to the Agency's statutory responsibility with the objective of providing advice and recommendations to the Commission. The Agency's Advisory Committees are the National Advisory Committee for the Flammable Fabrics Act, the Product Safety Advisory Council, and the Technical Advisory Committee on Poison Prevention Packaging. The Office of the Secretary is responsible for the recordkeeping for such meetings.

Section 1001.64 Recordkeeping categories

Depending on the type and purpose of meetings, different levels of recordkeeping are appropriate. The following is a list of the types of and requirements for the three categories of recordkeeping utilized by the Agency.

(a) *Meeting summaries.* Meeting summaries are written records setting forth the issues discussed at all meetings with outside parties involving substantial interest matters. A meeting summary should detail the essence of all substantive matters relevant to the Agency, especially any matter discussed which was not listed on the public calendar and should describe any decisions made or conclusions reached regarding substantial interest matters. A summary should also indicate the date and the identity of persons at the meeting. A meeting summary or notice of cancellation of the meeting must be submitted to the Office of the Secretary within twenty (20) days after the meeting for which the summary is required. The Office of the Secretary shall maintain a file of meeting summaries in chronological order.

(b) *Commission minutes.* Commission minutes document the decisions of the Commission. Minutes may be taken verbatim when necessary or desirable and may include attachments such as Commission opinions, briefing papers, or other documents presented at the meeting.

(1) Minutes recorded at executive session are subject to the final approval of the Commission. The Commission's final minutes constitute the official means of recording the decisions of the Commission and the votes of the individual Commissioners when filed with the Office of the Secretary.

(c) *Transcript records.* A transcript is a verbatim record of meetings. Transcript records may include exhibits submitted to be part of the formal record of a meeting. Transcripts are generally taken at public hearings. Copies of transcripts are placed on file for public inspection in the Office of the Secretary.

Section 1001.65 The news media.

The Agency recognizes that the news media occupy a unique position relative to the activities of the Agency. It is believed that the inherently public nature of the new media requires that their activities be exempt from the requirements of this meetings policy whenever meetings are held with the news media for the purpose of informing them about Agency activities. Such meetings are not

exempt in the event that any representative of the news media attempts to influence any Agency employee on a substantial interest matter.

Section 1001.66 Telephone conversations.

Telephone conversations present special problems regarding this meetings policy. It is recognized that persons outside the Agency have a legitimate right to information and to present their views regarding Agency activities. It is further recognized that such persons may not have the financial means to travel to meet with Agency employees. However, because telephone conversations, by their very nature, are not susceptible to attendance or participation by the public, care must be taken to ensure that they are not utilized to circumvent the meetings policy. Two basic rules apply to telephone conversations:

(a) Any telephone conversation in which substantial interest matters are discussed with outside parties must be detailed in a meeting summary.

(b) All Agency personnel must exercise sound judgment in discussing substantial interest matters during a telephone conversation and should, in the exercise of such discretion, not hesitate to terminate a telephone conversation and insist that the matters being discussed be postponed until a meeting with appropriate advance public notice may be scheduled or until the matter is presented to the Agency in writing if the outside party is financially or otherwise unable to meet with the Agency employee. A chart summary of the proposed amended meetings policy is as follows:

CHART SUMMARY OF MEETINGS POLICY

Meeting category	Notice			Attendance			Records	
	Federal Register	Public calendar	No advance notice	Open	Closed	Minutes	Transcript	Meeting summary
Public hearings	X	X		X			X	
Involving Commission:								
Executive session			X		X	X		
Closed session			X		X	X		
Open session		X		X		X		
Involving outside parties		1 X		2 X				3 X
Advisory committees	X			X			X	
Staff meetings		4 X			4 X			4 X

¹ Notice in the public calendar is required for all meetings between Commissioners, Agency staff, and outside parties, involving matters of substantial interest, except:

(a) meetings with outside parties not involving substantial interest matters (although such meetings should be listed where the public interest would be served)

(b) initial reports pursuant to sec. 15(b) of the Consumer Product Safety Act, and

(c) discussion held in the normal course of field surveillance and investigation. However, advance notice is required for any negotiations leading to settlement of individual cases.

² Meetings between Commissioners or Agency staff and outside parties are open to the public, except:

(a) meetings or portions of meetings at which proprietary data is to be discussed in such a manner as to imperil its confidentiality.

(b) meetings held by outside parties at which limits on attendance are imposed by lack of space, provided that such meetings are open to the press or other news media.

(c) initial notifications pursuant to sec. 15(b) of the Consumer Product Safety Act. All subsequent meetings shall be open.

(d) meetings held during the normal course of field surveillance, inspection, or investigation of a person or company. The public may, however, attend negotiations leading to settlement of individual cases.

(e) meetings held with other government officials where said government officials request that the meeting be closed and, in the opinion of the Agency employee, extraordinary circumstances warrant closing the meeting.

(f) meetings with contractors in connection with the negotiation of competitive and noncompetitive contracts. Also all meetings with contractors required in the administration of Agency contracts and with contractors regarding "house-keeping" functions of the Agency.

(g) meetings between Agency staff (other than Commissioners and their personal staff) and an outside party when, by majority vote of the Commission it is determined that extraordinary circumstances require the meeting be closed. In such a case, the reasons for closing the meeting or a portion of the meeting should be detailed in the public calendar.

(h) meetings between a Commissioner, his or her personal staff, and an outside party, when in the opinion of said Commissioner, extraordinary circumstances require the meeting be closed. In such case the reasons for closing the meeting, or portion of a meeting, shall be detailed in the public calendar.

³ Meeting summaries are required for meetings where matters of substantial interest are discussed.

⁴ At the discretion of participants.

Comments and views on this notice may be submitted, preferably with five copies, to the Secretary, Consumer Product Safety Commission, room 1025, 1750 K Street, NW., Washington, D.C. 20207 on or before December 30, 1974. Comments received after that date will not be considered. All comments timely received will be on public view in the Office of the Secretary during normal working hours, Monday through Friday.

Dated: October 17, 1974.

SADYE E. DUNN,

Secretary, Consumer Product Safety Commission.

PUBLIC CALENDAR

CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

Volume II, No. 33
February 17-23 and
February 24-March 2, 1975
Published February 14, 1975

Under the amended meetings policy adopted on an interim basis by the Commission, the weekly printed Public Calendar has become the primary means by which the Commission notifies the public of its day-to-day activities.

The amended policy requires that essentially all meetings on "substantial interest matters" between Commission staff and outside parties be open, and that they be announced in advance through the Public Calendar. Exceptions to these requirements are available only under "extraordinary circumstances" through procedures outlined in the policy.

The Public Calendar provides a minimum of seven days prior notice for all meetings which involve substantial interest matters, except in cases where shorter notice has been approved for emergency meetings. Unless noted, all meetings between Commission staff and outside parties are open to the public.

Notice of open meetings in the calendar does not constitute prior arrangement for attendance, or invitation. Arrangements for attending meetings held by individual staff members may be made by calling the person whose number is listed. Information, and arrangements to attend meetings of the Commission or Advisory Committee is available from the Office of the Secretary, (202) 634-7700. The Commission's headquarters office are located at 1750 K Street, N.W., Washington, D.C. and in the Westwood Towers Building, 5401 Westbard Avenue, Bethesda, MD.

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CPSC PUBLIC CALENDAR

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Meeting of the Product Safety Advisory Committee, February 18-19: Sixth Floor Hearing Room, 1750 K Street, N.W., Washington, D.C. Additional information is available from the Office of the Secretary, (202) 634-7700.

Regular Monday Noon Meeting. Between Commissioners and interested members of the press, an informal, on-the-record discussion of CPSC matters; Sixth Floor Hearing Room, 1750 K Street, N.W., Washington, D.C. This meeting is open to the public: Additional information is available from the Office of Public Affairs, (202) 634-7780.

NEISS Briefing: Held every other Thursday, these slide-illustrated briefings on the National Electronic Injury Surveillance System (NEISS) are presented by the Bureau of Epidemiology in Room 235, Westwood Towers Building. Persons interested in attending should call in advance, (301) 496-7687.

MEETINGS OF STANDARDS DEVELOPMENT OFFERORS

Organizations developing consumer product safety standards under Section 7 of CPSC--"offerors"--hold frequent meetings during development of the standard. Generally, these public meetings are announced in advance through the printed Public Calendar; meetings which must be scheduled without sufficient prior notice will be listed in the Master Calendar maintained in the Office of the Commission Secretary, 1750 K Street, N.W., Washington, D.C. Representatives of CPSC's Office of Standards Coordination and Appraisal, along with staff from other bureaus and offices, regularly attend these meetings. Further information on standards development meetings is available from the Project Director or Commission monitor listed below, or from the Office of the Secretary.

ARCHITECTURAL GLASS: Consumer Safety Glazing Committee (CSGC); Robert Gidel, Project Director, One Gateway Center, Pittsburgh, Pennsylvania 15222; telephone (412) 434-3315. Commission monitor Alan Ehrlich, telephone (301) 496-7606.

CGSC's recommended standard and final report have been presented to the Commission, and are now being reviewed by staff. Copies of the recommended standard are available from the Office of the Secretary.

POWER LAWN MOWERS: Consumers Union (CU); Bertram Strauss, Project Director, 256 Washington Street, Mount Vernon, NY 10550, telephone (914) 664-6400. Commission monitor Alan Ehrlich, telephone (301) 496-7606.

Blade Contact Subcommittee: All meetings 9:30 a.m.
February 26 (CPSC - New Orleans Area Office, 2 Canal Street)
March 11 (Sheraton - Laguardia, New York)
March 25 (Howard Johnson's - O'Hare, Chicago)

Steering and Stability Subcommittee
February 28 (CPSC - New Orleans Area Office, 2 Canal Street)

Brake and Drive Train Subcommittee
February 27 (CPSC - New Orleans Area Office, 2 Canal Street)

CPSC PUBLIC CALENDAR

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Fire and Burn SubcommitteeFebruary 20 (Holiday Inn - LaGuardia, New York, 10:30 a.m.)

BOOKMATCHES: American Society for Testing and Materials (ASTM); Barney Corrigan, Project Director, 1916 Race Street, Philadelphia, Pa., telephone (215) 569-4200. Commission monitor George Nichols, telephone (301) 496-7552

ASTM's recommended standard and final report have been presented to the Commission and are being reviewed by staff. Copies of the recommended standard are available for review and copying in the Office of the Secretary.

SWIMMING POOL SLIDES: National Swimming Pool Institute (NSPI); Larry Paulick Project Director, 2000 K Street, N.W., Washington, D.C. 20006, telephone (202) 331-8844. Commission monitor Bert Simson, telephone (301) 496-7606. The following meetings of the development committee have been scheduled; all are at NSPI unless noted.

Development Committee: March 13-14 (Ft. Lauderdale Florida) April 17

Plant Visits: February 26: Poly-Slide (Salem, Mass.), February 28: Aqua Slide-n-Dive (Port of Brownsville, Texas).

RECENT CPSC FEDERAL REGISTER ISSUANCES

February 10 Test Methods for Simulating Use and Abuse of Toys, Games, and
(40 FR 6210) Other Articles Intended for Use by Children: Corrections
These are minor corrections to the regulation promulgated January 7, 1975 (40 FR 1480).

MEETINGS BETWEEN COMMISSION STAFF AND OUTSIDE PARTIES INVOLVING SUBSTANTIAL INTEREST MATTERSWeek of February 17-28, 1975

(Updated February 13, 1975. Asterisks* indicate meetings being listed for the first time in the Public Calendar.)

February 18

Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with Vincent Ross, Michigan Chemical Company, to discuss possible CPSC general wearing apparel flammability standards. Mr. Ross requested the meeting; it is in Room 801 Westwood Towers Building, at 10:00 a.m. (301) 496-7606.

Margaret Neily, Bureau of Engineering Sciences, meeting with representatives of the Associated Merchandising Corp., to discuss flammability testing under CS 191-53. The corporation requested the meeting; it is in Room 900, Westwood Towers Building at 10:00 a.m. (301) 496-7245.

MEETINGS . . . (Cont.)

February 18

Brian C. Pierman, Bureau of Engineering Sciences, meeting with Dr. A. Johnson, National Bureau of Standards (NBS) and representatives of the glazing industry to discuss NBS research on doors, and proposed glazing replacement requirements based on the research. The meeting is at NBS at 10:00 a.m. Further information is available from Mr. Pierman (301) 496-7588.

February 18-19

Stanley S. Morrow, Office of Standards Coordination and Appraisal, attending a meeting of the American Society for Testing and Materials (ASTM) F-8.10 Committee on Gymnastics, to discuss improving the ASTM safety standard for trampolines, and to discuss standards for gymnastic equipment.

February 19

Russ Smith, Office of Standards Coordination and Appraisal, meeting with the National Fire Prevention Administration, Department of Commerce, to establish a working liaison between the Fire Prevention Administration and the Commission. The meeting is in Room 801 Westwood Towers Building. (301) 496-7197.

Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with Wallace Kaine, Executive Director, Textile Staff, Distributor Association, to discuss possible CPSC general wearing apparel flammability standards. Mr. Kaine requested the meeting; it is in Room 801, Westwood Towers Building, at 10:00 a.m. (301) 496-7606. The meeting was originally scheduled for February 5.

Dr. Joseph McLaughlin, Bureau of Biomedical Science, and other BBS staff, meeting with Dr. Frederick E. Reno, Hazelton Laboratories, Falls Church, Va., to discuss skin irritation testing procedures. Dr. Reno requested the meeting; it is in Room 5836, Federal Building 8, 200 C Street, S.W., Washington, D.C. (202) 245-1445.

Kenneth W. Edinger, Bureau of Engineering Sciences, and William P. Menza, Office of Standards Coordination and Appraisal, meeting with the Union Technique de L'Automobile, du Motorcycle, et du Cycle, and with S.A. Cycles Peugeot, to discuss the CPSC bicycle regulations and proposed amendments. The two organizations requested the meeting; it is in Room 450 Westwood Towers Building at 1:00 p.m. Additional information is available at (301) 496-7197.

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February 19

Margaret Neily, Bureau of Engineering Sciences, attending a demonstration of flammability test methods for fabric and apparel, developed by DuPont Corp. The demonstration, one of a series, was requested by James Bercaw, DuPont; attendance is limited to invitees because of space restrictions. Additional information is available from DuPont.

February 19-20

James V. Ryan, Office of Standards Coordination and Appraisal, meeting with the American Society for Testing and Materials (ASTM) E-39 Fire Hazards Task Group, to discuss integration of the fire research information and planning task groups. The meeting is at ASTM offices in Philadelphia.

February 19-23

Jerry A. Penno, Special Assistant to Commissioner Barbara Hackman Franklin and James Brodsky, Special Assistant to Commissioner Constance Newman, attending a workshop on decision-making for regulating chemicals in the environment, sponsored by the National Academy of Sciences, in New Orleans, Louisiana.

February 20

Mary Kay Ryan, Acting Director, Bureau of Compliance, meeting with Edward S. Jones, attorney for J.C. Penney Co., and others, to discuss flammability test procedures under CS 191-53 and test results for napped/flannel fabric. Mr. Jones requested the meeting; it is in Room 427, Westwood Towers Building at 10:00 a.m. (301) 496-7083.

Bernard Schwartz, Office of Standards Coordination and Appraisal, and other Commission staff, meeting with Curtis Early, Monsanto Corp., to discuss the impact of flammability regulations, especially on construction related requirements. Mr. Early requested the meeting; it is in Room 235, Westwood Towers Building at 9:30 a.m. (301) 496-7606.

Russell Smith, Office of Standards Coordination and Appraisal, and other Commission staff, meeting with the National Paint and Coatings Association (NPCA) to discuss the paint industry's ability to respond to CPSC's product ingredient survey. NPCA requested the meeting; it is in Room 801, Westwood Towers Building at 1:00 p.m. (301) 496-7197.

February 21

Commissioner R. David Pittle meeting with John Locke, Can Manufacturers Institute, to discuss metal containers. Commissioner Pittle requested the meeting; it is in his office, 1750 K Street, (202) 634-7726.

MEETINGS . . . (Cont.)

February 21

Representatives of CPSC operations staff meeting with Tom Russell, Sibley & Austin, Chicago, to discuss tests by Commission staff on airless paint spray guns. Mr. Russell requested the meeting; it is in Room 801, Westwood Towers Building at 1:00 p.m. Additional information is available from Harvey Tzucker, (301) 496-7197.

Week of February 24-March 2, 1975

February 24

Brian Pierman and Charles Willis, Bureau of Engineering Sciences, meeting with Dr. R. Brungraber, National Bureau of Standards, and P. Kollman and Alfred Shaines. CONTRASLIP, Inc., to discuss slipperiness test methods and products designed to reduce slip hazards in the bathroom. Dr. Brungraber requested the meeting; it is in Room 363, Building 226., National Bureau of Standards, Gaithersburg, Maryland, at 9:00 a.m., (301) 496-7588.

February 25

Commissioner Barbara Hackman Franklin meeting with Jack Hockenberry, Chairman, Product Safety Committee, Industrial Designers Society of America, to discuss safety as a major factor in the earliest design stages of product development. Mr. Hockenberry requested the meeting; it is in the Seventh Floor Conference Room, 1750 K Street, at 2:00 p.m. (202) 634-7710.

Bert Simson, Office of Standards Coordination, and other Commission staff meeting with Aaron Locker and representatives of the Toy Manufacturers Association, to discuss the Commission's proposed sharp point and sharp edge regulations. Mr. Locker requested the meeting; it is in Room 801, Westwood Towers Building, at 10:00 a.m. Further information is available from Harvey Tzucker, (301) 496-7197.

Charles M. Jacobson, Bureau of Compliance, attending the Regional Seminar on Labeling and Product Safety sponsored by the National Paint and Coatings Association. The meeting is at the O'Hare Inn, Chicago.

Donald A. Mackie, Boston Area Office, meeting with John Jones, Noble & Cooley Co., Granville, Massachusetts, to discuss toy regulations and children's drum sets. Mr. Jones requested the meeting; it is at the Boston Area Office. (617) 223-5577.

MEETINGS . . . (Cont.)

February 25-26

Donald R. MacKay, Office of Standards Coordination and Appraisal, attending a meeting of the American Society of Testing and Materials (ASTM) F-15 Executive Subcommittee to discuss consumer product safety standards activity within ASTM F-15. The meeting is at ASTM offices in Philadelphia.

February 25-28

Bureau of Engineering Sciences staff attending the Southern Regional Committee Meeting, National Conference of States on Building Codes and Standards, in Arlington, Virginia. The Commission plans action on a number of residential-related products. Additional information on the meeting is available from Jules Bigio, (301) 496-7588.

February 26

William V. White, Director, Bureau of Information and Education, meeting with Dr. George Wam and Jane Keeley, Good Housekeeping magazine, to discuss current CPSC information on aerosols, oven cleaners and other spray products. Dr. Wam requested the meeting; it is in Room 738, Westwood Towers Building at 2:30 p.m. (301) 496-7621.

Bernard Schwartz, Office of Standards Coordination and Appraisal, meeting with W.R. Moelich, Chicopee Mfg. Co., to discuss possible CPSC general flammability standards. Mr. Moelich requested the meeting; it is in Room 801, Westwood Towers Building, at 10:00 a.m. Additional information is available at (301) 496-7197.

February 27

The CPSC Commissioners testifying at oversight hearings, Room 5110, Dirksen Senate Office Building, at 9:30 a.m.

Bureau of Information and Education, and other CPSC staff, meeting with Joe Radzius, Dow-Corning Co., to discuss a consumer complaint and recall program developed by Dow-Corning. The Commission has proposed record-keeping requirements for consumer complaints. Mr. Radzius requested the meeting; it is in Room 801, Westwood Towers Building, at 10:00 a.m. (301) 496-7621.

William H. King, Bureau of Engineering Sciences, meeting with Hans Olof Hansson, Sievert Kabelverk, AB, Sweden, to discuss nickel-plated aluminum building wire. Mr. Hansson requested the meeting; it is in Room 900, Westwood Towers Building at 10:00 a.m. (301) 496-7245.

CPSC PUBLIC CALENDAR

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MEETINGS NOT INVOLVING SUBSTANTIAL INTEREST MATTERS, SPEAKING ENGAGEMENTS,
AND PARTICIPATION IN SEMINARS AND CONFERENCES BY COMMISSIONERS AND STAFFWeek of February 17-23, 1975(Updated February 13, 1975. Asterisks*
indicate meetings being listed for the
first time in the Public Calendar.)

February 17

Commissioner R. David Pittle speaking on "Consumer Product Safety Engineering: Technical and Legal Aspects", at the Temple University School of Engineering, Philadelphia.

Donald R. MacKay, Office of Standards Coordination and Appraisal, meeting with John Ware, Technical Help to Exporters, British Standards Institute, to discuss current standards development activities within CPSC. Mr. Ware requested the meeting; it is in Room 857, Westwood Towers Building, at 2:00 p.m. (301) 496-7511.

February 18

Commission Chairman Richard O. Simpson speaking on CPSC to the Rochester (N.Y.) Engineering Society.

James Brodsky, Special Assistant to Commissioner Newman, meeting with Myra Karstadt, Office of Technology Assessment, to discuss CPSC in general. The meeting is in Mr. Brodsky's office. (202) 634-7790. The meeting was originally scheduled for January 30.

Deputy Executive Director Albert S. Dimcoff meeting with John Andrews, Kenneth Van Tine, and David Ward, Owens-Illinois Co., for a general discussion of the firm's product lines and internal product safety policies. The company requested the meeting; it is in Room 440, Westwood Towers Building, at 10:00 a.m. (301) 496-7601.

James P. DiGrazia, Director, and Lois Van Guilden, San Francisco Area Office, meeting with representatives of Travelers Insurance Co. to discuss a joint panel presentation on product liability for the Golden State Exposition to be held in March. The meeting is at the San Francisco Area Office.

- * Edward Yturri, Director, Dallas Area Office, speaking on consumer education, to the AFL-CIO, Dallas.

February 18-19

- * Representatives of several CPSC offices and bureaus, attending the American Toy Fair, sponsored by the Toy Manufacturers of America, at various hotels, New York City.

SPEECHES . . . (Cont.)

February 18-19

Donald R. MacKay, Office of Standards Coordination and Appraisal, meeting with the Occupational Safety and Health Administration (OSHA) Advisory Committee on labeling of hazardous products, to discuss development of recommendations to the Secretary of Labor on labeling of hazardous materials in the workplace. OSHA called the meeting; it is at the Departmental Auditorium.

February 19

- * Norman D. Ray, Dallas Area Office, speaking on "Lead Tolerance Levels in Household Products" to the Southwestern Ink Manufacturing Association, Dallas.
- * Robert W. Kilpatrick, Boston Area Office, speaking on fabric flammability to the National Organization for Women (NOW), Taunton, Mass.

Thomas Van Eck, Minneapolis Area Office, participating in a career counseling day, Phillips Junior High School, Minneapolis.

February 20

General Counsel Michael A. Brown speaking on CPSC to the Annual Symposium on trade associations, sponsored by the Antitrust Committee, Bar Association of the District of Columbia, Sheraton Park Hotel, Washington.

James P. Talentino, Bureau of Engineering Sciences, attending the monthly meeting, area chapter, American Society of Gas Engineers, in Columbia Maryland.

- * Margaret A. Freeston, Office of the General Counsel, participating in a panel on flammability at the conference of the Textile and Needle Trades Division, American Society for Quality Control, Raleigh, North Carolina.

February 21

Bureau of Information and Education (BIE) staff meeting with consumer and industry groups to discuss ways to improve Fact Sheets on children's furniture and toys. BIE requested the meeting, the first in a series of six; it is in Room 450, Westwood towers Building, at 1:00 p.m. (301) 496-7621.

February 21-24

- * Bureau of Information and Education, and Dallas Area Office staff maintaining a booth at the American Association of School Administrators meeting, in Dallas.

Week of February 24 - March 2, 1975

February 24

Bureau of Information and Education staff meeting with consumer and industry groups to discuss revisions in CPSC Fact Sheets on recreational equipment, Room 235, Westwood Towers Building, 1:00 p.m. (301) 496-7621
This is the second of six similar meetings.

February 24-26

Dr. Robert M. Hehir, Director, Bureau of Biomedical Science, meeting with the Inhalation Toxicology Research Institute, U. S. Energy Research and Development Administration, to review toxicology research programs. The meeting is in Albuquerque, New Mexico.

February 25

James P. DiGrazia, Director, San Francisco Area Office, speaking on CPSC to the San Francisco Exchange Club, at the St. Francis Hotel, San Francisco.

February 26

Bureau of Information and Education staff meeting with consumer and industry groups to discuss revisions in CPSC Fact Sheets on outdoor power equipment, power tools and home appliances. The meeting, third in a series of six, is in Room 450, Westwood Towers Building at 1:00 p.m. (301) 496-7621

James F. Hoebel, Office of Standards Coordination and Appraisal, speaking on development of standards under the CPSA, to the New York State College of Human Ecology, Cornell University, Ithaca, NY.

February 27

Robert Adler, Special Assistant to Commissioner Pittle, speaking on "Advertising and Product Safety," to the Alliance for Consumer Protection, Greentree, Pennsylvania.

February 28

Commissioner R. David Pittle lunching with Charles Cavagnaro, Office of Consumer Affairs, to discuss CPSC in general.

Ron Aaron Eisenberg, Director, Office of Public Affairs, speaking on the Role of CPSC, and Federal Involvement on Behalf of Consumers, at Principia College, Elmhurst, Illinois

Bureau of Information and Education staff meeting with consumer and industry groups to discuss revisions in CPSC Fact Sheets on home structures. The meeting fourth in a series of six, is in Room 801, Westwood Towers Building, at 1:00 p.m. (301) 496-7621

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Robert W. Kilpatrick, Boston Area Office, speaking on fabric flammability to students at Hingham (Mass.) High School.

Addendum

February 11

June Needle, Office of Public Affairs, met with representatives of the Japanese Trade Union for an overview of CPSC, with an emphasis on testing toys for safety.

February 12

Jerry A. Penno, Special Assistant to Commissioner Franklin, met for lunch with John Ware, British Standards Institute. No substantial matter was discussed.

CONSUMER PRODUCT SAFETY COMMISSION SAMPLE LOGSHEET

MEETING LOG

BUREAU OF ENGINEERING SCIENCES

RECEIVED
OFFICE OF THE SECRETARY
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DATE OF MEETING: 2/12/75
 PLACE OF MEETING: Southern Building Code Congress, Birmingham, Alabama
 SUBJECT OF MEETING: Discussion of CPSC home systems safety programs and related Southern Building Code Congress programs.

NAME OF PERSON MAKING LOG ENTRY:

Jules L. Bigio

NAMES AND TITLES OF MEETING PARTICIPANTS & COMMISSION UNITS REPRESENTED:

Jules L. Bigio, Director, Special Engineering Studies Division
 James P. Talentino, Manager, Mechanical/Electrical Systems Programs,
 Special Engineering Studies Division
 Brian C. Pierman, Manager, Structural/Architectural Systems Programs,
 Special Engineering Studies Division
 David H. Arthur, Supervisory Consumer Safety Officer, Atlanta Area Office

NON COMMISSION PARTICIPANTS AND NAME OF ORGANIZATION:

Southern Building Code Congress International
 Sam R. Sparks, Director of Administrative Services
 Earnest F. Kiker, Technical Director
 R.E. Sullivan, Director of Education
 Ray Whalen, Technical Assistant

ISSUES DISCUSSED, DECISIONS MADE, ACTION TAKEN OR PLANNED:

See Attached Sheet

cc: Office of the Secretary
 Executive Director

D. Clay
 R. Armstrong
 W. West
 J. Price
 M. Jones
 A. Castle
 D. Scott
 J. Bigio
 B. Pierman
 J. Talentino
 D. Arther

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No decisions were made or specific actions taken or planned as a result of the meeting. Mr. Bigio opened the meeting by restating that the purpose of the session was to become acquainted with Southern Building Code operating personnel and determine how we might cooperate on problems of mutual interest in residential building safety. He advised that we hoped to have similar meetings with other model building code groups in the country.

CPSC programs in residential systems such as; stairs, doors, flame-fired equipment were described briefly and their status covered. The offeror process for standard development was described and the Congress officials were told how they might keep abreast of these developments and participate in areas of interest to them.

Code officials described aspects of the code and their process for incorporating changes. The group explored how CPSC-developed residential building safety suggestions might best be brought to the attention of the Code membership or adopted by the Model Code.

Senator KENNEDY. Our next witness this morning is Chairman Lewis Engman of the Federal Trade Commission. He has served as chairman of the FTC since February 1973, and has directed the agency toward vigorous regulatory reform and antitrust enforcement, providing this subcommittee with most useful testimony recently on Federal airline regulations. We welcome you back today.

**STATEMENT OF LEWIS A. ENGMAN, CHAIRMAN,
FEDERAL TRADE COMMISSION**

Mr. ENGMAN. Thank you, Mr. Chairman. It is always a pleasure to be back here.

I appreciate this opportunity to offer my personal views on S. 1289 and the general issue of Government openness.

In a democracy, citizens have a right to know what the Government for which they pay and by which their lives are shaped is doing for them, to them, or in their name. Information is the basis of accountability, the foundation of political choice, and our best guarantee against tyranny.

But, as you recognize, Mr. Chairman, the issue is rarely as simple as it sounds. There are instances in which public disclosure is obviously contrary to the public interest. We cannot ask the Defense Department to open its war plans file so that the taxpayers may see what may one day be done to affect the taxpayer's life. Even at the Federal Trade Commission, which so far as I know, has no plans—even of a contingency nature—to blow up anybody, there is a need for some confidentiality in order for us to be able to carry out our enforcement mission.

The point is that resolving the problem of openness is a matter of reaching an appropriate balance. Moreover, I think that no two different agencies are going to find that balance in precisely the same place, since no two agencies have exactly the same function.

The FTC is a law enforcement agency. As much, during the course of an investigation, we routinely deal with information which, if made public, would defeat the very purpose of that investigation. In drafting FTC policy, we have had to consider not only the possibility that disclosure would create an administrative burden and that it might discourage the candid exchange of information; we have also taken into account the possibility that greater openness would discourage some citizens from coming forward with information of use to the Commission.

More specifically, we have tried to bear in mind the need to protect evidence, the importance of safeguarding legal strategy in an adversary system of law; the rights to due process without unfair adverse publicity of those under investigation; the individual's right to privacy; and the need to encourage respondents to provide confidential data voluntarily, thus avoiding the need for time-consuming subpoena enforcement activity.

Not every agency will have these factors to consider. Some will have many more. I simply cite these to illustrate the need for careful consideration of Government missions when dealing with the issue of Government openness.

Over the past several months, the Federal Trade Commission has addressed this issue on several occasions. We have weighed the various

factors I have mentioned; and in several instances, we have found the considerations supporting the need for confidentiality to be outweighed by the need for Government accountability, the need for Government integrity, and the need for public confidence. This process has resulted in the following changes in the way we do business at the FTC.

First, the Federal Trade Commission now announces the existence of industrywide investigations whenever it votes to undertake one and when such disclosure would not prejudice the investigation by making likely the destruction of evidence. The existence of all other Commission investigations is made public at some later point, when a complaint issues or when the investigation is closed.

Senator KENNEDY. Do you announce the closings of investigations too?

Mr. ENGMAN. We announce their closings; yes.

Senator KENNEDY. Of any investigation?

Mr. ENGMAN. Of any investigation, whether it be industrywide or not.

Senator KENNEDY. How do you respond to the observation that the Commission has opened an investigation into a particular area with a full staff and then dramatically reduce the number from a staff of 10 to 1. In effect it is as though the investigation was being closed, and yet it still dribbles along. How do you handle that kind of a situation?

FEDERAL TRADE COMMISSION'S INTEREST IN CONDOMINIUMS

Mr. ENGMAN. Well, I think you are referring specifically, Mr. Chairman, to a recent discussion in the press concerning the Federal Trade Commission's interest in condominiums. In my judgment, this is not that kind of situation.

The investigation is ongoing. There was a determination made, in the interest of meeting our responsibilities under other congressional mandates, including the new warranties legislation that there should be a cutback in some areas on a short-term basis. In fact, we are continually shifting people among various investigations, among various cases, as the needs may change. In these instances, particularly when they relate to manpower requirements, we of course lay all of this out on the table when we appear before the Appropriations Committees both here and in the House.

Second, if I may continue, all members of the Federal Trade Commission staff are required to maintain for the files a record of all contacts from outside the agency, including those from Members of Congress, representatives of the executive branch, members of the press, and anyone else, when such contacts relate to investigations or cases—except for casual status inquiries and for those parties directly involved in the normal course of business. These memorandums become available for public inspection when the file becomes public.

In addition, each commissioner has individually agreed to maintain a log of all meetings or conversations between the Commissioner and anyone outside the Commission when such contacts relate to pending investigations or cases.

Finally, all meetings between the Commission and outside groups dealing with Commission business are open to the public unless the

Commission determines by public vote that such a meeting should be closed.

It is still somewhat early for me to offer an appraisal of the effect these new policies have had. I view them as part of a process which I expect to continue as we evaluate the changes we have made and address the possibility of additional changes and refinements. I also mention them to illustrate the extent to which I support the objectives of S. 1289, the Open Communications Act of 1975, which this subcommittee has before it.

Senator KENNEDY. In terms of your second point—recording of information—that all members of the Federal Trade Commission staff are required to maintain for the files a record of all contacts from outside: is that staff only, or does that apply to the Commissioners?

Mr. ENGMAN. That particular directive applies only to the staff. The Commissioners had some concern that being a constituted body we could not bind future members of the Commission, but each member of the Commission at the time this directive was issued announced that each would independently follow the logkeeping requirement that I referred to.

Senator KENNEDY. So at least with regards to the Commission now, the Commissioners themselves follow those same standards?

Mr. ENGMAN. All members of the Commission follow the same procedures.

Senator KENNEDY. When does something become a matter under investigation? Could there be a matter of substantial interest, as you heard Mr. Simpson suggest that would not fall into the under investigation category?

Mr. ENGMAN. It is possible. My own practice in this regard, Mr. Chairman, is to utilize this procedure with respect to all outside contacts of a nonsocial nature.

Senator KENNEDY. Since you mention occasions of a social nature as well, do you have the same kind of requirements that Mr. Simpson talked about in terms of social contacts? How do you handle them?

Mr. ENGMAN. The way I handle it is first of all to try to avoid them wherever it is possible. I find that the cocktail circuit in Washington tends to get pretty repetitive, but on those occasions where I do attend, I particularly attempt to avoid any substantive discussion. If by chance there is such, which is rarely, I would make a notation of it the following morning in the office.

Senator KENNEDY. Is that understood? How do the other commissioners handle it?

Mr. ENGMAN. The other commissioners will have to speak for themselves on this issue. I think there is at least an understanding of this among the top people on the staff.

Senator KENNEDY. What about the memorandums being made public? As I understand it, they are closed and not made public until the case is actually filed. Suppose if the case is closed down?

Mr. ENGMAN. Well, the fact that a case is closed is made public. Then there may be access to the file under either the Freedom of Information Act, or after a certain period of time, there is a presumption that these matters should be made public.

The difficulty we have had and are still trying to wrestle with is that, since the vast majority of our activities relate to law enforcement activities and involve questions of legal strategy or tactics and the

like; the individual most interested in the content of the strategy memorandum, the contact or the discussions is undoubtedly the attorney for the proposed respondent. Whereas I think it is important to keep a record of these contacts, they should not be disclosed at a time which would interfere with the enforcement proceeding itself.

Proceeding with my discussion of the bill, S. 1289, as you know, addresses the problem of communications regarding agency business directed to an agency or to its staff from parties outside the agency. I have indicated that current FTC practice already tracks the requirements of this bill. I should emphasize in addition that our ex parte rule expressly prohibits such communications to a Commissioner or to an administrative law judge when a matter is in adjudication. Having stated my general support for the bill, let me offer a few suggestions which I believe would make this legislation more workable and more effective, particularly as it might apply to the FTC.

First, specifically, I suggest that nonpublic treatment be permitted for written communications and written memorializations of oral communications which meet the criteria for nonpublic treatment contained in the Freedom of Information Act—with the exception, of course, of the intra-agency memorandums exemption.

This would prevent the Commission from being required to divulge certain confidential commercial or financial information received in this manner or the substance of investigatory records which do meet the criteria of the Freedom of Information Act, as amended.

EMPLOYEES BELOW GS-15 GRADE LEVEL OFTEN MAKE CRUCIAL DECISIONS

Second, I would suggest that the requirements of the bill not be limited to GS-15 employees and above. Employees below this grade level often play a crucial role in agency decisionmaking and the intent of the bill would seem equally to apply to all such employees.

Third, under Federal Trade Commission recordkeeping policy, there is an exception for staff contacts with persons who are involved in a Commission investigation or adjudicative procedure. This exempts contacts with parties and witnesses which must routinely be expected to take place in any law enforcement agency. Of course, such staff contacts with parties under investigation are not, strictly speaking, ex parte at all, since both sides are present, and I would recommend that the subcommittee consider including in the bill such an exception at least for law enforcement agencies.

Fourth, by its terms, section (b) (2) of the bill encompasses all communications which meet its criteria, no matter how inconsequential. I would suggest adding a de minimis exception for "insubstantial or casual discussions." This exception, which necessarily would have to be applied in good faith by the agency, would minimize the administrative burden of reporting and recording each such communication.

Fifth, I would also suggest that the exception covering communications with so-called informants be clarified so that protection will be extended to all persons who, because of communications with the agency, are reasonably concerned about retaliation by third persons. The Federal Trade Commission often receives unsolicited letters of complaint from employees and customers who, even without a specific

assurance of confidentiality, provide the Commission with valuable information that might subject them to retaliation if it were made available to the party complained against.

Sixth, and finally, I would suggest broadening the scope of this bill to include other than executive branch agencies. Since this bill is designed to fill certain gaps left by the Administrative Procedure Act, the definition of agency in this bill should be the same as that of the Administrative Procedure Act and not limited to executive branch agencies.

In recent years, Mr. Chairman, Government officials have come to understand that public confidence is as fragile as it is essential. They have also come to understand that simple honesty is not enough and that appearances are as important as reality in obtaining and preserving that public confidence.

FULL DISCLOSURE A VITAL FORCE IN RESTORING PUBLIC TRUST

Full disclosure can be a vital force in restoring the public trust. Openness in Government should be the rule and the exceptions should be narrow indeed. Now, while this truth appears to be so self-evident, is the ideal time to act decisively to assure that this first lesson of democratic government is not lost of those who come to serve the public in the years ahead.

Thank you, Mr. Chairman. I would be happy to respond to any further questions.

Senator KENNEDY. I know you have time problems, Mr. Engman, but can you just review very briefly why you keep information as it is related to noninvolved parties, and you do not with regard to parties involved in matters before the Commission?

Mr. ENGMAN. Well, first of all, we handle that in two ways. At the Commission level those contacts would normally be logged but they would not always be logged at the staff level where the complaint counsel is involved with the investigation of a matter. Contacts with the subject of an investigation or with potential witnesses in a litigation, or with counsel, are something which obviously goes on and which are necessary to the final staff judgment as to whether the matter proceeds or is finally closed. Public notations would be made at that point, but not during the process.

Senator KENNEDY. So you keep record of contacts at the Commission level, but not in the other area?

Mr. ENGMAN. That is correct. The whole question—and it becomes a very difficult one—is that we are talking only about investigations, some of which may lead to nothing, some of which lead to litigation. These may involve questions of privacy and it was our best judgment to draw the line at this point.

I indicated when these guidelines were adopted and the directive was issued that we should not view any of this as being fixed, that perhaps changes should be made in the future too, but that is presently where we have the line drawn.

NONINVOLVED PARTY IN A RULEMAKING PROCEEDING

Senator KENNEDY. Who is a noninvolved party in a rulemaking proceeding?

Mr. ENGMAN. Someone who may have some interest apart from the particular group of people who are involved. What often happens, however, is that the decision to proceed by way of rulemaking as opposed to litigation is not made until after the investigation has already gone a certain distance. We have a number of instances in which both are going on concurrently. But the investigation in a normal circumstance will focus initially on two or three companies in an industry and move from there.

Senator KENNEDY. Do you keep a public calendar? Are all the members' voting records public?

Mr. ENGMAN. The votes of the Commissioners on these matters, the long list of matters, are disclosed. I personally announce all of my outside appointments to the Office of Public Information and that is available on a recorded telephone message that one can reach by dialing a certain number on a daily basis.

Senator KENNEDY. Does that include the other members of the Commission?

Mr. ENGMAN. That does not include the other members of the Commission.

Senator KENNEDY. Has this sort of thing been discussed with the other Commissioners? What has been their reaction? Because you are doing it, has there been any consideration whether the others would? Do they feel that they would not?

Mr. ENGMAN. We have considered these matters on a number of occasions. I have been particularly concerned about this whole question of openness ever since I joined the Commission. The Commission initially gave some thought to doing the same things that then-Attorney General Richardson did in issuing the Justice Department guidelines, but at least at the present time the majority of the Commission has not followed that procedure, but I decided that I felt strongly enough about it that I would begin to do it on an individual basis.

Senator KENNEDY. How burdensome is this practice?

Mr. ENGMAN. It is not burdensome to me at all. As a matter of fact, from the first day I entered the Government, I began keeping logs of all of my telephone conversations as well as all meetings, and it is a procedure which I find to be not burdensome at all.

My secretary makes a notation of every telephone call that comes into the office, including, I might add, those calls of anguish from my wife when the washing machine will not work, or something of that nature.

Senator KENNEDY. Thank you very much. You have been helpful.

Mr. ENGMAN. Thank you, Mr. Chairman. It has been a pleasure to be here.

[The prepared statement of Lewis Engman follows:]

PREPARED STATEMENT OF LEWIS A. ENGMAN, CHAIRMAN, FEDERAL TRADE COMMISSION

Mr. Chairman, I appreciate this opportunity to offer my personal views on S. 1289 and the more general issue of Government openness.

In a democracy, citizens have a right to know what the Government for which they pay and by which their lives are shaped is doing for them, to them or in their name. Information is the basis of accountability, the foundation of political choice and our best guarantee against tyranny.

But the issue is rarely as simple as it sounds. There are instances in which public disclosure is obviously contrary to the public interest. We cannot ask the Defense Department to open its war plans file so that the taxpayers may see what may one day be done with their money, even though the plans undoubtedly have the potential to affect the taxpayer's life. Even at the Federal Trade Commission, which so far as I know, has no plans—even of a contingency nature—to blow up anybody, there is a need for some confidentiality in order for us to be able to carry out our mission.

The point is that resolving the problem of openness is a matter of reaching an appropriate balance. Moreover, no two different agencies are going to find that balance in precisely the same place, since no two agencies have exactly the same function.

The FTC is a law enforcement agency. As such, during the course of an investigation, we routinely deal with information which, if made public, would defeat the very purpose of that investigation. In drafting FTC policy, we have had to consider not only the possibility that disclosure would create an administrative burden and that it might discourage the candid exchange of information; we have also taken into account the possibility that greater openness would discourage some citizens from coming forward with information of use to the Commission.

More specifically, we have tried to bear in mind: the need to protect evidence; and the importance of safeguarding legal strategy. In an adversary system of law: the rights to due process without unfair adverse publicity of those under investigation; the individual's right to privacy; and the need to encourage respondents to provide confidential data voluntarily, thus avoiding the need for time-consuming subpoena enforcement activity.

Not every agency will have these factors to consider. Some will have many more. I simply cite these to illustrate the need for careful consideration of Government missions when dealing with the issue of Government openness.

Over the past several months, the Federal Trade Commission has addressed this issue on several occasions. We have weighed the various factors I have mentioned; and in several instances, we have found the considerations supporting the need for confidentiality to be outweighed by the need for Government accountability, the need for Government integrity, and the need for public confidence. This process has resulted in the following changes in the way we do business at the FTC.

First, the Federal Trade Commission now announces the existence of industry-wide investigations whenever it votes to undertake one and when such disclosure would not prejudice the investigation by making likely the destruction of evidence. The existence of all other Commission investigations is made public at some later point—when a complaint issues or when the investigation is closed.

Second, all members of the Federal Trade Commission staff are required to maintain for the files a record of all contacts from outside the agency, including those from members of Congress, representatives of the executive branch, members of the press and anyone else, when such contacts relate to investigation or cases—except for those contacts with parties directly involved in the normal course of business. These memorandums become available for public inspection when the file becomes public.

In addition, each Commissioner has individually agreed to maintain a log of all meetings or conversations between the Commissioner and anyone outside the Commission when such contacts relate to pending investigations or cases.

Finally, all meetings between the Commission and outside groups dealing with Commission business are open to the public unless the Commission determines by public vote that such a meeting should be closed.

It is still somewhat early to offer an appraisal of the effect these new policies have had. I view them as part of a process which I expect to continue as we evaluate the changes we have made and address the possibility of additional changes and refinements. I also mention them to illustrate the extent to which I support the objectives of S. 1289, the Open Communications Act of 1975, which this subcommittee has before it.

This bill addresses the problem of communications regarding agency business directed to an agency or to its staff from parties outside the agency. I have indicated that current FTC practice already tracks the requirements of this bill. I should emphasize, in addition, that our *ex parte* rule expressly prohibits such communications to a Commissioner or to an administrative law judge when a matter is in adjudication.

Having stated my general support for the bill, let me offer a few suggestions which I believe would make this legislation more workable and more effective—particularly as it might apply to the FTC.

1. Specifically, I suggest that nonpublic treatment be permitted for written communications and written memorializations of oral communications which meet the criteria for nonpublic treatment contained in the Freedom of Information Act (with the exception of the intraagency memorandum exemption, 5 U.S.C. Section 552(b)(5)). This would prevent the Commission from being required to divulge certain confidential commercial or financial information received in this manner or the substance of investigatory records which meet the criteria of 5 U.S.C. Section 552(b)(7).

2. Furthermore, I would suggest that the requirements of the bill not be limited to GS-15 employees and above. Employees below this grade level often play a crucial role in agency decisionmaking and the intent of the bill would seem equally to apply to all such employees.

3. Under Federal Trade Commission recordkeeping policy, there is an exception for staff contacts with persons who are involved in a Commission investigation or adjudicative procedure. This exempts contacts with parties and witnesses which must routinely be expected to take place in any law enforcement agency. Of course, such staff contacts with parties under investigation are not, strictly speaking, *ex parte* at all. I would recommend that the Subcommittee consider including in the bill such an exception for all law enforcement agencies.

4. By its terms, Section (b)(2) of the bill encompasses all communications which meet its criteria, no matter how inconsequential. I would suggest adding a *de minimis* exception for "unsubstantial or casual discussions." This exception, which necessarily would have to be applied in good faith by the agency, would minimize the administrative burden of reporting and recording each such communication.

5. I would also suggest that the exception covering communications with so-called informants be clarified so that protection will be extended to all persons who, because of communications with the agency, are reasonably concerned about retaliation by third persons. The Commission often receives unsolicited letters of complaint from employees and customers who, even without a specific assurance of confidentiality, provide the Commission with valuable information that might subject them to retaliation if it were made available to the party complained against.

6. Finally, I would suggest broadening the scope of this bill to include other than executive branch agencies. Since this bill is designed to fill certain gaps left by the Administrative Procedure Act, the definition of agency in this bill should be the same as that of the Administrative Procedure Act, 5 U.S.C. Section 551(1), and not limited to executive branch agencies.

In recent years, government officials have come to understand that public confidence is as fragile as it is essential. They have also come to understand that simple honesty is not enough and that appearances are as important as reality in obtaining and preserving that confidence. Full disclosure can be a vital force in restoring the public trust. Openness in government should be the rule and the exception should be narrow indeed. Now, while this truth appears so self-evident, is the ideal time to act decisively to assure that this first lesson of democratic government is not lost on those who come to serve the public in the years ahead.

[The Federal Trade Commission guidelines follow:]

EXISTING FEDERAL TRADE COMMISSION EX PARTE RULES

Section 4.7 Ex parte communications.

(a) In an adjudicative proceeding, no person not employed by the Commission and no employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, shall communicate *ex parte*, directly or indirectly, with any member of the Commission, or the administrative law judge, or any employee involved in the decisional process in such proceeding, with respect to the merits of that or a factually related proceeding.

(b) In an adjudicative proceeding, no member of the Commission, administrative law judge, or employee involved in the decisional process of such proceeding,

shall communicate ex parte, directly or indirectly, with any person not employed by the Commission, or with any employee or agent of the Commission who performs any investigative or prosecuting function in connection with the proceeding, with respect to the merits of that or a factually related proceeding.

(c) In an adjudicative proceeding, if an ex parte communication is made to or by any member of the Commission, the administrative law judge, or employee involved in the decisional process, in violation of paragraph (a) or (b) of this section, such member, administrative law judge, or employee, as the case may be, shall promptly inform the Commission of the substance of such communication and the circumstances thereof. The Commission will take such action thereon as may be considered appropriate, provided that any written ex parte communication and a summary of any oral ex parte communication falling within the terms of this subsection and made by a member of the public not a party to the adjudication to which the ex parte communication relates shall be made part of the public records of the Commission, pursuant to sec. 4.8, and placed in the docket binder of the case to which it pertains, but will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence by one of the parties to the proceeding.

(d) A request for information with respect to the status of an adjudicative proceeding shall not be deemed to be an ex parte communication prohibited by this section.

(32 F.R. 8456, June 13, 1967, as amended at 38 F.R. 35300, Dec. 27, 1973)

Administrative Bulletin 73—

Subject: Contacts by Persons Outside the Commission Relating to Investigations or Cases

The Purpose of this directive is to set forth procedures for making and keeping records of contacts made with Commission personnel by noninvolved persons outside of the Commission concerning investigations or cases pending within the Commission. The requirements of this bulletin are in addition to the requirements of section 4.7 of the Commission's Rules of Practice and Procedure as well as any requirements of the Administrative Procedure Act.

Each Commission employee shall record on a "Record of Outside Contact" form (see attached form) each oral communication (in person, by telephone, or otherwise) concerning such a matter pending within the Commission by a noninvolved person indicating an interest in the matter.

The completed "Record of Outside Contact" form shall be placed in the file of the matter and shall thereafter be made part of the Commission's public records if and when a public record of the matter is established. If the communication concerns an adjudicative proceeding, the completed "Record of Outside Contact" form shall be transmitted to the Secretary who shall place it in the public record of the case, but separate from the record material upon which the Commission can rely in reaching its decision in the case.

For purposes of this directive, a "noninvolved person" means one with whom contact would normally not be made in the routine handling of the investigation or case and includes, but is not limited to, a Member of Congress or his staff, an official of another government agency or of the executive branch and any other person in public or private life not directly involved in the matter. It does not include an official or employee of the Commission or a person outside of the Commission with whom an employee would be expected routinely to communicate in the normal course of handling such a matter such as a person under investigation, an informant in an investigation, a party or witness to a proceeding or the attorney for such person, interment, party or witness.

This directive does not apply to communications of applicants or complaining parties in accordance with the policy set forth by section 2.2(2) of the Commission's Procedures and Rules of Practice.

The directive does not apply to routine requests for information solely with respect to the status of a matter. Such requests for status reports would include inquiries regarding when public actions were taken or may be taken, identification of parties or staff personnel responsible for the matter, or availability of public information about the investigation or case.

PROPOSED FEDERAL TRADE COMMISSION REGULATIONS ON LOGGING AND EX PARTE

Section 3.61(f). All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing of justification therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Within thirty (30) days after such requests and materials are placed on the public record, any person may file formal written objections or comments with the Secretary of the Commission. Such objections or comments shall be placed on the public record except for information for which confidentiality has been requested, with a showing of justification therefor, and which the Commission with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Additionally, any communications, written or oral, concerning such proposed transactions, received by any individual member of the Commission, or by any employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth the full contents of such communication and the circumstances thereof, and such memorandum will immediately be placed on the public record. All responses to applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders, together with a statement of supporting reasons, will be published when made.

* * * * *

Section 4.7, Separation of Functions and Ex Parte Communications.—(a) No Commission employee or agent who has performed an investigative or prosecuting function for the Commission in connection with an adjudicative proceeding shall, in that or a factually related adjudicated proceeding, participate or advise in any decision therein of the administrative law judge or of the Commission except as a witness or as counsel in public proceedings.

(b) No person not employed by the Commission shall communicate about an adjudicative proceeding to the administrative law judge presiding therein, to a Commissioner or to a member of a Commissioner's personal staff except to the extent required for the disposition of *ex parte* matters as authorized by law or as authorized by the Commission's rules to be disposed of on an *ex parte* basis. A request for information with respect to the status of an adjudicative proceeding shall not be deemed to be a communication prohibited by this subsection.

(c) If a communication is made in violation of subsection (a) or (b), the recipient thereof shall file a copy of the pertinent part of such communication, if written, or a summary of such communication, if oral, with the Secretary for inclusion in the docket binder of the case to which it pertains and it shall be made part of the public records of the Commission. However, such communications will not be considered by the Commission a part of the record for purposes of decision unless introduced into evidence. The Commission may take such further action as it may deem appropriate for violation of this section.

Written comments on the foregoing proposed revision of section 4.7 may be sent to the Secretary, Federal Trade Commission, Pennsylvania Ave. and 6th St. NW., Washington, DC 20580 on or before thirty (30) days after the date of publication of this announcement in the Federal Register. Such comments will be entered on the public records of the Commission and will be available for inspection in room 130 at the above address during normal business hours.



FEDERAL
TRADE
COMMISSION

NEWS

WASHINGTON, D. C. 20580
For further information call: Office of Public Information, (202) 962-7144
Arthur L. Amolsch, Director

FOR RELEASE AFTER 6:00 P.M., EDT, Sunday, September 29, 1974

FTC EXPANDS OPENNESS POLICIES
DISCLOSES COMMISSIONERS VOTES

The Federal Trade Commission said today that it has decided, unanimously, to broaden its present policy of disclosing individual commissioners' votes only with respect to final actions in rulemaking or adjudicatory proceedings.

In the future, individual votes will also be released when the Commission:

- . Makes a determination with respect to applications filed under Rule 4.11 for release of exempt information;
- . Issues a complaint or proposed complaint;
- . Institutes a rulemaking proceeding;
- . Publicly announces it has directed an investigation, such as an industrywide investigation or an investigation of practices posing risks to public health or safety;
- . Rejects a report of compliance;
- . Provisionally accepts a consent order which is placed on the public record for 60 days; and
- . Closes an investigation.

The votes will be included in any news release which is issued concerning such action. Where no news release is issued, the votes can be obtained from Legal and Public Records, Federal Trade Commission, Washington, D.C. 20580 (Telephone No. (202) 962-5214).

1033-VOTES



FEDERAL
TRADE
COMMISSION

NEWS

WASHINGTON, D. C. 20580

For further information call: Office of Public Information, (202) 962-7144
Arthur L. Amolsch, Director

FOR RELEASE AFTER 7:00 A. M., EST, Monday, November 25, 1974

**FTC EXPANDS OPENNESS POLICIES BY MAKING
CERTAIN MEETINGS OPEN TO THE PUBLIC**

The Federal Trade Commission today announced that all future meetings between the Commission, as a body, and outside (non-government) groups, where the planned or expected discussion will deal with the Commission's official duties, will be open to the public unless the Commission by a vote of its members determines that such a meeting must be closed because a statute or regulation prevents the disclosure of certain information or the public interest otherwise requires such closing.

Such meetings will be announced 30 days in advance by publication in the Federal Register, and such notice will include a brief description of the expected topic, if available, identification of the participants, and an indication whether the meeting is to be open or closed. If the meeting is to be closed, it will be noted that the decision was made by vote of the Commission, and the reasons for the decision will be briefly indicated.

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Senator KENNEDY. Our next witness is Commissioner Schmidt, and General Counsel Peter Hutt, of the Food and Drug Administration. They are no strangers to this subcommittee. Some of the subcommittee's earlier hearings focused on specific problems of the FDA. This legislation would go a long way toward remedying those problems. The Agency has been moving forward on its own initiative, and we look forward to this morning's report on its progress.

I see Mr. Wetherell is with you. He is, as I understand, the Director of Legislative Services.

STATEMENT OF DR. ALEXANDER M. SCHMIDT, COMMISSIONER OF FOOD AND DRUGS, FOOD AND DRUG ADMINISTRATION, ACCOMPANIED BY PETER BARTON HUTT, GENERAL COUNSEL, AND ROBERT C. WETHERELL, DIRECTOR, OFFICE OF LEGISLATIVE SERVICES

Dr. SCHMIDT. Thank you, Mr. Chairman.

We are, for the reason you already noted, particularly pleased to be here this morning because this subject is one of great importance to us. As you pointed out, some of your recent investigations of FDA procedures and practices have demonstrated some shortcomings in our past practices, particularly in our documentation of meetings and in our laying out for public scrutiny not only what we do, but how and why we do it.

During the past year, while some of the previous hearings were being held, the Food and Drug Administration has been in the process of change. One major aspect of this change has been our effort to develop realistic, intelligible rules, readily available to everyone, that specify how the Food and Drug Administration does go about its business. We are now in the stage where these rules are being promulgated, some of them have been already, and our major concern for the future is that they be followed.

I would like briefly to describe what we have done to improve the documentation of our meetings, to make that documentation available to the public, and to provide better public access to our decisionmaking, and I would also touch on what we have learned that is both good and bad about our opening up of the agency.

Before proceeding, I need to state that I am speaking only for the Food and Drug Administration. In my capacity as Commissioner for Food and Drugs, I am not in a position to weigh either the need for nor the operating costs of the requirements of S. 1289 if applied throughout the Department of Health, Education, and Welfare, or throughout the executive branch.

My inability to speak for anyone beyond FDA is based chiefly on that provision of S. 1289 whereby its requirements would apply to all employees of the executive branch grade 15 and above, including the executive schedule officials. I am told this would take in about 24,000 Federal employees, the great majority of whom are not engaged in rulemaking or adjudicative actions. I will, therefore, defer to other agencies and the Department on the suitability of S. 1289 to settings other than FDA.

Now, our new procedural regulations are central to our efforts, beginning 21½ years ago, to formalize and, where necessary, to establish

a framework to deal with recurring and difficult issues involving the interaction of private persons with our agency. These regulations set out in a formal and comprehensive manner standards of behavior which were sometimes imperfectly prescribed, communicated, understood, or followed by agency personnel. The FDA's Policy Board has completed its review of the new procedural regulations, and we will publish them in the Federal Register in May.

Now, included in these regulations are rules to assure the maintenance of accurate records of communications with persons outside the Government when the communications are relevant to agency decisions, and to establish an open calendar of meetings with nongovernment parties. We believe that these steps present basic tenets of sound management in a regulatory agency.

A complete record of a proceeding provides a necessary basis for making a decision and for subsequent review of that decision. Also, accurate records and their disclosure, subject to the limited exceptions specified in the Freedom of Information Act, promote public confidence in the Government by aiding understanding of the basis of agency decisions.

Openness also reduces the possibility of inferences of impropriety in those contacts with affected parties, contacts which are often necessary in administrative proceedings to secure advice and comments, and which reflect the right of every citizen to communicate with the Government.

OPEN CALENDAR ESTABLISHED FOR FOOD AND DRUG ADMINISTRATION

In recent months, pending publication of our procedural regulations, I have issued memorandums to all employees of the agency concerning the documentation of communications with individuals outside the Federal Government, and the establishment of an open calendar for the Food and Drug Administration's top officials. These memorandums are attached to my statement.

Our procedural regulations recognize the right of every citizen to confer with the Food and Drug Administration, and they state explicitly when employees should keep records of communications they have with individuals outside the Department.

Under our procedures, when an employee talks with a private party about a pending regulatory matter or decision, and the conversation involves more than simply a brief description of the matter for informational purposes, then a written memorandum recording the substance of the meeting must be prepared by the Food and Drug Administration employee, and placed in the administrative file of the matter.

Senator KENNEDY. Does this apply to all employees, or just those at certain levels of salary and responsibility?

Dr. SCHMIDT. This applies to all employees. We agree with what was said earlier. Very frequently, employees at grade levels much below 15 are important in the decisionmaking process, and we believe that what should be recorded is that decisionmaking process.

Senator KENNEDY. Is the administrative file a public file or available upon public request?

Dr. SCHMIDT. Yes; the administrative file is public.

Mr. HUTT. There would, Senator Kennedy, be one or two exceptions. For example, if it related to a new drug application and contained confidential material, and if this particular memorandum were relating to confidential information, it would not be available, that is the rare exception.

Dr. SCHMIDT. Another provision of the regulations requires preparation of memorandums recording the substance of communications, in other appropriate situations, such as where a meeting involved an important matter, a decision on an issue, or statements, advice, or conclusions to which future reference may be required as part of an administrative record. These memoranda must also be filed in any relevant administrative file.

Both of these procedures apply to all oral communications, whether by telephone or in person. Under both, all memorandums are available to the public upon request, except where exempt from disclosure under our freedom of information regulations.

Senator KENNEDY. How do you decide what is an important matter? You heard Mr. Simpson indicate earlier that it was anything that was not trivial. How do you define it?

Dr. SCHMIDT. Well, it is difficult to find general words that would define things other than trivial. I would agree with the "other than trivial" definition, but we prefer to try to express it positively and chose these words. The English language is somewhat limited from time. Just "anything of importance," I think, would be an inclusive rather than an exclusive definition of the term "important."

Mr. HUTT. Senator, the draft regulations do not define the term.

Senator KENNEDY. Given your review of decisions taken at all levels of the agency, are employees interpreting the term too leniently or too strictly?

Dr. SCHMIDT. Well, the experience has been limited because by and large the review of recordkeeping of this kind comes at final review of matters, and our experience under the new procedures is limited. We have not undertaken a formal look as yet.

The new regulations, as you know, have not been promulgated publicly yet, and while we are operating under them now, our check on compliance has not been formal.

To my limited evaluation to date, I think that most everyone in the Agency believes that most everything we do is important and therefore must be recorded. I think the experience is such that people, if facing an option now, would choose to record rather than not to record. Our administrative procedures are to assure that accurate records of written communications from outside the agency are maintained, appropriately filed, and made available also in accordance with our Freedom of Informations regulations.

Our procedural regulations also provide for the maintenance of two types of public calendars to be disseminated weekly. This will formalize an interim procedure we established last fall, and have been operating under since last fall.

PROSPECTIVE AND RETROSPECTIVE CALENDARS

First, there is a weekly prospective calendar of all public affairs involving the FDA. In addition, there is a retrospective calendar of private meetings held the previous week by top agency officials with per-

sons outside the Federal Government. By top agency officials, we mean a number of officials and their deputies, including myself and my Deputy, my Associate Commissioners, the Directors of all regionals operation, the Directors of all of the offices in my office, and the Office of the Chief Counsel for the Food and Drug Administration.

The retrospective calendar includes personal meetings of these officials. Telephone discussions may be included at the option of the official making the report; so I think the use of the retrospective calendar ensures that everything is listed and nothing escapes public scrutiny.

Senator KENNEDY. Just before we move on—the Consumer Product Safety Commission provides for advance notice of their private meetings. Did the FDA consider this?

Dr. SCHMIDT. We considered listing private meetings, but decided it would be more meaningful and accurate to list those meeting that had been held. Listing private meetings in advance we rejected as being a necessary part of the prospective part of the calendar. We did feel that they were important to be on the calendar.

Senator KENNEDY. Did you consider opening those meetings between the staff and industry?

Dr. SCHMIDT. Well, we have moved toward opening all meetings that do not include discussions of trade secrets or material that would materially affect the industries. We have retained the ability to close parts of advisory committee meetings when options are discussed or where there is discussion on the part of members of the advisory committees and possible recommendations to the Agency.

But otherwise, the meetings are increasingly being opened, and many of the meetings that I think formerly would have been closed are now held in the open.

Mr. HURT. Senator, perhaps I could just explore this for a moment. We considered very carefully whether the Food and Drug Administration should adopt a policy that every meeting with any member of the public, whether it be industry or professionals or consumer groups or whatever, would be open to the public. We would, in order to do that, of course, have to have a prospective calendar of all meetings. Otherwise, that would not be feasible.

We concluded for two reasons not to do that. The first reason that quite frequently—in fact we looked at our own personal calendars for a couple of weeks to make this determination—we meet to consider emergency situations. We have literally hundreds of recalls, for example, during the course of a year of various products subject to the jurisdiction of the Food and Drug Administration. Those issues typically must be decided within 24 or 48 hours. There is no way that we could get those things on a prospective calendar, and no way we would be satisfied by holding them over for a week before we could talk to someone about them.

The second reason for rejecting that approach is one that I would characterize as a constitutional or a basic civil liberties reason. We do believe that citizens have a right to meet with their Government in private when they wish to do so. The Constitution, for example, speaks of a right to petition the Government for a redress of grievances.

In any event, we feel, as Chairman Engman of the Federal Trade Commission said, that this is a question of balancing rights. Citizens have rights to meet with us in private. On the other hand, when the

meeting affects a public interest, a memorandum should be kept and should be made publicly available, so that there would be no implication or possibility of undermining the public confidence in the Government. That is the reason why, in balancing those two interests we allow people to have private meetings, but where it does not involve matters that are exempt from disclosure, we then make public the result of that meeting. We do guarantee access to everyone to come in and meet with us on any subject.

Senator KENNEDY. As I understand the Consumer Product Safety Commission, they also have situations which demand immediate action. However, they have a waiver provision which is exercised by the Commission in times of emergency. Why wouldn't something along those lines work satisfactorily?

DIFFERENCES IN FUNCTIONS OF AGENCIES NECESSITATE FLEXIBILITY IN LOGGING

Mr. HUTT. I am unable precisely to compare the two agencies, Senator, not knowing the exact type of situation that occurs there. There are a number of differences though. Perhaps I could just run down a few. We conduct over 33,000 inspections of industry establishments every year. Each one of those presumably would, if one were to adopt a prospective calendar, be required to be put on a public calendar, because those are "meetings." Presumably, anyone could attend that type of oral discussion with the regulated industry, which would mean that anyone could accompany an FDA inspector on a plant inspection.

I do not think that kind of inspection occurs, at least as much, with the Consumer Product Safety Commission as with the Food and Drug Administration. That is a vital part of our business.

Second, at our district level after those inspections, there is an enormous amount of oral discussion that goes on with the regulated industry, literally throughout the country. Every one of our regional directors and district directors and indeed compliance officials spends a good deal of time on the telephone in contact with the industry in order to achieve compliance with the law.

Again, and we are talking here probably about hundreds of thousands of telephone conversations throughout the agency in a year—would be subject to this requirement.

We also have the situation where we are required to give our pre-clearance to various types of products, whereas the Consumer Product Safety Commission does not. That means the industry must come to us on literally a daily basis to obtain information that will allow them to put such products as antibiotics, new drugs, color additives, and food additives on the market. They cannot legally do so without first obtaining our approval. So here is another form of daily meeting throughout the Agency that is required, which is not under the Consumer Product Safety Commission's legal provisions.

In short, as Mr. Engman said, there are differences between agencies which may require a somewhat different approach. I think to adopt the CPSC approach for FDA would bog us down to the point of tying us up in red tape and would be counterproductive to the public interest in many, many areas.

Senator KENNEDY. You list the top Agency officials, and then you list the others. Are not a lot of decisions made within the FDA by individuals below that level?

Dr. SCHMIDT. The listing referred to those officials who have to keep the open calendar. Requirements for recordkeeping, memorandum recording, and so on extend throughout the Agency.

Senator KENNEDY. How do you know that they have had meetings if they are not on the calendar? If you have a calendar you know who has been talking to whom and what the subject has been. But, if meetings are not on the public calendar, how would anyone know to ask for the memorandums?

Dr. SCHMIDT. Well, we considered it important to have the meetings of the top Agency officials listed, as most of the controversial decisions, and most of the important matters would be handled, even if just at the final stages by these officials. Listing all meetings of everyone in the Agency on the calendar would be, on a cost-benefit basis, not worth the cost.

There are memorandums of all such meetings and records of those meetings. If anyone asked about them, they could be informed of them. We made in essence a cost-benefit decision as to how far down the open calendar should extend.

Mr. HUTT. Senator, it is possible to get back to those memorandums, even if you do not know that a particular meeting occurred. All that one need do, under the Freedom of Information Act, is request all meeting memorandums with a particular trade association during the past year, or relating to a particular subject matter, and under the 1974 Freedom of Information Act amendments that is a sufficient description to require the Agency to produce those documents. Thus it is not as though they are simply not traceable. They must be kept in a particular administrative file, and that file can be requested.

I would like to point out one other aspect of this. The issue that you just raised was raised with us by both the press and consumer advocates after our proposed Freedom of Information regulations were published in May 1972.

POSSIBILITY OF A PUBLIC INDEX ON FDA FILES

As a result of that, we have been working with Jim Turner, a consumer advocate, and through him with the University of Maryland, to determine whether there might be a public index that could be prepared of all FDA files, so that people would know how to make meaningful requests. This would achieve the same purpose that was indicated by your question to us.

We have had the University of Maryland officials for a year going around the Agency to review all of our files to see whether that is feasible or simply is not feasible. As of this moment, no resolution of that has been achieved.

Dr. SCHMIDT. OK; I will submit part of my—

Senator KENNEDY. We will include it in the record. I have some specific questions, but I want to give you a chance to make whatever comments you want.

Dr. SCHMIDT. I think a number of the points that I would make, particularly about the differences between S. 1289 and our regulations, have already been made. We think that in some respects our procedures are broader than the bill, and to some degree a little simpler, and we have spelled that out in the testimony.

I think that the only important points that I would like to make have to do with some of the problems that we have encountered. It

might very well be that your questions would pick those up. I think that there is, depending on the extent to which one requires these kinds of procedures, a cost to the agency, and I think that this must be dealt with realistically.

Another point is that we have been partly amused and partly disappointed at what has happened as we have opened up the agency. We have been intrigued by the relatively great interest of the industry as to whom we meet with while making FOI requests. The industry has been more interested than have consumer groups or others. I think probably this is understandable when one thinks about it, but it was a bit surprising to us.

In general, we think that our procedures are highly successful and are terribly important in achieving what we want, which is a good public understanding and confidence in agency actions. I will submit my statement for the record and conclude with that.

I would be happy to respond to your questions.

Senator KENNEDY. Do you have some ideas as to what these practices cost, and would you submit that to us?

Dr. SCHMIDT. I would agree with some of the earlier comments that keeping the open calendar is not a great cost. It is something that should be done, but with the memorandums and the freedom-of-information requests under our new regulations, we have become somewhat concerned with the expenditure of manpower this has caused.

We have tried to calculate this accurately. Currently, about 37 additional man-years of effort are being expended to answer freedom-of-information requests, due in part by amendments to the law and in part by the procedure. This is considerable. This takes people away from other activities, and I think this again gets back to my point that the cost ought to be recognized and counted in.

Senator KENNEDY. Do you think the new procedures have inhibited any useful communications FDA employees would normally receive from the outside?

Dr. SCHMIDT. No; absolutely not. I think that it depends in part on the degree of sophistication and maturity of those with whom we are communicating. Since communications with unsophisticated, immature groups would not be too useful, the understanding that has come forth on the part of most groups has been helpful and encouraging, and I do not believe that the new procedures have inhibited good communication with anyone.

Senator KENNEDY. What has been the reaction of industry?

Dr. SCHMIDT. This is my semifacetious point about sophistication and so on. We deal with large trade associations and multinational corporations that understand this and can deal with us on our terms with no problems. We also deal with some very small concerns in the Midwest. They have been nervous about the new procedures. Nevertheless, since they are often forced to communicate with us to go ahead, they do, and they have discovered that it is not so bad after all. Most people are concerned that other industry lawyers will somehow sneak a peak at their trade secrets by taking advantage of freedom of information or by getting memorandums that are leaked.

However, experience should dispel the concern, and I think everyone will relax and live quite happily under our procedures.

PUBLIC PARTICIPATION IN DECISIONMAKING PROCESS INCREASED
BY THESE PROCEDURES

Senator KENNEDY. Do you think these kind of procedures are going to increase public participation in the decisionmaking process?

Dr. SCHMIDT. I sincerely hope so. This is really one of the two principal reasons that I am so anxious that the agency does open up. Dr. Edwards and Mr. Hutt and many others over the last couple of years have talked about our advisory committee proceedings. We hope that this will foster public understanding not only of what we do, but also of the issues with which we and the public, in a real sense, must deal.

Mr. HUTT. Senator, I would like to add one comment here. It will guarantee the possibility of greater participation. Until there is some means, however, of increasing the size of the very small group of people who today represent the public before any Government agency, the actual amount of participation is unlikely substantially to increase. That is a fact of life.

Senator KENNEDY. Many of these meetings are listed as courtesy calls. For example, on March 10, Mr. Searle brought a new company official to pay a brief courtesy call on Dr. Kraut. No memorandums were made on the matters discussed.

Are these just a formality and a waste of time?

Dr. SCHMIDT. Well, many, many of them are formalities because in point of fact the agency business that is done usually requires a substantial group of people and very rarely, for example, does someone like Mr. Searle come without his lawyers and chemists and toxicologists and so on to do business. His company would not let him come alone in the first place.

Senator KENNEDY. Do you think the company counts that meeting as a business meeting, taking the cost of the time as a business expense and a tax deduction?

Dr. SCHMIDT. I do not know. It is ceremonial, but in a sense it is important ceremony. Knowing people is important. Very frequently people are brought to meet with me. I think the objective is that when in another setting we do have a meeting, which would be on the Public Calendar, I do not say, "Who is he?"

Senator KENNEDY. Mr. Hutt, there was a recent article in the trade press which indicated that you have been meeting with House committee staff people and industry representatives together to work out drafting on device legislation.

Were industry people present? Why would that not have appeared in a public calendar?

Mr. HUTT. At different times there were industry people and consumer people present. Yes, that did not appear on my public calendar because the FDA policy board concluded that you would make a decision based upon who invited you to the meeting and not who they also invited. When we are invited too, for example, a meeting with another Government agency or Congress, if the other party also invites someone else, that is not determinative of what we put on the public calendar.

Senator KENNEDY. Isn't that a loophole?

Mr. HUTT. Unquestionably it is. If that were to be changed by the Policy Board, I would have reported it. But that was the decision that was made and that is the way all of us have been following it.

Senator KENNEDY. What is your reaction, Dr. Schmidt, to that loophole?

Dr. SCHMIDT. Well, this was discussed at some length and, as Mr. Hutt has indicated, it was deliberate. I think that there were two desires or two reasons for it. One was that we did not feel it proper to force on Congress or to force on another Government agency arbitrarily our own behavioral criteria. And we thought we needed a little experience to see what would happen. We did not wish to be in a position of embarrassing Congress or of embarrassing another agency which may be less rigorous than we were being with meetings that we called.

Senator KENNEDY. We would like to stay in touch with you to follow up on this whole area. We would like to work with you in the development of your own regulations as well.

We want to thank you very much.

Dr. SCHMIDT. Thank you, sir.

[The prepared statement of Dr. Schmidt follows:]

PREPARED STATEMENT OF ALEXANDER M. SCHMIDT, M.D., COMMISSIONER, FOOD AND DRUG ADMINISTRATION, PUBLIC HEALTH SERVICE, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

We are particularly pleased to appear before you this morning, as the subject is one of great importance to the Food and Drug Administration. Some of this subcommittee's recent investigations of regulatory agency practices and procedures have demonstrated shortcomings in Food and Drug Administration past practices, particularly in our documentation of meetings and in our laying out for public scrutiny what we do, and how and why we do it.

During the past year, and while your hearings were being held, the Food and Drug Administration has been in a process of change. One major aspect of this change has been our effort to develop realistic understandable rules, readily available to everyone, that specify how the Food and Drug Administration goes about its business. We are now in the stage where these rules are being promulgated; our major concern for the future is that they be followed.

I will describe what we have done to improve the documentation of our meetings, to make that documentation available to the public, and to provide better public access to agency decisionmaking. I will touch on what we have learned that is good and bad about our opening up our operation.

Before proceeding further with my testimony, I would like to state that I am speaking only for the Food and Drug Administration. In my capacity as Commissioner of Food and Drugs, I am not in a position to weigh either the need for, nor the operating costs of, the requirements of S. 1289 if applied throughout the Department of Health, Education, and Welfare, or the executive branch.

My inability to speak for anyone beyond the Food and Drug Administration is chiefly based on that provision of S. 1289 whereby its requirements would apply to all employees of the executive branch in grade 15 and above, including executive schedule officials. I am informed that this definition would take in approximately 24,000 Federal employees, the great majority of whom are not engaged in rulemaking or adjudicative actions. I will, therefore, respectfully defer to other agencies and the Department on the suitability of S. 1289 to settings other than FDA.

FOOD AND DRUG ADMINISTRATION PROCEDURES

The Food and Drug Administration's new procedural regulations are central to our efforts, beginning more than two years ago, to formalize, and, where necessary, establish a framework to deal with recurring and difficult issues involving the interaction of private persons with our Agency. They will set out in a formal and comprehensive manner standards of behavior which were sometimes imper-

fectly prescribed, communicated, understood, or followed. The Food and Drug Administration's Policy Board has completed its review of our new procedural regulations, and we plan to publish them in the *Federal Register* in May.

Included in the regulations are rules to assure the maintenance of accurate records of communications with persons outside the Government when the communications are relevant to agency decisions, and to establish an "open calendar" of meetings with nongovernment parties. We believe these steps present basic tenets of sound management in a regulatory agency.

A complete record of a proceeding provides a necessary basis for making a decision and for subsequent review of the decision. Also, accurate records and their disclosure, subject to the limited exceptions specified in the Freedom of Information Act, promote public confidence in the Government by aiding understanding of the basis of agency decisions. Openness also reduces the possibility of inferences of impropriety in those contacts with affected parties, contacts which are often necessary in administrative proceedings to secure advice and comments, and which reflect the right of every citizen to communicate with the Government.

In recent months, pending publication of our procedural regulations, I have issued memoranda to all employees concerning the documentation of communications with individuals outside the Federal Government, and establishing an open calendar for the Food and Drug Administration's top officials. These memoranda are attached to my statement.

MEMORANDUMS OF MEETINGS

Our procedural regulations recognize the right of every citizen to confer with the Food and Drug Administration, and state explicitly when employees should keep records of communications they have with individuals outside the Department.

Under our procedures, when an employee talks with a private party about a pending regulatory matter or decision, and the conversation involves more than simply a brief description of the matter for informational purposes, a written memorandum recording the substance of the meeting must be prepared by the Food and Drug Administration employee, and placed in the administrative file of the matter.

Another provision of our regulations requires preparation of memoranda recording the substance of communications, in other appropriate situations—such as where the meeting involved an important matter, a decision on an issue, or statements, advice, or conclusions to which future reference may be required as part of an administrative record. These memoranda must also be filed in any relevant administrative file.

Both of these procedures apply to all oral communications, whether by telephone or in person. Under both, all memoranda are available to the public upon request, except where exempt from disclosure under our Freedom of Information regulations.

Existing Food and Drug Administration procedures assure that accurate records of written communications from outside the Agency are maintained, appropriately filed, and made available in accordance with our Freedom of Information regulations.

PUBLIC CALENDAR

Our procedural regulations also provide for the maintenance of two types of public calendars to the disseminated weekly. This will formalize an interim procedure we established last Fall.

First, there is a weekly prospective calendar which includes all public meetings, seminars, conferences, advisory committee meetings, public hearings, and other public proceedings of the Food and Drug Administration.

In addition, there is a retrospective calendar of private meetings held the previous week by top agency officials with person outside the Federal Government. By top agency officials, we mean the following officials and their deputies:

- The Commissioner, Food and Drugs
- The Deputy Commissioner
- The Associate Commissioners
- The Assistant Commissioners
- The Executive Director of Regional Operations

The Director of the Office of Legislative Services
 The Director of the National Center for Toxicological Research
 The Bureau Directors
 The Chief Counsel for the Food and Drug Administration

The retrospective calendar includes personal meetings of these officials; telephone discussions may be included at the option of the official making the report.

S. 1289

S. 1289 is quite similar to these procedures. It would require each Federal agency employee of grade GS-15 or above, including executive schedule officials, to maintain records of oral and written communications initiated by persons outside the agency concerning, basically, all important policy matters. The new requirements would supplement the "ex parte rules" applicable to formal adjudicatory proceedings which are already prescribed in the Administrative Procedure Act. Copies of the records of these communications must be placed in appropriate files and, subject to a number of exceptions, be open for public inspection at a designated location in each agency. S. 1289 also requires executive schedule officials to post for public inspection their prospective and retrospective calendars.

COMPARISON OF FDA PROCEDURES AND S. 1289

Our procedures are broader in that the requirements of making memoranda of contacts concerning significant matters extend to all Food and Drug Administration employees, not just those above any particular grade level. Furthermore, our requirements extend to communications initiated by Agency officials, as well as those initiated by outsiders, and they are stated in a somewhat more understandable manner.

There is an ambiguity in S. 1289 with respect to what is meant by an ex parte contact. It is clear from the bill and your introductory remarks that the bill covers contacts from officials elsewhere in the executive branch of the Government. Our procedural regulations only cover communications with individuals outside the Department of Health, Education, and Welfare. For agencies like the Food and Drug Administration which are part of an executive branch department, it is unclear whether the bill's recordkeeping and filing requirements apply to contacts from elsewhere in our Department, such as the Office of the Secretary or the National Institutes of Health. Because the statutes we administer vest ultimate authority in the Secretary of Health, Education, and Welfare, it would not be appropriate to apply ex parte contact rules to the frequent communications among employees of the Secretary, the ultimately responsible official. Of course, sound management would dictate the maintenance of accurate records of meetings among officials of our Department involving agency decisions, and these memoranda could be disclosed unless withheld in accord with exemptions under the Freedom of Information Act.

S. 1289 requires that the filing of memoranda of conferences and meeting in the appropriate files be done within 5 days of the communication. The experience of the Food and Drug Administration, now striving to meet an increased number of Freedom of Information Act requests, would indicate that this time limit is not realistic. The present deadlines in the Freedom of Information Act assure that documents which are disclosable are made available in a timely manner where there is a request for them.

S. 1289's open calendar requirement differs from that adopted by the Food and Drug Administration in several ways. Under the bill, officials compensated under the executive schedule would be required to maintain and disclose prospective and retrospective calendars. In the Food and Drug Administration, there is only one official, the Commissioner, who would be affected. Further, the Agency's prospective public calendar does not include a requirement of listing of nonpublic meetings, largely because of the fact that in a fast-moving regulatory agency it is often difficult to predict what kinds of meetings might have to be set.

The Food and Drug Administration's retrospective calendar, for the top officials I listed earlier, requires listing only of contacts with individuals outside of the Federal Government. S. 1289 can be read as requiring that all executive schedule officials disclose their entire daily agenda, including internal meetings. We would question the value of having these officials list their everyday stream of routine, nonpublic meetings with other Government officials and employees. Also, under our regulations, there are exemptions from public disclosure where disclosure of the existence of a meeting would prejudice a pending enforcement proceeding (e.g., a meeting with an informant) or invade privacy (e.g., a meeting with a job applicant).

S. 1289, like our regulations, provides that meetings with the working press shall not be included in the retrospective calendar at this time. However, our decision was an interim one upon which the Agency will invite particular comment.

FOOD AND DRUG ADMINISTRATION'S EXPERIENCE

Finally, Mr. Chairman, you asked us to provide you with our insights based on our experience under our ex parte contact and open calendar procedures.

Our major observation would be that adopting clear rules on Agency procedures is but an important first step. The more difficult phase is achieving compliance, which may involve a process of reeducation and getting people to abandon long-held habits.

One reason why procedures on documentation of contacts are not always followed is that it may be more efficient to not do so. Officials in a busy agency, such as ours, tend to want to spend their time dealing with a substantive regulatory or scientific issue which is demanding attention rather than going through the procedure of reducing to writing the substance of a meeting or conversation that they have just had.

What must be understood by all is that other values demand that newly rigorous procedures be followed: the openness in Government which these procedures promote helps secure our freedom, improve Agency performance, and enhance public confidence in their Government.

In addition, we have found that one must not underestimate the importance of working out the mechanics of implementing these procedures. We have noticed a problem of identifying which Food and Drug Administration official is responsible for writing the memorandum of a meeting, where several officials were present. Our procedures have dealt with this by charging the official who presides over the meeting with the task of seeing that a memorandum is prepared. This promotes certainty as to whom is responsible for the task, and improves accountability. There are also practical difficulties in assuring that memorandums and public calendars are complete, accurate, and done in a uniform manner. These difficulties must be overcome not only by prescribing rules, but also by monitoring compliance.

We should also mention the impact that procedural changes, such as our open calendar policy and Freedom of Information regulations, can have on an Agency's programs. At the present rate, we are receiving an average of 130 requests per week under the Freedom of Information regulations, many involving complex issues. A number of Freedom of Information requests for memorandums of meetings stem from our use of the open calendar.

We would have to report that opening up agency procedures does not always lead to the results one might have expected. The greatest interest in how our top officials spend their time is shown, not by consumer organizations, but by the regulated industry. Similarly, we have observed that the industry and their representatives are taking advantage of our broad disclosure policies under the Freedom of Information Act to a much greater extent than are the general press, consumers, health professionals, or scientists.

It is interesting to note that once we responded to Congressional and consumer concern about secrecy through reform of our Freedom of Information procedures and by instituting an open calendar, interest in obtaining access to information on Agency proceedings among Congress and consumers has diminished, while industry interest has increased.

While this trend has been somewhat disappointing, we are convinced that the policies we are striving to follow, which stress openness and maximum disclosure, strengthen the Agency, and increase confidence in the integrity of the Agency's decisions. We also believe that it is a tenet of our society that things be done this way.

From our perspective, Mr. Chairman, we believe our actual record of experience demonstrates that the legitimate objective of S. 1289 can be addressed under current law and administrative authority, and that additional legislation is not needed as far as the Food and Drug Administration is concerned. S. 1289 would, however, apply to every executive branch agency including those that do not have regulatory responsibility. Such application may be inappropriate in the nonregulatory sphere, and we urge this subcommittee to seek the views of a representative sample of the nonregulatory Federal agencies.

Mr. Chairman, this completes my formal statement. My colleagues and I will be pleased to answer any questions you may have.

[Food and Drug Administration guidelines and regulations follow:]

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

TO : All FDA Employees

DATE: September 18, 1974

FROM : The Commissioner

SUBJECT: Memoranda of Meetings (including telephone conversations)

The FDA Policy Board has been considering new FDA administrative procedures since last fall. Proposed regulations will be published in the Federal Register this fall. In the interim, I am releasing some of our conclusions for immediate implementation.

As a result of my expressed commitments to maintain the integrity of the regulatory processes of this Agency and to promote openness in Government, I am hereby reaffirming, as written policy, the long-standing practice of preparing memoranda of important meetings (including telephone conversations) between FDA personnel and persons outside the Federal Government.

Memoranda of meetings (including telephone conversations) held between employees of the Food and Drug Administration and persons outside the Federal Government involving an important matter, a decision or an issue, or statements or advice or conclusions to which future reference may be required as part of the administrative record, will be promptly written and become part of the official files.

These memoranda will be publicly available upon request, except for those which fall under the exemptions provided in the Freedom of Information Act and regulations, or which contain information prohibited from disclosure by existing statutes.

In each case, these memoranda are to contain the following information:

- a. Date of meeting or conversation;
- b. Names of participants and affiliations;
- c. Location of meeting;
- d. Statement of subject matter discussed, including any conclusions, decisions, agreements, or follow-up actions.

Memoranda are to be brief and concise. Discussions, arguments, etc., are not required to be included, only the final actions.

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There have been only a few instances thus far when discussions with representatives of regulated industries have not been recorded. But each one of these situations creates a problem for the agency in reviewing a particular decision. In addition, we run the risk of losing public confidence in the integrity of our decisions. Consequently, I am again asking each of you to adhere to these procedures for documenting meetings and telephone conversations.

A. M. Schmidt

Alexander M. Schmidt, M.D.

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

TO : Sec below

DATE: OCT 29 1974

FROM : Commissioner of Food and Drugs

SUBJECT: Public Calendar

As a further step to fulfilling my commitment to an open Agency, I am asking that all FDA officials designated by this memo compile a weekly record showing for the previous week the meetings and events, both open and closed, in which they were involved with regulated industry or other groups and individuals outside the Federal Government. The calendar shall include all meetings, conferences, seminars, speeches, and social events sponsored by regulated industry.

In addition to this retrospective listing of individual meetings and events, each weekly report shall include a prospective listing of all open public meetings and other public proceedings of the FDA which do not appear in the monthly FEDERAL REGISTER notice of advisory committee meetings. Each prospective report shall cover a four-week period.

All reports, both retrospective and prospective, shall be delivered no later than 10:30 a. m., each Friday, to the Office of the Assistant Commissioner for Public Affairs, Room 15B42, Parklawn. ACPA will reproduce the accumulated information and distribute the public calendar by close of business the same day.

Each issue of the public calendar shall be posted in the following places:

1. Public Records and Documents Center, ACC
2. Office of the Assistant Commissioner for Public Affairs (Parklawn and FOB #8)
3. A central place in each Bureau
4. A central place in each Field office

It shall be the responsibility of ACPA to provide copies for posting and it shall be the responsibility of the offices named to select an appropriate place and insure immediate posting.

To avoid duplicate reporting of retrospective meetings or events, it shall be the responsibility of the presiding FDA official, or lead participant, to report the meeting or event for the public calendar. No other FDA officials need report. It shall be the further responsibility of the office of the reporting FDA official to respond to requests from the public for summary minutes of the meeting, if such minutes are available. Memoranda of meetings will be kept and made available in conformance with my memorandum of September 18 (attached).

For the moment, contacts with members of the working press shall not be included on the calendar. This issue will be addressed in the proposed procedural regulations, and a final decision will be made after full consideration of public comment. Telephone conversations and meetings with other government officials may be included, but reporting is not mandatory. Meetings and telephone conversations, disclosures of which would compromise regulatory enforcement activities or constitute an invasion of privacy, are excluded from the procedures outlined in this memo.

If a large number of FDA staff or non-FDA participants are at a meeting, simply indicate the fact instead of giving the full list of names. For example, if Bureau of Biologics has an influenza workshop, attended by 12 FDA staff and 37 non-FDA participants, list only the numbers, not the names.

The prospective meeting calendar shall be restricted to open public proceedings of the Food and Drug Administration. It shall not include speeches by FDA officials at events not sponsored by FDA, or meetings with any group or individual not open to attendance by the public. The Office of Legislative Services shall provide a listing of all scheduled hearings before the Congress. The Committee Management Office in ACS shall provide ACPA with the monthly FEDERAL REGISTER announcement of meetings of advisory groups for inclusion with the calendar. ACS will also promptly provide ACPA with information about meetings which are scheduled after the routine monthly FEDERAL REGISTER announcement has been made. Such meetings will be listed on the prospective calendar in addition to FEDERAL REGISTER announcement. General Counsel will report on all upcoming court proceedings. No other FDA officials need report such meetings.

I realize this system will pose an additional burden on all of us, but I feel it is essential in today's critical climate if the FDA is to maintain full credibility with its own staff and the public. Please understand, therefore, the importance that I attach to compliance with this procedure.

I am fully aware that FDA officials, other than those who are required to report for the public calendar, hold important outside meetings. Nevertheless, practicality demands a cut-off at some point, and I feel the point I have chosen will protect the integrity of those levels of FDA leadership responsible for and involved in final decisions on any given matter of policy.

I would emphasize that this formal calendar in no way relieves those FDA officials not designated for listing on the calendar from full responsibility for following all established rules of public responsibility for their activities.

A. M. Schmidt.
Alexander M. Schmidt, M. D.

Attachment

Addressees:

Deputy Commissioner
Associate and Assistant Commissioners
Deputy Associate and Deputy Assistant Commissioners
General Counsel, Deputy General Counsel
Executive Director of Regional Operations, Deputy EDRO
Bureau Directors, Deputy Bureau Directors
Director, Natl. Ctr. for Tox. Res., Deputy Director, NCTR
Director, Office of Legislative Services, Deputy Director, OLS

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION

TO : ALL FDA EMPLOYEES

DATE: March 15, 1975

FROM : Commissioner of Food and Drugs

SUBJECT: Documentation of Meetings and Telephone Conversations

This is a reminder to all employees that formal procedures exist within FDA to ensure that the Agency conducts its affairs in an open manner and maintains an accurate record of its decisions.

In my memorandum of September 18, 1974, I stressed the importance of preparing memoranda to record important meetings and telephone conversations between FDA employees and persons outside the Federal Government.

Since that time, there have been several instances when telephone conversations between staff members of FDA and representatives of regulated industries have not been documented. Consequently, I must assume that guidelines for documenting meetings and telephone conversations must not be entirely understood throughout the Agency.

I remind all of you that you must prepare a memorandum for the record of any meeting or telephone conversation with someone outside the Federal Government when your discussion pertains to an important matter, a decision or an issue, or statements, advice or conclusions to which future reference may be required as part of the administrative record. Your memorandum should contain the following information:

1. Date of meeting or conversation;
2. Names of participants and their affiliations;
3. Location of meeting; and
4. Statement of subject matter discussed, including any conclusions, decisions, agreements, or follow-up actions.

All memoranda that relate to any petition or regulation formally pending before the Agency must be promptly filed with the Hearing Clerk and made a part of the public administrative record of the proceeding.

All FDA Employees

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All memoranda which relate to any petition or regulation formally pending before the Agency shall promptly be filed with the Hearing Clerk and made a part of the public administrative record of the proceeding.

Adherence to this policy should result in more complete records and information so necessary in making sound decisions and promote public confidence in our regulatory activities.

A. M. Schmidt
Alexander M. Schmidt, M.D.

Senator KENNEDY. Our next witness is Mr. Eric Fygi. Mr. Fygi joined the Federal Energy Agency in February 1974 as Assistant General Counsel. In March 1975 he was appointed Deputy General Counsel.

**STATEMENT OF ERIC J. FYGI, DEPUTY GENERAL COUNSEL,
FEDERAL ENERGY ADMINISTRATION, ACCOMPANIED BY W.
DENNIS SUMMERS**

Mr. Fygi. Mr. Chairman, with me today is W. Dennis Summers, Special Assistant to the General Counsel, who has participated in the development and the carrying out of the program reflected in the regulations about which we are asked to testify today.

We appreciate the opportunity to appear before you to discuss FEA's regulations concerning oral communications from persons from outside the Agency, our so-called lobbying regulations. I understand that, although this subcommittee will be considering a bill on this subject, S. 1289, we have been asked today to summarize our regulations and to comment on our experience to implementing them.

First, I would like to mention briefly the reasons why FEA decided to adopt these regulations. I believe the background will be useful in examining the operation of the regulations in practice, and may be helpful when the subcommittee ultimately considers the legislation before it. Second, I will describe the substantive requirements of the regulations themselves, placing particular emphasis on the scope of their coverage. Third, I would like to share with you some of our experience in implementing the regulations, including some of the difficulties that we have encountered in their operation.

When FEA's predecessor, the Federal Energy Office, was established during the Arab oil embargo in December 1973, it faced the formidable task of allocating supplies and regulating prices in an industry which is unsurpassed in its resources and complexity. During and following the period of the embargo, it became increasingly apparent that enforcement of FEA's regulatory programs would necessitate frequent contact with the oil industry, with producers and refiners as well as retail marketers and others in the chain of distribution. In addition, due to the pervasive economic impact of FEA's programs and policies, the views, suggestions and criticisms of the private sector, the Congress, other Federal agencies and the public-at-large frequently have been brought to bear upon FEA's policymaking process. As a result, the Agency has had to consider and balance often competing interests in order to carry out its statutory duties in the public interest.

In order to maintain the integrity of FEA's decisionmaking process and to ensure that FEA's programs and policies would be developed in an open atmosphere, FEA adopted internal procedure for preparing and maintaining records of communications and contacts between certain FEA employees and persons outside the Agency. At the time when the regulations were adopted, FEA, like most other Federal agencies, had no formal procedures for recording communications from persons outside the Agency. The regulations as adopted require

FEA employees in grades GS-15 and above to maintain written records of oral communications received from so-called "noninvolved persons" who express an opinion or viewpoint on the merits of a specific application, petition, appeal, investigation or enforcement proceeding pending before FEA. The regulations require records of communications from "noninvolved" persons, rather than from actual parties to applications or proceedings, in order to identify and record sources of influence that would not otherwise be apparent. Each such contact must be recorded on a form which requires certain minimal information, including the name of the communicant, the application or proceeding involved, the organization or entities represented by the communicant and the subject matter or matters discussed.

NO RECORD REQUIRED FOR ROUTINE REQUESTS FOR INFORMATION

No record is required, however, for routine requests for information concerning the status of a matter, such as inquiries regarding when FEA actions were or may be taken, the identity of parties or staff personnel responsible for a matter, or the availability and location of public information concerning a particular matter. Completed record forms are placed in the appropriate subject matter or case file and thereafter become part of the permanent record of that particular matter.

In addition to records of outside contact, the FEA regulations require the administrator, deputy administrators, the General Counsel and all assistant administrators and directors of FEA offices to maintain logs of their meetings concerning FEA policy issues with persons from outside the Agency. These records must identify the organizations and entities represented by each participant, and include a brief summary of the subject matter or matters discussed.

Finally, the regulations require FEA's Office of Public Affairs to make available to the public, upon request, lists identifying the participants and general subjects discussed during all meetings that have occurred between the administrator, deputy administrators, assistant administrators or the General Counsel and persons from outside the agency during the preceding 2-week period. The Office of Public Affairs also distributes copies of these lists to interested parties on a regular basis. The meeting list requirement was imposed in order to facilitate public awareness of the identities of those who meet with senior FEA officials.

Perhaps an immediate question which arises in connection with these regulations is whether, or how well, they work given the arduous responsibilities carried out by FEA from its inception. To a large degree we sought to assure the feasibility of these regulations in advance by defining precisely the scope of their coverage. By limiting the record of outside contact requirement to employees in grades GS-15 or above, for example, FEA accomplished the purpose of the regulation without unduly burdening the agency by including a larger number of employees whose contacts with outsiders would present but a remote likelihood of abuse. Furthermore, the exclusion of routine contacts, such as requests for status reports, from the record of outside contact requirement has reduced the volume of required records without diminishing the effectiveness of the regulation. Similarly, our meeting log

requirement is applicable only to the FEA administrator, deputy administrators, the General Counsel and all assistant administrators and office directors. Thus, records of meetings on policy matters are, appropriately, required only of those FEA officials with substantial policymaking responsibilities.

In short, FEA has attempted to balance the need to demonstrate and record its openness with the obvious administrative burden which would result from requiring every employee to record every meeting and telephone conversation with a person outside the Agency.

In terms of implementing our regulations we have found that although the system is workable, it is not perfect. For example, we have encountered some administrative difficulties in responding to requests for public access to record of outside contact forms. Requests for these forms often seek disclosure of records involving a general subject, as opposed to seeking disclosure of records identified in the manner used to index the specific matters covered by the regulation—namely, applications, interpretation requests, appeals, petitions for redress and investigation or enforcement proceedings. Since most of FEA's records involving such proceedings are indexed by the name of the party or respondent involved, the search for records according to subject matter is somewhat imprecise and burdensome. Although this is not an insurmountable problem, we believe that this regulation may require additional indexing and other clerical demands not previously anticipated.

FEA OFFICIALS MUST PREPARE MEETING SUMMARIES

In addition, we have found that one aspect of the meeting log requirement is somewhat burdensome. In order to comply with the requirement for a brief summary of the subject matter or matters discussed, the senior FEA officials covered by the regulation must prepare summaries of the substance of each of the numerous meetings they attend. Because of the demanding schedules of these officials, the summaries prepared often are sketchy and imprecise in detail. By way of contrast, since the meeting list requirement simply calls for a statement of the general subject discussed, rather than a summary of the discussion, it is much less burdensome to administer.

In this regard, Mr. Chairman, I would like to emphasize the desirability and utility of recording and disclosing these meeting lists. FEA has found that, while compilation of these lists is relatively simple, it provides a valuable service to the public. I might add that these lists are not only available for viewing in FEA's public reference room, but they are also regularly distributed to interested parties on request.

In conclusion, Mr. Chairman, I believe that FEA's regulations have proved well-suited to the agency's particular objectives and statutory responsibilities. In addition, it is clear that the problems to which I have referred are by no means fatal to the operation or purpose of the regulations. FEA's approach to this problem has, in my opinion, contributed to openness in Government in a meaningful and responsible way. I hope that our experience will be useful to the subcommittee.

Thank you.

[The regulations referred to above, as they appeared in the Federal Register, follow:]

federal register

WEDNESDAY, SEPTEMBER 25, 1974
WASHINGTON, D.C.

Volume 39 ■ Number 187



FEDERAL ENERGY ADMINISTRATION
Rules
Certain oral communications; es-
tablishment of procedures..... 34395

CHAPTER II—FEDERAL ENERGY ADMINISTRATION

PART 204—RECORDS OF ORAL COM- MUNICATION WITH PERSONS OUTSIDE FEA

Establishment of Procedures to Record Certain Oral Communications

The Federal Energy Administration ("FEA") hereby establishes Part 204 of its regulations in order to provide internal FEA procedures for preparing and maintaining written records of oral communications received from persons outside FEA concerning applications, petitions, appeals, investigations, or enforcement proceedings being considered by FEA. The new Part also sets forth procedures for maintaining logs of meetings between the Administrator, the Deputy Administrator, the General Counsel, Assistant Administrators or Directors of FEA Offices and persons outside the agency concerning FEA policy questions. Finally, procedures are established for preparing and making available to the public a list of all meetings that have occurred between the Administrator, the Deputy Administrator, Assistant Administrators or the General Counsel and persons outside FEA during the preceding two-week period.

Part 204 is designed to maintain the integrity of FEA's decision making process, to insure that FEA's programs and policies are developed and implemented in an open atmosphere and to promote public confidence in the agency.

Section 204.1 sets forth the general organization and objectives of Part 204. Section 204.2 contains the definitions applicable to this part.

Under the provisions of § 204.3, FEA employees in grade GS-15 and above, will be required to prepare and maintain written records of oral communications received from "non-involved" persons expressing an opinion or viewpoint on a specific application, interpretation request, appeal, petition for special redress, investigation, or enforcement proceeding pending before FEA. The pur-

pose of the requirement that written records be maintained on communications from "non-involved" persons, rather than from actual parties to applications or proceedings, is to insure that sources of influence that would not otherwise be apparent to the public are identified. Section 204.3 also prescribes the form to be utilized in reporting conversations. Such forms will provide information on: The name of the communicant, the application or proceeding involved, the organization or entities represented by the communicant, and the subject matter or matters discussed.

Under the provisions of § 204.4, the Administrator, the Deputy Administrator, the General Counsel, and all Assistant Administrators and Directors of FEA Offices will be required to maintain records of their meetings with persons from outside the agency concerning FEA policy questions. These records will identify the organizations and entities represented by each participant and will provide a brief summary of the subject matter or matters discussed.

Section 204.4 requires the Office of Public Affairs to distribute to interested parties a list of all meetings that have occurred between the Administrator, the Deputy Administrator, Assistant Administrators, or the General Counsel and persons from outside the agency during the preceding two-week period. These lists will also be made available to the public in the Office of Public Affairs' Public Reference Room.

Because Part 204 pertains to rules of internal agency procedure and practice, formal notice and public hearings are not required.

In consideration of the foregoing, a new Part 204 of Chapter II, Title 10 of the Code of Federal Regulations is hereby established.

Issued in Washington, D.C., on September 20, 1974.

ROBERT E. MONTGOMERY, Jr.,
General Counsel,
Federal Energy Administration.

FEDERAL ENERGY ADMINISTRATION

WASHINGTON, D.C. 20361

September 1974

31396

RULES AND REGULATIONS

Part 204 is added to Chapter II to read as follows:

- Sec.
204.1 Purpose and scope.
204.2 Definitions.
204.3 Preparation of record of outside contact forms.
204.4 Preparation of meeting logs.
204.5 Public record of meetings.

AUTHORITY: Federal Energy Administration Act of 1974, Pub. L. 93-275; E. O. 11790, 39 FR 23185.

§ 204.1 Purpose and Scope.

This part establishes regulations for the preparation and maintenance, by specified FEA employees, of written reports and meeting logs regarding certain types of oral communications received from and meetings held with persons from outside the agency. Procedures are also established for the preparation and distribution to the public of a list of all meetings that have occurred between the Administrator, the Deputy Administrator, Assistant Administrators, or the General Counsel and persons from outside the agency during the preceding two-week period. These regulations and procedures are designed to maintain the integrity of FEA's decision making process, to insure that FEA programs and policies are developed and implemented in an open atmosphere, and to promote public confidence in FEA.

§ 204.2 Definitions.

As used in this part—

(a) "Appeal" means a request for further view of an order or interpretation, or of any action taken in response to an application.

(b) "Application" means a request for an exception, exemption, assignment or adjustment, modification or rescission, or stay.

(c) "Enforcement proceeding" means a proceeding relating to the preparation and issuance by FEA of notices of probable violation or remedial orders.

(d) "FEA" means the Federal Energy Administration.

(e) "Noninvolved person" means a person with whom contact would normally not be made in the routine processing by FEA personnel of an application, interpretation request, petition for special redress, appeal, investigation or enforcement proceeding and includes, but is not limited to, a Member of Congress or his staff, an employee or official of another government agency or of the Executive Branch, and any other person in public or private life not directly involved in the matter. It does not include an official or employee of FEA, or a person from outside the agency with whom an employee would be expected routinely to communicate in the normal course of processing the matter, including but not limited to, the applicant, the person requesting an interpretation, an appellant, a petitioner for special redress, a person under investigation, an informant in an investigation, a person charged with a violation, a party or witness to a proceeding or the attorney representing such persons.

(f) "Person from outside the agency" means a person not employed by FEA or detailed to FEA by another Federal agency.

(g) "Petition for special redress" means a "Petition for Special Redress and Other Relief" filed with the FEA Office of Private Grievances and Redress pursuant to section 21 of the Federal Energy Administration Act and Part 205 of this chapter.

§ 204.3 Preparation of record of outside contact forms.

(a) All FEA employees in grades GS-15 and above shall prepare a "Record of Outside Contact Form" ("Record Form") on each oral communication received (in person, by telephone or otherwise) from a non-involved person expressing an opinion or viewpoint on a specific application, interpretation request, appeal, petition for redress, investigation, or enforcement proceeding pending before FEA: *Provided*, That no Record Form shall be prepared for routine requests for information concerning the status of a matter, including, but not limited to, inquiries regarding when FEA actions were or may be taken, the identity of parties or staff personnel responsible for a matter, or the availability and location of public information concerning a matter.

(b) The form set forth below, entitled "Record of Outside Contact Form", shall be used in complying with the provisions of paragraph (a) of this section.

RECORD OF OUTSIDE CONTACT

(Identity of Application, Petition for Redress, Appeal, Interpretation Request, Investigation or Enforcement Proceeding Involved)
Name of Communicant.....
Organizations or Entities Represented.....
Date and time of Communication.....
Place or Method of Communication.....
Brief Summary of Subject Matter(s) Discussed:
Completed by:
Name
Office

(c) Completed Record Forms shall be placed in the appropriate subject matter or case file and shall thereafter become part of the public record, if and when a public record of that particular matter is established. If the communication concerns an appeal before the Office of Exceptions and Appeals, the completed Record Form shall be immediately transmitted to that Office where it shall be placed in the appropriate application or enforcement proceeding file: *Provided*, however, That such Record Forms shall be maintained separately from the materials upon which the Review Committee may rely in reaching a final decision.

§ 204.4 Preparation of meeting logs.

(a) The Administrator, the Deputy Administrator, the General Counsel, and all Assistant Administrators and Directors of FEA Offices shall maintain logs of

their meetings with persons from outside the agency concerning FEA policy questions.

(b) The meeting logs prepared pursuant to paragraph (a) of this section shall reflect, at a minimum, the date and place of each meeting, the name of each participant in the meeting, the organizations or entities represented by each participant, and a brief summary of the subject matter or matters discussed.

§ 204.5 Public record of meetings.

(a) Within one week after the 15th and the end of each month, the Administrator, the Deputy Administrator, each Assistant Administrator, and the General Counsel shall submit to the Office of Public Affairs a list of all meetings that they have held with persons from outside FEA during the preceding half-month period. The list shall contain the date of each meeting, the names of all participants, the entities represented and the general subject discussed.

(b) The Office of Public Affairs shall make the lists prepared pursuant to paragraph (a) of this section available to the public, upon request, in its Public Reference Room. In addition, the Office of Public Affairs shall distribute copies of the lists to interested parties on a regular basis.

[FR Doc. 74-22278 Filed 9-24-74; 8:45 am]

Senator KENNEDY. Thank you very much. Have you given any consideration to opening meetings like the Consumer Product Safety Commission does?

Mr. FYGI. Well, Mr. Chairman, we already do have many open meetings in the context of the requirements of the Advisory Committee Act, as further amplified by the peculiar requirements of our own organic legislation which, in effect, requires that anything resembling an advisory committee meeting be conducted open to the public and, under the appropriate FEA Act provision, permit members of the public who are interested to appear and make oral presentation before the meeting.

So once a particular meeting comes within the ambit of the advisory committee proceedings, we already have that process in place. But nonetheless, many of our other meetings, as I am sure you have gleaned from our statement, are conducted privately in the more conventional manner.

Senator KENNEDY. Why must these meetings be private? What kind of information and policy is being considered that should not be in the public domain?

Mr. FYGI. Well, I can think of a couple of factors which might be germane. First, as Mr. Hutt suggested, to have a meaningful opportunity for public participation would require, in effect, some sort of advance notice structure and the nature of many of the meetings conducted at FEA involves a much shorter time frame than that which would be associated with effective advance notice.

Senator KENNEDY. Yes. But you don't have a particular drug, as the FDA has, where emergency action might be needed for health or safety reasons. It seems to me that the Consumer Product Safety Commission would have more privileged information in terms of patents or trademarks than the FEA would.

Mr. FYGI. Well, I most respectfully disagree there, Mr. Chairman, as to the degree to which we acquire and obtain proprietary information.

Senator KENNEDY. Consumer Product Safety Commission also acquires proprietary information.

Mr. FYGI. Precisely.

Senator KENNEDY. What sort of things must FEA take action on that cannot wait for a week's notice?

Mr. FYGI. Despite the lack of statutory analog between, say, for example, the Allocation Act and the Food, Drug and Cosmetic Act, where we would have to condemn something in the public interest, simply the nature these days of the responsibilities placed on the FEA and the demands placed on the agency by the Congress as it considers the legislation we have submitted before it, has resulted in a tempo which is wholly dissimilar from such advance planning as would be entailed in the concept of advance notice of all meetings.

Senator KENNEDY. Well, I haven't heard any good examples of why FEA cannot give a week's notice on matters of policy that are major, fundamental, and rather basic. I haven't heard any good examples from the other witnesses either.

Mr. FYGI. Well, it is not a flavor which is particularly susceptible to being reduced effectively to a narrative. But nonetheless, the state-

ment I have made, I think, accurately conveys the nature of the calendars of all of the senior FEA officials, particularly these days.

That would be one factor; I do not think it is the only legitimate factor. I think we do have real, legitimate balancing requirements to take into account, again, as Mr. Hutt has suggested during his comments, and we have to examine what the benefits, if any, may be of a general policy that would entail, as I understand your suggestion, conducting every meeting by a principal in the agency in public. And that is really the kind of analysis we have to take into account in considering such things. It is an evocative idea, and we would be glad to consider it in the context of our regulations, but we will have to do some balancing as has been suggested here today.

Senator KENNEDY. Do your logging requirements include meetings with Congress, White House, and other agencies?

FEA LOGGING REQUIREMENTS INCLUDE CONGRESSIONAL AND WHITE HOUSE CONTACTS

Mr. FYGI. Our logging requirements? Yes, sir, they do. Are you speaking particularly there of the logging of noninvolved party communications?

Senator KENNEDY. Yes.

Mr. FYGI. Yes, they definitely do. In fact, the regulation states explicitly that it applies to communications from Members of Congress.

Senator KENNEDY. Why wouldn't FEA log primary interest groups as well?

Mr. FYGI. Well, the thinking there was that the basic purpose of the logging requirement was to reveal in the Agency's records instances where something unusual had occurred during a particular adjudicative or investigative matter.

And it is foreseeable that the petitioner himself, for example, or his counsel, may well make a telephone call to someone who is handling the matter. But the real harm we sought to avoid was unforeseen attempts to influence the outcome of the case made by people who would not ordinarily be involved with no record of these approaches preserved in the case file.

Senator KENNEDY. Well, yes. But if parties try to influence a case, it is all right, but if others do it, it is not?

Mr. FYGI. Clearly a petitioner is going to attempt to influence the outcome of his own case. That is really what he is there for. And the potential abuse that this requirement is aimed at is a lateral intrusion, if you will, of someone who could have questionable business interfering in the merits of a particular matter. So that is the reason for the distinction.

Senator KENNEDY. Isn't the issue how parties influence a case, not whether the case is influenced by them? Isn't that the nub of the problem? For example, it seems that Exxon does not have to log anything and none of the people that talk to Exxon have to, but everybody has to log in various other kinds of groups, consumer groups and others. Isn't the public entitled to know what Exxon is doing, both officially and unofficially, in terms of its contracts?

Mr. FYGI. Well, it is but—

Senator KENNEDY. And how Exxon is doing it? Why is that not important?

Mr. FYGI. I think you have to recognize that these regulations did not seek to come to grips with all of these issues, but rather discriminated, if you will, and focused on a particular way the potential abuses could occur. So accordingly, they do not purport to be an omnibus assurance of procedural equity in the way FEA does its business.

Senator KENNEDY. Isn't that important, though?

Mr. FYGI. It is, indeed, but I would say that in order to come to grips with that issue as to how we really do our business, would entail a much broader inquiry, examining the entirety of our procedural regulations. Other mandatory administrative requirements as recording telephone calls on the merits of particular cases, are not within the context of these regulations, and these regulations are just a piece of the picture, if you will. To get an accurate idea of how FEA does its business, it is necessary to take into account these other factors, including some of the peculiar statutory requirements we function under in the FEA Act.

Senator KENNEDY. Does the Agency think that is important to consider those factors or not important? Will they be considered or not?

Mr. FYGI. Oh, we do consider it important and I believe we have a very sound system.

All I am saying is that the scope of these regulations is limited to one part of describing how we are to carry out our business in the public interest, and to get an accurate idea of other measures we have employed to assure that decisions are made in the proper manner, it would be necessary to broaden the inquiry substantially.

Senator KENNEDY. Have particular situations arisen where having logs and summaries proved useful to the Agency?

Mr. FYGI. Well, I am aware of none in which I could say with assurance that this proved to be a handy thing. But in general we anticipate that these requirements will prove useful, for example, during litigation if issues of fact arise concerning any of the events recorded under these regulations.

So on balance, our approach has always been that these regulations are a useful management tool, if nothing else, as well as carrying out the equitable purposes for which they obviously are primarily intended.

When we adopted them we did so under the premise that perhaps 75 or 80 percent, if not 100 percent, of the practices to be required under these regulations ought to be occurring anyway, just under principles of sound management by the principal officers in the Agency.

Senator KENNEDY. Has this inhibited industry's contacts with the Agency at all?

Mr. FYGI. I do not believe it has inhibited contacts by members of the public with the Agency, no.

Senator KENNEDY. How about the oil industry?

Mr. FYGI. Well, I was scanning some testimony to be delivered this morning which suggested that a rather high preponderance of the meetings recorded involved industry people, but until this morning I had no idea what the proportion was. But it would appear that if the proportion is accurately conveyed in the figures contained in that testimony, it would not appear that there has been a substantial disincentive for meetings to occur.

Senator KENNEDY. Thank you very much. We will stay in touch with you.

Mr. FYGI. Thank you very much.

[The prepared statement of Eric FYgi follows:]

PREPARED STATEMENTS OF ERIC FYGI, DEPUTY GENERAL COUNSEL, FEDERAL ENERGY ADMINISTRATION

Mr. Chairman, members of the subcommittee, I appreciate this opportunity to appear before you to discuss FEA's regulations concerning oral communications with persons from outside the agency—the so-called lobbying regulations. I understand that, although this subcommittee will be considering a bill on this subject, S. 1289, we have been asked today to summarize FEA's regulations and to comment upon our experience in implementing them.

My statement consists of three principal parts. First, I would like to mention briefly the reasons why FEA decided to adopt the regulations. I believe that this background will be useful in examining the operation of the regulations in practice, and may be helpful when the subcommittee ultimately considers the legislation before it. Second, I will describe the substantive requirements of the regulations themselves, placing particular emphasis on the scope of their coverage. Third, I would like to share with you some of our experience in implementing the regulations, including some of the difficulties that we have encountered in their operation.

When FEA's predecessor, the Federal Energy Office, was established during the Arab oil embargo in December 1973, it faced the formidable task of allocating supplies and regulating prices in an industry which is unsurpassed in its resources and complexity. During and following the period of the embargo, it became increasingly apparent that enforcement of FEA's regulatory programs would necessitate frequent contact with the oil industry, with producers and refiners as well as retail marketers and others in the chain of distribution. In addition, due to the pervasive economic impact of FEA's programs and policies, the views, suggestions and criticisms of the private sector, the Congress, other Federal agencies and the public at large frequently have been brought to bear upon FEA's policymaking process. As a result, the agency has had to consider and balance often competing interests in order to carry out its statutory duties in the public interest.

In order to maintain the integrity of FEA's decisionmaking process and to ensure that FEA's programs and policies would be developed in an open atmosphere, FEA adopted internal procedures for preparing and maintaining records of communications and contacts between certain FEA employees and persons outside the agency. At the time when the regulations were adopted, FEA, like most other Federal agencies, had no formal procedures for recording communications from persons outside the agency. The regulations adopted require FEA employees in grades GS-15 and above to maintain written records of oral communications received from "noninvolved persons" expressing an opinion or viewpoint on the merits of a specific application, petition, appeal, investigation or enforcement proceeding pending before FEA. The regulations require records of communications from "noninvolved" persons, rather than from actual parties to applications or proceedings, in order to identify and record sources of influence that would not otherwise be apparent. Each such contact must be recorded on a form which requires certain minimal information, including the name of the communicant, the application or proceeding involved, the organization or entities represented by the communicant and the subject matter or matters discussed.

No record is required, however, for routine requests for information concerning the status of a matter, such as inquiries regarding when FEA actions were or may be taken, the identity of parties or staff personnel responsible for a matter, or the availability and location of public information concerning a matter. Completed record forms are placed in the appropriate subject matter or case file and thereafter become part of the permanent record of that particular matter.

In addition to records of outside contact, the FEA regulations require the Administrator, Deputy Administrators, the General Counsel and all Assistant Administrators and Directors of FEA offices to maintain logs of their meetings concerning FEA policy issues with persons from outside the agency. These records must identify the organizations and entities represented by each par-

ticipant, and include a brief summary of the subject matter or matters discussed.

Finally, the regulations require FEA's Office of Public Affairs to make available to the public, upon request, lists identifying the participants and general subjects discussed during all meetings that have occurred between the Administrator, Deputy Administrators, Assistant Administrators or the General Counsel and persons from outside the agency during the preceding 2-week period. The Office of Public Affairs also distributes copies of these lists to interested parties on a regular basis. The meeting list requirement was imposed in order to facilitate public awareness of the identities of those who meet with senior FEA officials.

Perhaps an immediate question which arises in connection with these regulations is whether, or how well, they work given the arduous responsibilities carried out by FEA from its inception. To a large degree we sought to assure the feasibility of these regulations in advance by defining precisely the scope of their coverage. By limiting the Record of Outside Contact requirement to employees in grades GS-15 or above, for example, FEA accomplished the purpose of the regulation without unduly burdening the agency by including a larger number of employees whose contacts with outsiders would present but a remote likelihood of abuse. Furthermore, the exclusion of routine contacts, such as requests for status reports, from the Record of Outside Contact requirement has reduced the volume of required records without diminishing the effectiveness of the regulation. Similarly, our meeting log requirement is applicable only to the FEA Administrator, Deputy Administrators, the General Counsel and all Assistant Administrators and Office Directors. Thus, records of meetings on policy matters are, appropriately, required only of those FEA officials with substantial policymaking responsibilities. In short, FEA has attempted to balance the need to demonstrate and record its openness with the obvious administrative burden which would result from requiring every employee to record every meeting and telephone conversation with a person outside the agency.

In terms of implementing our regulations we have found that although the system is workable, it is not perfect. For example, we have encountered some administrative difficulties in responding to requests for public access to record of outside contact forms. Requests for these forms often seek disclosure of records involving a general subject, as opposed to seeking disclosure of records identified in the manner used to index the specific matters covered by the regulation—namely, applications, interpretation requests, appeals, petitions for redress and investigation or enforcement proceedings. Since most of FEA's records involving such proceedings are indexed by the name of the party or respondent involved, the search for records according to subject matter is somewhat imprecise and burdensome. Although this is not an insurmountable problem, we believe that this regulation may require additional indexing and other clerical demands not previously anticipated.

In addition, we have found that one aspect of the meeting log requirement is somewhat burdensome. In order to comply with the requirement for a brief summary of the subject matter or matters discussed, the FEA officials covered by the regulation must prepare summaries of the substance of each of the numerous meetings they attend. Because of the demanding schedules of these officials, the summaries prepared often are sketchy and imprecise in detail. By way of contrast, since the meeting list requirement simply calls for a statement of the general subject discussed, rather than a summary of the discussion, it is much less burdensome.

In this regard, Mr. Chairman, I would like to emphasize the desirability and utility of recording and disclosing these meeting lists. FEA has found that, while compilation of these lists is relatively simple, it provides a valuable service to the public. I might add that these lists are not only available for viewing in FEA's public reference room, they are also regularly distributed to interested parties on request.

In conclusion, Mr. Chairman, I believe that FEA's regulations have proved well suited to the agency's particular objectives and statutory responsibilities. In addition, it is clear that the problems to which I have referred are by no means fatal to the operation or purpose of the regulations. FEA's approach to this problem has, in my opinion, contributed to openness in government in a meaningful and responsible way. I hope that our experience will be useful to the subcommittee.

Senator KENNEDY. Mr. O'Neal and Mr. Robinson. Mr. Robinson is the Commissioner of the Federal Communications Commission, and Mr. O'Neal is currently serving as Vice Chairman of the Interstate Commerce Commission. Mr. O'Neal joined the Commission in April 1973, and part of that time he was transportation counsel to the Senate Commerce Committee. Mr. Robinson was appointed to the Federal Communications Commission in June 1974. He has been a professor of law at the University of Minnesota and is the author of numerous writings of administrative law.

We look forward to your testimony.

**STATEMENT OF GLEN O. ROBINSON, COMMISSIONER, FEDERAL
COMMUNICATIONS COMMISSION**

MR. ROBINSON. Thank you, Mr. Chairman.

I am pleased to appear today to testify in support of S. 1289. I should point out that I do not appear in any official capacity as a representative of the FCC. My views therefore will be entirely personal, and they do not necessarily reflect official views of the FCC, nor do they necessarily reflect the views of my colleagues at the FCC.

In the interest of expedition, Mr. Chairman, if I may, I will submit the statement for the record, and summarize one or two pertinent features that I think I would like to comment on.

I should point out that the FCC does not now have rules similar to those set forth in S. 1289. We are considering these. We have an ongoing staff study of this in connection with general sunshine regulations. I personally hope that we would have some requirements in the near future whether or not legislation is imminent.

I would like to comment on three major problems. Well, let me not call them major; they are really rather minor, but they are three prominent problems that I have with the legislation as currently drafted, and which I urge be modified.

The first is one that has been touched on by several other witnesses. That is the general provision that this reporting requirement be applied to all GS-15's and above. I believe that may be too broad and it may be too narrow at the same time. It depends on the particular agency and the particular office within that agency that is involved. I am aware of some advantage in dealing with all the agencies uniformly, and a GS grade facilitates doing that. But I suggest that instead of attempting to apply uniform standards, it might be preferable to simply specify that all agency members and their staffs, their personal staffs, be subject to this reporting and disclosure requirement, and that the agency should then go on further to implement the same requirement for decisionmaking personnel as in the agency. I believe that there may be some decisionmaking personnel who are lower than GS-15. By the same token, I believe there are probably some GS-15 persons within the FCC at least, who are not truly decisionmaking personnel, that is, they do not have discretionary policymaking functions. This is not really a large item. It is really a minor detail.

A second difficulty I have, which I think may be potentially more difficult and more important, is the scope of the reporting requirement with respect to the kinds of reports that need to be made. As I examine the bill, it appears to require reporting of not only what we would

call ex parte communications, but indeed all communications, whether they be officially filed for the record or not.

Now let me illustrate. At the FCC we get an original and 14 copies of every filing, be it a petition or pleading, a brief, a proposed finding, or whatnot. I get one of those copies. My six colleagues at the FCC get six other copies, and the remainder are scattered around the agency in various offices. I do not often peruse those when I receive them. If I did, I would not do anything else. We get literally mountains of filings every day. What I usually do is to sort out those that look particularly interesting which I wish to keep for my own files—knowing that there is, of course, a public file in the agency itself in which all of the documents officially filed. Now, I obviously could record those items, and I could summarize their content. But quite frankly, since the documents are in the public record anyway, and since it would be a somewhat onerous task to attempt to summarize their content, I think that it would be ill advised to require it. I do not see any particular purpose in it, frankly. These are all formally filed comments and documents, open to the public.

My final point is perhaps minor, but it is possibly significant. One section of the bill would require that, in connection with certain communications, the reports should include a summary of the action taken in response to the communication.

Let me illustrate how that might work. Suppose, for example, that we are deliberating, the FCC is deliberating, on a rulemaking or a petition for rulemaking to consider restriction on 10-watt FM stations, and representatives of higher powered noncommercial FM stations come in and urge my active support of this. In response to that I communicate with the staff and say, what gives on this item? Please advise me of the status; and in the course of that I also say by the way, I think, that some restrictions on 10-watt operations ought to be imposed. Now apparently under this bill, my communication to the staff member would be reportable. Well, I suppose there is nothing wrong in that. I note that if I sent him a written memorandum, however, it would not be disclosable under the Freedom of Information Act. But more bothersome than the possible confidentiality of inter-agency communications to me is the possible unnecessary burden involved in routine and relatively innocuous intraagency communications in response to an ex parte communication made to me. Bear in mind that some of these matters go on for years. If, in response to that original communicate from outside interests, I were to make repeated inquiries over a period of months or a year, presumably they would all be reported. Now, again, I do not know how much of a burden it is but I have a feeling that the nuisance cost of that burden probably exceeds the benefit from reporting or disclosure.

Those are some detailed criticisms. But I should stress they by no means undermine my enthusiasm for this legislation. I think it is a good concept. I hope that at the FCC we would implement something like this whether or not this legislation is passed. I cannot make any guarantees or assurances along those lines since I am only speaking for myself, but I do think this is good legislation and should be adopted.

Senator KENNEDY. Thank you.

I just have a couple of questions. Then I will turn to Mr. O'Neal.

The trade press, like Broadcasting and TV Digest, constantly carry articles about industry visits with commissioners on various subjects. It sometimes seems that only the public is kept in the dark about who is talking to whom at the FCC. Is this accurate or fair?

Mr. ROBINSON. Well, Mr. Chairman, there is a good deal of speculation about who knocks at the FCC's door. Some of this speculation may be a little wide of the mark. We do see quite a few people. I brought with me, for example, an appointments calendar, with just some representative items. I keep a general appointments calendar. It could not really be called a log within the meaning of the proposed legislation. But, it records appointments with everyone I see; for example, these pages show appointments with representatives of land-mobile industry, public radio, and others.

Senator KENNEDY. Doesn't a sketchy record just add to speculation? If you have a name and a very brief title, it raises more questions than it really answers. Doesn't this suggest that there ought to be something more descriptive?

Mr. ROBINSON. I agree there ought to be something more descriptive. The question is how descriptive. I think it ought to have both the name and the general subject matter. For example, what I normally do is not very elaborate because I made this up for my own purposes rather than for any public reporting requirement. I can read, for example, down here, docket 18262, that would not mean anything to a member of the public; but anybody in the communications field would know that that was an important land mobile docket. Since I know the individual, in this case from Motorola, and I know Motorola's position, I know exactly what he was talking about. Since this is for my own personal records, it suffices.

But I agree with you that it probably ought to be more detailed for a public record. I would put down, for example, something like their position, the general subjects that they talked about, a docket if there was a docket—something of that order. I do not think we ought to get involved in trying to establish an elaborate kind of a narrative for every discussion. I think that would be quite burdensome.

Senator KENNEDY. I understand that there is some reverse jawboning going on with the broadcast industry about some of the issues carried—the violence and sex—on the shows during the family viewing hours. Is there a proceeding before the Board on that issue?

DISCUSSIONS WITH INDUSTRY LEADERS RE VIOLENCE AND SEX ON TV DURING FAMILY HOURS

Mr. ROBINSON. There is no procedure, Mr. Chairman. There have been some informal discussions between the chairman and members of the industry, up to this point, just the networks and I believe the NAB. There are scheduled for the future some discussions with independent station owners to attempt to get their agreement. I cannot really speak to the matter because I have not been privy to it. It has been a negotiation, if you wish, or jawboning, or whatever you want—discussions between the chairman's office and the industry concerned. It is pretty much behind us as far as the networks are concerned, they have now agreed to have a family viewing hour. What the future holds for that, I do not know.

Senator KENNEDY. Does the public know about those meetings or who was asked to participate in them?

Mr. ROBINSON. Yes. I think it has been fairly widely reported. In fact it was publicly announced when they began.

Senator KENNEDY. It was announced that these meetings were going to take place?

Mr. ROBINSON. Yes. My recollection is that there was an announcement of the first meeting; I am not sure whether subsequent meetings have been publicized.

Senator KENNEDY. Were these closed meetings?

Mr. ROBINSON. They have been closed meetings.

Senator KENNEDY. How do you justify keeping these meetings closed?

Mr. ROBINSON. Well, I think the rationale for it—I am not sure frankly whether I want to justify it or criticize it, either one—I think maybe it does have a rationale. There was need, a felt need, for some candid, off-the-record exchanges—not merely directed at the industry from the FCC, but a candid disclosure among members of the industry—about what their practices were—this in addition to beyond the need for simply having candid off the record negotiations, if you will. I really cannot speak to it more than that. Since I was not present, I am not really sure what the negotiations were.

Senator KENNEDY. It is tough to explain to the public why the exchange of ideas between broadcasters and Commission members on matters concerning violence and sex in television programing shouldn't be candid and why they can't be included in them.

Mr. ROBINSON. Yes; although I suppose you are really opening up a somewhat broader question as to why there are any ex parte communications. I do not think I want to condemn all ex parte communications, because I think they are a valuable source of information, provided that they are acknowledged and that the general subject matter is disclosed.

Senator KENNEDY. That's right. But this is really a question whether the public should be involved or invited to these particular meetings, not the fact that they were taking place or what was being said.

Mr. ROBINSON. I suppose what you really have to ask is whether or not it was not essential for some private meetings to take place in any event, and whether they would not have taken place in part just between the industry itself—leave the FCC out of it. I would assume that the industry members talked among themselves quite a good deal about that.

Senator KENNEDY. Without getting into any of privileged information; what would be some of the candid things that a broadcaster would not talk about publicly concerning violence in programs during children's hour?

Mr. ROBINSON. You do get into finances in part.

Senator KENNEDY. Finances?

Mr. ROBINSON. You could get into financial information, but I do not know whether that was involved.

Senator KENNEDY. Don't you think the public would be interested in the fact that broadcasters make more money showing violent programs than they do showing children's programs?

Mr. ROBINSON. I think they could handle that fine. I assume that everybody knows that. What I meant was particular disclosures of finances of a particular program, that type thing, the kind of information that we would not ordinarily disclose. I am just speculating, Mr. Chairman. I do not know whether that kind of information was involved. There would also be some desire perhaps not to identify those in the industry who were at first recalcitrant and who had to be persuaded or jawboned, if you will. Again, I am not talking about jawboning by the FCC so much as I am about who in the industry, was pushing and who was falling back.

I think that people in the industry would be a little loathe to participate in a candid exchange under completely open circumstances. Now, maybe they would, maybe they would not; I do not know, for sure.

Again, I am trying to explain it more than I am trying to justify it. I do not particularly have any stake in this one way or another. This was an informal exchange between the Chairman's office and the networks. It was publicly open in the sense that everybody knew basically what was being talked about. There was no secret about that.

[The prepared statement of Glen O. Robinson, Commissioner, Federal Communications Commission follows:]

PREPARED STATEMENT OF GLEN O. ROBINSON, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and members of the subcommittee, I am pleased to appear here today to testify on S. 1289. I should point out that I do not appear in an official capacity as a representative of the FCC. My views are entirely personal and they do not reflect official views of the FCC, nor do they necessarily reflect the views of any of my colleagues at the FCC.

I am still new to Washington bureaucracy, having been appointed to the FCC in June of last year. In light of this brief experience on the Commission, I would feel somewhat diffident about offering this subcommittee my opinion on S. 1289 but for the fact that I have had some practical and academic experience in the field of administrative law. From 1961 to 1967, I practiced law in Washington, primarily in the field of administrative law (including several years work in communications law). From 1967 to 1974, I taught at the University of Minnesota, principally in the field of administrative law and regulated industries.

Based on this past as well as current experience, I support the essential concept of S. 1289 insofar as it requires the maintenance of public records of informal communications between agency officials and outside parties pertaining to substantive agency policy matters. I doubt that reporting and disclosure requirements will, in themselves, radically transform the character of administrative decision-making or quality of administrative policy. I nevertheless do believe that they can have some salutary effect not only in bringing private influences into public vision, but also in enhancing the credibility and the integrity of administrative government at a time when it seems to be at an alltime low.

I am aware that not all agency officials and observers agree with this appraisal. I have heard the concern expressed not specifically in connection with this legislation but in the more general context of "sunshine" and public disclosure laws, that opening agency meetings and communications with agency officials to public inspection would discourage candid communications between the agency officials and outside individuals and groups—either industry or nonindustry. I do not think we need be concerned about this possible effect. It is important to permit private contacts between agency officials and outside individuals or groups except on matters that are within the purview of "restricted proceedings" (i.e., those in which, under the APA or agency rules, all communications of substantive matters must be made on a record); such contacts are a useful source of information and ideas for the agency. However, I see no good reason why either the *fact* of such communications, or their *general* character, needs to be private and

secret—at least as a general rule. To the extent disclosure might “chill” such communications and contacts, I would not regard the lost contact as worth troubling about. (I should add parenthetically that I cannot recall any conversations or contacts, written or oral, which I have had with any outside person or group in the nine months of my tenure on the Commission that were of such a confidential character that they would not have taken place had reporting and disclosure requirements such as those specified in S. 1289 been in effect.)

Possible “chilling effects” aside, the other argument that is sometimes raised against reporting and disclosure is that it would constitute an administrative burden which would cost more than the benefit derived from it. In general, I am unpersuaded by the burden argument; I see very little burden in a simple requirement for reporting and disclosure of *ex parte*¹ written or oral communications to agency officials on matters related to substantive policy. Such burden as there is would, in my opinion, be offset by the benefits which I have mentioned.

Although I support the concept of reporting and disclosure of *ex parte* contacts, and the general thrust of S. 1289, I do have some trouble with certain features of the bill and I would like to suggest some changes in it.

First, imposing the reporting requirement on all agency employees in grade GS-15 or above may be both too broad and too narrow, depending on the particular agency and office involved. I am aware that defining this requirement in terms of civil service grades allows for a uniformity that is simple to supply across different agencies. But the simplicity is deceptive, for persons in the same grade may have greatly different responsibilities in different agencies and in different offices. What is wanted is to reach the major decision and policymakers—those that have significant discretion. In some offices an official at that level may have only minor discretion, while in others substantial discretion may be vested in employees of lesser grade. I would limit the requirement to agency members, and their staffs, and then require that the agency promulgate regulations to implement the requirement further for the agency's staff. In this way, there can be a uniformity as to the basic requirement but some flexibility within each agency.

Second, there is, I think, a problem with respect to what is subject to reporting. The bill seems to impose what I would regard as onerous and unnecessary requirements for reports with respect to receipt of routine, publicly filed documents. For example, at the FCC we generally receive an original and 14 copies of each pleading, brief, petition or other formal document filed; each Commissioner receives one copy. I read few of such formal documents as they come in; if I carefully perused each one, I would be able to do very little else. Some—very few—of the documents I keep for my own files for further reference when the matter comes before the Commission (which is generally months, and may indeed be years, after the filings are first made). A copy of these documents goes directly into the Commission's public files where it is, of course, available to anyone. For such documents, I believe no more should be required. However, section 560(b) (1) and (2) seem literally to say that because I receive copies of such formal filings I would have to prepare a record—as prescribed by 560(a). Indeed, every Commissioner and every other “agency official” would have to make such a record, of the same documents, under a literal reading of S. 1289. I trust that such a requirement is not intended, for it would not only be quite pointless (the documents being in the public files anyway), it would be quite literally a mind-numbing burden for every “agency official” to record even minimal information pertinent to the mountains of publicly filed materials which we receive each week. Accordingly, I would modify 560(b) (1) and (2) to make clear that the reporting requirement does not apply to documents which are formally filed with the agency and are maintained in the agency's public files.

Let me also suggest one further modification to take care of another related difficulty. Agency members receive a considerable volume of mail that, though personally addressed, is in the nature of a public filing, complaint, or inquiry, even though it may not be filed as a formal document in accordance with our rules. Commonly, these are forwarded to the staff for appropriate disposition (they may or may not call for a reply). Where this is done, I see no point in logging these twice, once in my office and once in the bureau office.

Third, I have some difficulty with Section 560(a) (7) (F). I am not quite sure what is encompassed within the phrase “action taken in response,” but if it is

¹ I use the term “*ex parte*” in the general sense given it by FCC rules, to mean: on behalf of one person without advance notice to other interested persons (including the public) and opportunity for such persons to be present.

broadly construed it could get to be rather complicated. Let me give an example, which, as it happens, is both real and current. Suppose that the Commission is deliberating on a rulemaking or petition for rulemaking to consider rules restricting 10-watt noncommercial FM stations, and representatives of higher powered noncommercial public FM stations come to see me to urge my active support for the rules. I express to them an interest in the matter. Later, I talk to a person at the staff level who is working on the problem, inquiring as to its present status; I also express the hope that we will be able to do something about the problem of preemption of the FM noncommercial frequencies by 10-watt stations. Later still, my engineering assistant has a similar contact. And so on. Now, is all that reportable? Note that any written correspondence with the staff would presumably be exempt from disclosure under the 5 U.S.C. sec. 552(b): is it then sensible to require reports of oral discussions? Congress could, of course, simply override the exemption under the Freedom of Information Act for internal agency communications in this instance, but I question whether this is wise policy. Even if the confidentiality issue is set to one side, however, the reporting requirement in this instance still raises difficulty. If "in response" to an outside contact such as that which I just mentioned, I made repeated further inquiries of the staff, when would the reporting end? Bear in mind that inquiries of this kind could be made many times over a period of months. I think that to record every such contact would impose a burden out of proportion to the very minor benefits to be derived from section 560(a)(7)(F).

Finally, there is one relatively small point that should perhaps be made clear in the bill: that the legislation is not intended to change the current rules restricting ex parte communications. It is, of course, obvious from the very character of the bill that it is not intended to prohibit all ex parte contacts, but it is perhaps less obvious that it is not intended to sanction all such contacts either. In short, the bill presupposes that the contacts are, under existing law (the APA or pertinent agency rules), lawful, and I think it may be well to make clear that the reporting and disclosure requirements are not intended to change any of the existing structures on such ex parte communications.

Mr. Chairman, at this point, inasmuch as over half of my statement discusses some of the difficulties with this bill, I think it is appropriate for me to reiterate what I stated at the outset: the reporting and disclosure concept reflected in S. 1289 is a good one and should be adopted. The criticisms which I have made of particular parts of the bill are offered entirely with the constructive purpose of strengthening this otherwise sound measure. To this same end, any further assistance I can provide I will be most willing to offer.

STATEMENT OF A. DANIEL O'NEAL, VICE CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. O'NEAL. Thank you, Mr. Chairman. I would just go through parts of my statement.

Senator KENNEDY. We will include all of the statement.

Mr. O'NEAL. I am appearing here today in response to a specific request of the subcommittee for my personal, individual views. So this statement has not been approved, disapproved, nor considered by the Commission.

Generally, I favor more openness in government. I have advocated it within the Interstate Commerce Commission and I support something along the lines of this bill.

The legislation would impose some time-consuming and potentially expensive burdens on the agencies. The question is whether, on balance, the public gain would equal or exceed the public cost. No precise dollar figure can be attached to the public gain side of the ledger. This bill, S. 1289, goes a good distance toward reaching the proper balance.

Insofar as the Interstate Commerce Commission is concerned, our authority indicates some regulatory authority over some 17,000 carriers. In addition, at one time or another practically every business in the country, every citizen, every State, every Member of Congress,

and other official representatives of every community might have cause to contact the Agency.

For example, ICC officials might be contacted by a truckline, railroad employee, farmers' group, Amtrak passenger, household good complainant, grain shipper, automobile shipper, and Ralph Nader.

We conduct various investigations and audits, and respond to numerous complaints every day. These communications are, hopefully, in response to perfectly proper requests of the ICC to take some action—provide information to audit, investigate, or whatever.

We respond through our office here in Washington, and through our 78 field offices, including 6 regional offices located in every State except Hawaii. We do all this—or maybe I should more accurately say we attempt to do this with a staff of some 2,000 people.

Many offices like the ones in Billings, Mont., Carson City, Nev., Casper, Wyo., Anchorage, Alaska, Concord, N.H., and Raleigh, N.C., are basically one-man operations supported by one clerical assistant.

We do have some experience with efforts to record contact in the Commission Secretary's Office which handles congressional and other inquiries. I understand that the massive number of communications there has caused the recording system to founder because it has interfered with the staff's primary working responsibilities.

Several problems, therefore, are raised for the Interstate Commerce Commission because of its limited staff, the scope of the Agency's responsibilities, and its farflung activities.

Among these problems include questions of what additional personnel would be required to gather, reproduce, and file the material that would be collected? Would 5-day intervals be sufficient? Where should matter collected in Casper, Wyo., be made available to the public? The bill at the present time would have it placed in the Agency's "public reading room."

It is one thing for an agency like the Department of Transportation with an \$11 billion budget to absorb these kinds of costs. It is another for an agency like the ICC, with a \$50 million budget, to do so.

Another matter which has been raised here earlier is that in agencies including the ICC, many decisions are made by persons at a level much lower than GS-15. So I wonder if maybe some attention should be given to directing the thrust of this bill to the decisionmaker regardless of salary level.

It does seem that if answers can be found to these questions and others that have been raised, that there are substantial benefits which could flow from disclosure. Aside from restoring some greater confidence in Government which we certainly need, potentially troublesome contacts could be reduced and perhaps eliminated. The Commission itself would be better informed when deciding what appropriate action to take if it had a better idea of the type and number of outside contacts made.

Perhaps a tighter definition of the type of communication to be reported would be helpful. Routinely the Commission receives letters and telegrams seeking information, generally commenting on ICC performance, and making status-type inquiries. Whether such requests are made by a potential passenger, a disgruntled shipper, an affected local government official, or whatever, they would not seem to constitute undue influence or have much potential for undue influence.

In some respects, I wonder if some additional areas should not be covered by the bill? For example, all offers of gifts should be within any provision requiring disclosure by Agency officials, detailing who made the offer and how the offer was handled. Some of these may involve no reportable communication, as the bill is now written.

It is also important that agencies routinely disclose the votes of members on all official decisions, statements, or findings issued by the Agency. This also would be important in helping the public determine the effect, if any, of various communications to the Agency.

Although such disclosures are not without administrative problems, the public's right to know about, and participate knowledgeably in Agency decisionmaking is important enough to warrant undertaking and fashioning appropriate adjustments in the law.

Senator KENNEDY. Thank you very much. Tell me, is the ICC contemplating doing anything at all in these areas?

Mr. O'NEAL. Well, the Interstate Commerce Commission has made some adjustments recently. We have had some problems with publishing dissents on certain kinds of decisions by the Agency. We have made an important change.

We have had some meetings recently that have been opened to the public. An example would be meetings a few weeks ago, concerning the future of the Rock Island Railroad which is in financial trouble, threatening termination of important rail service. Those meetings were open to whomever wanted to participate. There were members of the press there who wrote stories about the meetings.

Senator KENNEDY. In addition to these unique recent instances, is the ICC planning to do anything generally in this area?

ICC DOES NOT HAVE ANY LOGGING RULES UNDER CONSIDERATION

Mr. O'NEAL. With respect to logging and that sort of thing?

Senator KENNEDY. Yes, open meetings.

Mr. O'NEAL. We have nothing underway at the present time that would establish such rules.

Senator KENNEDY. I am sure you are aware that there are general criticisms that have been leveled at a number of agencies, charging that they were really captive of the various industries rather than regulating them.

We have looked into a number of agencies, and the truth of these charges varies dramatically in terms of industry influence and impact on decisionmaking.

However, I certainly think it would be fair to say that the ICC is an agency that has been one of those really targeted as a captive of industry. I wish you would make whatever response you want to that particular observation.

Now I am interested in what steps the ICC is considering in order to give the public a greater degree of confidence in its deliberations and decisionmaking.

It seems to me that open meetings is one very important step in promoting public confidence. You have heard a spokesman for the Consumer Products Safety Commission say that it is one of the most important things they have done, in winning public confidence in their agency's decisionmaking.

That is the view of just one official. But given the fact that he feels that way, I am wondering whether this is a matter which has been raised at the ICC. What is the general climate on this type of issue at the Commission?

Mr. O'NEAL. Well, I think that there is no question that as far as public confidence is concerned, that it would stand the Interstate Commerce Commission, as well as other agencies, in good stead if they were to take these kinds of actions.

I think part of our experience, ad hoc as it has been, has indicated that it is not nearly as troublesome as some would think it could be. I do think, however, there may be a cost problem involved.

We are now subject to considerable criticism, not only for being on the one hand close to industry, but on the other hand for being very slow in making some decisions. And, part of that for being very slow in making some decisions. Part of the reason for decisional lag to the extent it exists is the vast number of cases that come before the Agency, the number of personnel available to handle the cases, and the turnover in the Government generally.

So we are talking about how do we achieve an additional goal. And I think there may be a problem, to some extent, in carrying it out.

As to how close the ICC is to industry, it depends upon one's perspective. Industry complains that the opposite is true that the ICC doesn't act fast enough in rate matters and gives the user and consumer interests too much weight.

So far as the Commission is concerned, and whether it has considered these kinds of proposals, I would say that we have had some preliminary discussions about the possibility of opening up specific kinds of decisionmaking processes, but there really is no discernable movement. I would say, at the present time in that direction.

Senator KENNEDY. I would hope that you might think it useful to bring the matters raised this morning to the attention of the Commissioners. We would be glad to work with them and to make any information they would like available to them. This is not an issue that is going to go away. With regard to legislation, it seems that we could all benefit by attempting to work together.

While there are different responsibilities in different agencies, there are some common approaches which deserve both recognition and attention. We hope that you can make some impact on the Commission by initiating action in these areas.

Let me ask you, you have recommended that all offers of gifts should be covered by a provision requiring disclosure by agency officials. How do you treat a free lunch?

Mr. O'NEAL. Well, in that paragraph I was not looking at free lunches, necessarily. I think lunches, by themselves, are probably not a problem. I think they are something to stay away from if there is any chance of ex parte communications that are of a significant nature.

In this particular case, I was referring to other kinds of gifts that may have been offered. I personally follow the practice of sending any gift back with a note saying I do not think its acceptance would be proper. It seems to me that those sorts of things would fall, or should be included, in any kind of disclosure rule.

Senator KENNEDY. When does it get from just a free lunch to a case of liquor at Christmas time, and then a case of liquor not at Christmas time?

Mr. O'NEAL. I think a case of liquor at any time is certainly outside the proper boundaries. Even a bottle of liquor I would think should not be accepted.

ICC DOES HAVE EX PARTE COMMUNICATION RULES

We at the ICC have some rules now that cover this sort of thing but generally do not prohibit lunches. However, we have ex parte communication rules which would cover any kind of ex parte communication.

Senator KENNEDY. As I understand it, they do not allow anyone to pay for trips at the FCC?

Mr. ROBINSON. That is right, Mr. Chairman. We have our own travel budget. I do not know when that provision was first adopted. It was several years ago as a consequence of some criticism about private funding of trips to make various speeches.

Senator KENNEDY. Do you think it is interesting that the FCC does not permit trips, while the CAB evidently does? The CAB has permitted trips made by members of the Civil Aeronautics Board to be paid for by the airlines which they are regulating.

Mr. ROBINSON. I think the FCC's practice is a good one. I personally feel that it—in fact, sometimes we carry a good thing too far. I cannot even go and speak, for example, before a commencement and get them to pay. I have to pay that out of my own.

Senator KENNEDY. I will give you an example. Mr. Brezhnev gave my wife a nice wooden carved panel that was valued at \$75. We had to give it to the State Department to auction off. This rule is for anything over \$50. Obviously it is a good rule. There have been instances where gifts have not been turned over to the State Department, but because of these abuses I do not think the rule should be eliminated. There are some important principles here that can be applied to the regulatory agency as well. These things do get into an area which is very troublesome though.

Mr. O'NEAL. Mr. Chairman, I would like to make one comment on that. The ICC does follow a policy of not accepting free trips from private groups. In other words, any trips are paid for by the Government.

Mr. ROBINSON. I should also point out that we have regulations that forbid any gifts. We have never interpreted them to include free lunch—partly because everybody keeps telling us there is no such thing. But we also have ex parte rules that apply and I would assume that any communications would be logged as a consequence.

But, anything of more than trivial value, like a plaque or something—

Senator KENNEDY. Well, a lunch at Sans Souci might be a little more.

I do appreciate your efforts. We are going to be staying in this area. We hope you are able to raise some of the issues that we touched on this morning at the ICC and the FCC. We have heard what some agencies have been doing and we look forward to hearing from you in more detailed ways as the legislation takes shape.

Mr. ROBINSON. Whatever we can do to help.

Mr. O'NEAL. Thank you.

Senator KENNEDY. Thank you very much.

[The prepared statement of Daniel O'Neal follows:]

PREPARED STATEMENT OF A. DANIEL O'NEAL, VICE CHAIRMAN, INTERSTATE
COMMERCE COMMISSION

I am appearing here today in response to the specific request of the subcommittee for my individual views concerning S. 1289, The Open Communications Act of 1975. Accordingly, my comments today represent solely my own ideas; my statement has not been approved, disapproved, nor considered by the Commission. The intent of this legislation, as I understand it, is to make public certain communications, both oral and written, between top Federal agency officials and members of the public. The purpose is to make a public disclosure of lobbying and similar activities for public scrutiny to help eliminate abuses which might occur if such activities were confined to unrevealed occurrences and to have internal records kept of certain other contacts made by parties to enforcement proceedings.

The spirit of the bill is commendable and it evidences that much work has been done on it to properly balance the need for public disclosure and the need for effective governmental action.

Our form of government depends upon the free flowing exchange of views and ideas—the right of the people to be informed not only of government action but also of how government decisions are reached. This seems to me to include exposing, without in all cases prohibiting, the exercise of private influence. Although there is a need to balance legitimate needs for confidentiality and the principle of freedom of information, the public's fundamental right of access to government records often outweighs many other considerations.

I note at this point that it is apparent from the comments made by Chairman Kennedy upon introducing this legislation that it is intended to embrace the independent regulatory agencies. However, the language in the bill defines "agency official" as an employee of the "executive branch." This could lead to some confusion as to whether employees of independent agencies such as the ICC are included. The point should be clarified by appropriate amendment.

The legislation would be of course impose time consuming and potentially expensive burdens on the agencies. The question is whether on balance the public gain would equal or exceed the public cost. No precise dollar figure can be attached to the public gain side of the ledger. This bill, S. 1289, goes a good distance toward reaching the proper balance. Its passage would mean disclosure of most communications relating to governmental actions with high Government officials, initiated by others, which are not already subject to other disclosure provisions of law. Worth considering is whether persons external to the agency would be unduly deterred from contacting Government officials for fear of embarrassing disclosures. Would this tend to exacerbate the "ivory tower" conditions of some agencies? Is that good or bad?

ICC jurisdiction includes regulatory authority over some 17,000 carriers. In addition, at one time or another practically every business in the country, every citizen, every state, every member of Congress, and every community might have cause to contact the agency. For example, ICC officials might be contacted by a truckline, railroad employee, farmers group, Amtrak passenger, household goods complainant, grain shipper, automobile shipper, member of Congress, and Ralph Nader. We conduct various investigations and audits and respond to numerous complaints every day. These communications are hopefully in response to perfectly proper requests of the ICC to take some action—provide information, audit, investigate or whatever. We respond here in Washington and through our 78 field offices, including six regional offices, located in every state except Hawaii. We do all this or more accurately perhaps attempt to do all this with a staff of some 2,000 people. Many offices like the ones in Billings, Montana; Carson City, Nevada; Casper, Wyoming; Anchorage, Alaska; Concord, New Hampshire; and Raleigh, North Carolina are basically one man with one clerical assistant operations. (None of the above single-man office officials are GS-15's and therefore would be exempted from the bill at present, but I raise this for a reason that will become apparent.) We have some experience with efforts to record contact in the Commission Secretary's Office which handles congressional inquiries. I understand the massive number of communications has caused the recording system to founder because it has interfered with the staff's primary work responsibilities.

Several problems therefore are raised by the Commission's limited staff, the scope of agency's responsibilities, and its far flung activities. What additional personnel would be required to gather, reproduce, and file the material that would be collected? Would five day intervals be sufficient? Where should matter collected in Casper, Wyoming be made available to the public—the bill would have it filed in the agency's "public reading room." It is one thing for a Department

with the \$11 billion or so budget of DOT to absorb such costs; it is quite another for one like the ICC with a \$50 million budget to do so, would Congress and OMB provide the necessary additional funds?

Another matter of concern to me is that in our agency a bill which reached only to the GS-15 level will not reach all those within the agency who have decisional responsibility. These are many applications and cases which are resolved by special employee boards, for example, that have no members who are GS-15. Thousands of cases are in this category. The single-man offices mentioned before have very important input to many cases. This suggests to me the need to examine the possibility of adjusting the scope of the legislation in some way to reach these lower level decisionmakers.

I have a lot of questions and not too many answers at this point. It does seem to me that if answers can be found there are benefits that would flow from the disclosure. Some troublesome contacts could be reduced and perhaps eliminated. The Commission itself could be better advised and take appropriate action if it had a better idea of the type and number of contacts made.

Perhaps tighter definition of the type of communication to be reported with some exceptions set out would be helpful. Routinely, letters and telegrams seeking information or generally commenting on ICC performance and status type inquiries, whether by a potential passenger, disgruntled shipper, affected local government, or a port authority would not seem to constitute undue influence or have much potential for undue influence. And, how would the present bill reach the "courtesy call" wherein a flood of generalities the point is made that carrier business is bad with no specific reference to the fact that a major rate increase proposal is pending?

In several respects I wonder if some additional areas shouldn't be covered by the bill. For example, all offers of gifts should be within any provisions requiring disclosure by agency officials, detailing who made the offer and how the offer was handled—some of these may involve no reportable communication as the bill is now written.

It is also important that agencies routinely disclose the votes on all official decisions, statement, or findings issued by the agency. This also would be important in helping the public determine the effect, if any, of various communications to the agency.

Although such disclosures are not without administrative problems, the public's right to know about and participate knowledgeably in agency decision-making is important enough to warrant undertaking and fashioning appropriate adjustments in the law.

I do not want any of these comments to be considered to be negative with respect to my views on the importance of the disclosure areas set forth in the bill or to the general approach taken. My suggestion goes to refinement that I believe desirable to achieve even better the balance which this bill so obviously seeks.

This concludes my testimony. I am available for any question you might have.

Senator KENNEDY. I will ask the next three witnesses to come up together. Fred Wertheimer is the vice president of Common Cause. Henry Geller is an attorney—former General Counsel to the Federal Communications Commission—and he is now with the Rand Corp., and Tom Asher is an attorney formerly with the Antitrust Division of the Department of Justice.

Mr. WERTHEIMER. Mr. Chairman, I am accompanied by Dick Clark, who is a lobbyist with Common Cause.

Senator KENNEDY. Would you start off, Mr. Wertheimer, and I would ask if you would hit the highlights. We will include all of these statements in the record.

STATEMENT OF FRED WERTHEIMER, VICE PRESIDENT OF OPERATIONS, COMMON CAUSE, ACCOMPANIED BY DICK CLARK, LOBBYIST, COMMON CAUSE

Mr. WERTHEIMER. We appreciate the opportunity to participate today. We strongly endorse S. 1289 and we would like to express our

appreciation to you for the outstanding leadership you are providing on this issue and have provided on similar issues.

In particular I had in mind public financing of Federal elections and the efforts to obtain a new lobby disclosure law. You have been raising earlier the question of open meetings in the executive branch, which we would consider another crucial issue that is entitled to action. I would like to focus on three areas of the testimony.

One, we believe that there is a strong and growing congressional support for the issue that is being discussed before your subcommittee today. In the House of Representatives, approximately 130 members have cosponsored the Railsback-Kastenmeier bill, which included a major section on logging regulations.

We did a survey of Members of Congress during the last campaign in the House of Representatives, and we asked a specific question on support for logging for executive branch agencies. And the results of the Common Cause survey conducted last year show that 263 House Members of the 94th Congress supported executive branch logging, while only 14 respondents indicated opposition. Of the 48 Senators who voiced an opinion on this issue, 45 said they would support it, and 3 expressed opposition. This is an issue that not only has legitimacy today, and great need, but in our view does have the support in Congress to achieve action this year.

The need for it, to us, is overwhelming. There really is no way of getting any information today on what goes on in the executive branch. Secrecy is the rule, not the exception.

Interest groups, particularly the interests that are regulated or controlled by a given agency, have disproportionate access, disproportionate interest, and eventually disproportionate influence in the way decisions are made.

I would like to read into the record the results of a survey we did of FEA, based on the narrow logging regulations they have adopted. While their regulation is narrow, their efforts in adopting this regulation provided an important breakthrough in attempting to demonstrate that it can be done and what the potential holds.

Our analysis of the meeting logs at FEA shows that since FEA Administrator Zarb took office last December, 91 percent of his meetings with outside groups have been with representatives of the energy industry. This is typical of other important policymakers as well.

PERCENTAGES OF MEETINGS WITH INDUSTRY REPRESENTATIVES

From October 1, 1974, to March 15, 1975, the following percentages of meetings with industry representatives took place: Thomas Noel, Zarb's assistant, 82 percent; Robert Montgomery, General Counsel, 75 percent; Marmaduke Ligon, Assistant Administrator for Energy Resource Development, 82 percent; and Gorman Smith, Assistant Administrator of Operations, Regulations, and Compliance, 68 percent.

The top 10 FEA officials held a total of 458 meetings with nongovernmental parties during this period, only 6 percent of which involved organizations such as consumer and environmental groups, State conservation agencies, educational institutions working on conservation projects, and so on.

Senator KENNEDY. Now, if you included the meetings with interested parties, would your total percentage be dramatically different?

Mr. WERTHEIMER. This includes the interested parties. These are the top policymakers.

Senator KENNEDY. I see.

Mr. WERTHEIMER. But we certainly agree with the question you raised earlier, and do believe that with respect to their logging procedures they should have to include interested parties, if it is going to make sense at all.

What this information illustrates is: (1) The kind of information that can be obtained with the narrow logging provision; and (2) we think it rather startlingly illustrates why there is a need for comprehensive provisions of this kind throughout the executive branch.

The value of logging provisions, I think, can be seen in many ways. They would enable both the public and the Congress, in a much greater way, to hold agency officials accountable for their activities. They would provide the media with information which, in turn, would allow the media to much better inform the public about what is going on and what the process is that leads to the decisions that are being made.

They would facilitate greater public involvement in agency matters. One of the most important things they would do would be to provide very strong incentive for these agencies to reach out and go beyond the people they are presently dealing with, to go beyond just the industry representatives. They would provide Congress with a great deal of information which is presently unavailable, and they would certainly help restore public confidence in the way Government is being run and the way decisions are being made.

A Harris poll last year stated that 74 percent of the public believed that special interest groups got much better treatment than people do from the Government.

We think the benefits of this legislation are clear. We think the benefits far outweigh whatever additional administrative responsibilities will occur. We would hope that the subcommittee can treat this as a priority item and act as expeditiously as it can on this matter, because we consider it a high priority question for Congress today.

Thank you.

Senator KENNEDY. Let me just ask you—and perhaps the others would comment on it, too—Mr. Hutt mentioned the chilling effect this would have on a person's constitutional right to a free petition. What is your reaction to that?

Mr. WERTHEIMER. There are always balance questions whenever you get into any of these kinds of questions, whether it be campaign disclosure laws, or logging disclosure laws. My view is that on the balance of this that it would not have a "chilling" effect, and that the public's right and need to know this information is the predominant need and right, when weighed against the specific interest of the individual.

My feeling is also that it is in no way going to change the efforts of the various interests groups regulated by industries in dealing with the executive branch. It is not, in any way, going to prohibit their petition activities.

Senator KENNEDY. You are not unduly concerned about the additional cost to these various agencies?

Mr. WERTHEIMER. No; we are not. We think the evidence so far demonstrates—

Senator KENNEDY. The FDA testified that administration of the FOIA is taking 37 man-years. What about that?

Mr. WERTHEIMER. No; the cost involved here are not undue costs, and the needs for this kind of legislation, basically the underlying need to restore the public's confidence in Government, is overwhelming at this time. The costs are minimal, and they are particularly minimal in terms of the benefits that this legislation will incur.

PREPARED STATEMENT OF FRED WERTHEIMER

Mr. Chairman, I am grateful for the opportunity to testify today on behalf of Common Cause. We strongly endorse S. 1289, the Open Communications Act of 1975, and commend the outstanding leadership taken by you and the other cosponsors on this crucial legislation.

The momentum has been steadily growing for comprehensive logging by agency officials of outside contacts and communications. Three major executive branch agencies—the Department of Justice, FEA, and the Consumer Product Safety Commission—have promulgated logging regulations over the last 2 years.

The Railsback-Kastenmeier lobby disclosure legislation in the House, which contains comprehensive logging provisions similar to those in S. 1289, now has 130 cosponsors. And the results of a Common Cause survey conducted last year show that 263 House Members of the 94th Congress supported executive branch logging, while only 14 respondents indicated opposition. Of the 48 Senators who voiced an opinion on this issue, 45 supported logging legislation. This is clearly a reform whose time has come.

S. 1289 goes to the heart of one of the most urgent challenges facing the Federal Government: the need to reform Executive branch agencies and departments. These agencies make decisions which have direct and critical consequences on the lives of all Americans. But very few Americans have any idea of how these agencies make decisions or how they as citizens can make their voice heard when decisions are being made. The quality of our food, the price of gas and electricity, the renewal of our cities, the development of public lands, the quality of our air and water, and countless other matters are substantially determined by executive branch activities. Every citizen, every consumer, every tax payer is directly affected.

But when you look at who has access to agency policymakers, you see the overwhelming presence and power of regulated industries and special interests. You see agribusiness firms seeking farm subsidies from the Agriculture Department. You see utility companies inside the Federal Power Commission and the new Nuclear Regulatory Commission. You see coal and oil companies seeking leases from the Interior Department. You see General Motors simultaneously lobbying the EPA, FEA, and Department of Transportation on auto emission standards.

These organizations have every right to do this. Most executive agencies have their own special constituencies—the private firms, labor groups, or industries regulated by them or to whom they award Federal grants and contracts. That these groups seek to influence agency rulemakings, contracting, and other policy matters is not surprising. Nor is the fact that it's done on a massive scale.

The problem is that the influence of these groups in the agencies has reached unprecedented proportions. This is dangerously undermining public confidence in our Government. It is similarly undermining the Government's ability to responsibly regulate private sector enterprises and protect the public welfare. This is evident in wasteful Government subsidies, nonenforcement of antitrust laws, and other regulatory decisions which perpetuate inflation and unjustifiably benefit certain private interests. Executive agencies today primarily serve their special interest constituencies. We wonder what becomes of the public interest in all this.

Several reforms are needed to balance the disproportionate influence of special interests in Federal agencies and make the bureaucracy more responsive to the general public. These include stronger conflict of interest regulations, open meet-

ing requirements, disclosure of activities by outside lobbyists to influence agency action, and more balanced representation on advisory committees.

One of the most critical reforms, however, is public disclosure by agency policymakers of outside contacts and communications. There is virtually no public scrutiny of the interaction between these officials and outside representatives. Nor does the public have ready access to documents submitted by outside parties on policy issues. This secrecy undermines accountability and effective public participation in agency proceedings. The logging requirements in S. 1289 would remedy these problems. S. 1289 would only cover higher level governmental officials.

INDUSTRY INFLUENCE IN AGENCIES

It is not hard to document the need for this legislation. There is clear evidence of the day-to-day interaction between regulated industries and agency officials and of the extensive efforts of industry lobbyists to influence agency policy.

The Federal Energy Administration is a good example. Last fall the FEA adopted, in response to recommendations by Common Cause, a regulation requiring top policymakers to log their meetings with outside parties. Although this regulation was a far cry from the model provisions we submitted, it was certainly an important step toward greater openness. It has now revealed some startling facts about outside contacts with FEA officials.

Our analysis of the meeting logs shows that since FEA Administrator Frank Zarb took office last December, 91 percent of his meetings with outside groups have been with representatives of the energy industry. This is typical of other important policymakers as well. From October 1, 1974 to March 15, 1975, the percentages of meetings with industry representatives were as follows: Thomas Noel, Zarb's assistant, 82 percent; Robert Montgomery, General Council, 75 percent; Marmaduke Ligon, Assistant Administrator for Energy Resource Development, 82 percent; and Gorman Smith, Assistant Administrator of Operations, Regulations, and Compliance, 68 percent. The top 10 FEA officials held a total of 458 meetings with nongovernmental parties during this period, only 6 percent of which involved organizations such as consumer and environmental groups, state conservation agencies, educational institutions working on conservation projects, and so on.

There are two points to be drawn from all this. First, these figures illustrate the kind of information which even a narrowly-drawn logging regulation can provide. Second, they indicate the overwhelming degree of industry involvement with agency policymakers, and therefore the need for more comprehensive logging requirements.

The Interstate Commerce Commission further illustrates this second point. The shipping industry has close ties with ICC officials and lobbies daily for favorable decisions. It appears for example, that commissioners have been cleared by industry executives before being officially nominated for the post. Commissioners have been enticed with lucrative industry positions after they leave the ICC, and twelve of the last seventeen to leave have accepted these offers. Industry executives have also taken high posts within the Commission. And in 1973, sixteen industry groups rented desk space at ICC to keep track of hearing decisions, rate changes, and policy information. Access to ICC policymakers is readily available and very effective. It is no wonder that ICC's regulation of shipping is accused of keeping rates artificially high and costing consumers over \$4 billion annually.

There are other examples of special interest efforts to influence executive action through contacts with agency officials:

There is the well-documented case of ITT executives who unknown to the public called personally on Cabinet officials and White House staff members in a widespread campaign to pressure the Justice Department to drop its antitrust suit against the corporation. It appears, moreover, that high-level personal contact is a favorite lobbying tactic of ITT. The job descriptions of several ITT lobbyists note the importance of this approach. As one lobbyist wrote: "There are several executive departments which are important to ITT and therefore contacts have to be maintained. I have several friends in the Department of Justice, Commerce, Post Office, SEC, and EPA."

American drug companies have been lobbying HEW to reject a plan to restrict prescriptions under Medicare and Medicaid to the lowest-priced drugs having the required therapeutic benefits. As part of this campaign, the firms have solicited letters from pharmacists and doctors in opposition to the plan, which would save taxpayers \$90 million annually. One company ordered 200 of its salesmen

to obtain letters of opposition from five druggists each, which were then to be presented to HEW Secretary Weinberger by the company's president.

The chief executives of the nation's largest corporations have formed an organization called the Business Roundtable to coordinate personal lobbying visits to key Congressmen and Executive branch officials. The organization identifies current policy matters which concern big business and provides corporate leaders with fact-sheets on issues, whom to contact, and when. Roundtable's members pay from \$2,500 to \$35,000 in annual dues, depending on the corporation's gross revenues. This adds up to an annual budget of over \$1.5 million.

All these examples illustrate the same problem: agency policymakers constantly interact with and are lobbied by outside parties—be they industry lobbyists, labor unions, officials in trade associations, or environmental groups—and there is virtually no public knowledge of these activities. This secrecy is convenient for the lobbyists, and often for the agency official as well. But it is not convenient for the public which has a right to scrutinize what is going on and to participate in agency proceedings.

NEED FOR LOGGING

Most observers would concede that outside interests continually lobby agency officials for favorable policy decisions, and that some of these secret efforts have a corrupting influence on the administrative process. But then the question comes: What good will logging do? I have already referred to this in part, but I would now like to address this question directly. We see six basic benefits from logging outside contacts and communications as required in S. 1289:

First, it would enable citizens to hold agency officials accountable for the inordinate access and influence they give to certain interest lobbyists and groups. We, of course, do not contend that all contacts between officials and outside interests diminish the integrity of agency policymaking. Much of this interaction is necessary and valuable. But we do contend that representatives of regulated industries, large corporations and other organizations are often given an excessive amount of access to agency officials and influence over their decisions. The patterns of contacts by FEA officials, the constant interaction between ICC policymakers and the industry they regulate, and the activities of ITT lobbyists and the Business Roundtable all illustrate this problem. The decisions being influenced are often ones that directly affect citizens welfare and concerns. Yet without logging, public scrutiny of who is influencing these decisions is conveniently avoided, as is the accountability of those involved.

Second, logging of outside contacts would give the media access to information concerning outside efforts to influence agency decisions, and enable it to better inform the public regarding these activities. This is related to the previous point, but it deserves a special note. Most of the information on lobbying activities inside executive agencies is provided by diligent investigative reporters. But the amount of this information reported is presently minimal. This is largely due to the difficulty in obtaining the necessary facts on who is contacting whom, and on what issues. Logging would make this data readily available and, through media coverage, keep the public better informed.

Third, it would facilitate public intervention in agency proceedings. As I mentioned before, most agencies relate primarily to their special interest constituencies. These interests are constantly involved in influencing agency rule-makings, the awarding of contracts and grants, licensing decisions, and other policy matters. Logging would put all this on the public record. Public interest groups and other interested parties could then analyze this situation, and counter with their own positions and supporting evidence. This already occurs in some proceedings. But in many others public scrutiny of industry's arguments and written documents is either difficult or impossible. This thwarts effective public participation in agency proceedings.

Fourth, logging would give agency officials a strong incentive to meet more regularly with nonindustry groups regarding agency policy decisions. The records of outside contacts required by S. 1289 will often dramatize, both to agency personnel and the public generally, the disproportionate degree of interaction with industry and other special interest representatives. The FEA logging data illustrate the point. We believe this will make agency policymakers more conscientious about meeting with various other interests and groups concerned about the agencies' decisions and soliciting their views on agency policy.

Fifth, it would provide Congress with information about agency proceedings and decisions which at present is usually unavailable. If Congress is to effectively

oversee executive branch actions, it must have timely access to the material submitted by outside interests and be able to evaluate the pressures on agency policymakers. For example, the documents supplied by the energy industry to FEA, EPA, and other executive agencies should be readily available to Congress, and it should know of the contacts with industry representatives which preceded executive policy recommendations or decisions. This also applies to agency interaction with outside interests concerning agency budget requests to Congress.

Finally, logging would go a long way toward restoring public confidence in the executive branch. A Harris survey last year showed that as many as 74 percent of those interviewed believe "special interests get more from Government than the people do." The only way to regain the trust and support of the American people in the political process is to assure that Government practices and institutions are worthy of their confidence. With respect to executive branch agencies, this means (among other reforms) opening the administrative process to full public scrutiny.

We believe these points make a compelling case for comprehensive logging of outside contacts and communications. But even granting these arguments, some opponents will still maintain that logging is impractical and overly burdensome. This argument should be faced head-on.

As this subcommittee is aware, there are a number of precedents for the kind of logging requirements contained in S. 1289. The FEA, Federal Trade Commission, Consumer Product Safety Commission, and Department of Justice have all promulgated regulations requiring detailed logging of outside contacts, letters, or meetings. In addition to these, however, Common Cause has found that other executive branch agencies have adopted limited forms of logging covering mail, phone calls, office visits, or other contacts. The Administrative Procedure Act already requires various contacts and written communications involving formal proceedings to be made part of the public record.

It cannot be persuasively argued, therefore, that logging is simply impractical. It is already being done in many agencies, although often in a very limited and informal basis. S. 1289 would set uniform logging provisions for all agencies to adopt, expand the logging requirements in the APA to cover additional agency proceedings, and make this information available for public inspection.

But there remains the argument that this legislation imposes overly burdensome requirements. We agree that logging imposes additional administrative responsibilities on agency personnel. The issues, of course, are: first, how much of a burden it imposes; and secondly, whether this burden is justified. On the first question, we believe that the agencies which require logging have demonstrated that it can be made a routine part of an official's daily responsibilities. We have talked to agency employees who have worked under logging requirements and have been told that once they grew accustomed to logging and had the necessary forms, the practice of recording outside calls, visits, and letters became almost automatic. And in regard to the second issue, we are convinced that the benefits derived from logging totally justify the administrative burden. The task of recording outside contacts and putting these records in the public record, together with copies of written material from outside interests, is a small price to pay for greater openness and accountability in the executive branch.

Mr. Chairman, your leadership on this issue has been vitally important, and we urge you and this committee to continue your efforts in behalf of this legislation. Enactment of a logging reform measure should be a top priority for Congress this year.

Senator KENNEDY. Mr. Geller?

STATEMENT OF HENRY GELLER, ATTORNEY, FORMER GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. GELLER. I support the bill, also. I think it would make a very marked contribution. I have petitioned the FCC to adopt open requirements and logging requirements along these lines. I think it is needed in order to restore confidence. I think you put your finger on it when you talked about the problem of agencies like the FCC being dominated by the industries that it is supposed to regulate.

I believe that that is true in the case of the Commission. And, although I do not think logging will be a panacea and will by itself correct this, I think it will make a contribution.

I would cite—and I do in the statement—Chairman Wiley's speech where, just as an example, he refers to the fact that after an oral presentation at some important rulemaking matter, the oral argument continues in the offices of the Commission.

And there, as he states in his speech, you get the "real facts"—the fallback positions, the compromise. He regards that practice as undesirable. I agree that it is stultifying to proceed in that way. I think that logging may inhibit that, to some extent, and is therefore desirable. It will not cut off the presentation, but it will inhibit the inordinate amount of this type of last minute ex parte logging.

Senator KENNEDY. What about the real frank, candid, open exchanges that we keep hearing about? That is always the point being raised. Agencies say that they will not be able to have these frank, candid, open discussions.

Mr. GELLER. I think if parties wish to rely on something, they ought to be able to state it publicly. They ought not to be saying here are the "real facts" but I just cannot tell you about this except in the privacy of your office.

Important matters—cable, prime time, access, domestic satellite—are all settled in these rulemaking proceedings. It seems to me that whatever the real facts are, they ought to be out in the open and not stated in the privacy of the Commission's office.

Senator KENNEDY. If you do all this will you really be putting an undue burden on the scrupulous while the unscrupulous continue to make their contacts anyway?

Mr. GELLER. I think there will be contacts. The bill does not cut off contacts.

Senator KENNEDY. Well, impropriety.

Mr. GELLER. What they will have to do is to reveal that there were contacts, and the essence of what was stated. I think that that will inhibit an inordinate amount of this last-minute lobbying, and that that is desirable. At least let it be out in the open, since that is what is occurring and ought to be faced.

BILL RELATES TO SUNSHINE LEGISLATION AND SANGAMON VALLEY CASE

Your bill goes toward sunshine. There is a serious legal question as to whether these contacts are not improper, under a case called *Sangamon Valley*, in an informal rulemaking matter where you have conflicting private claims to a valuable privilege. The Court of Appeals for the District of Columbia Circuit stated that basic fairness requires that in such a case the parties proceed in the open.

The Commission now does not do that. It receives these ex parte communications in proceedings such as domestic satellite, pay cable, and other matters involving conflicting claims to a valuable privilege. What I have raised in these comments for your consideration is whether such ex parte presentations should not be cut off. That is a very serious legal issue, I believe.

You also mentioned lunches. While it is not a matter of major importance, there are regulations that do limit lunches to those of

infrequent nature and of nominal value. There is now no enforcement of that. I think that if there were a logging requirement, that would be helpful, because usually there are pitches made at these lunches about coffee time. There is sometimes a pattern of operating this way week after week at the Sans Souci or some other expensive restaurant.

It does not reflect well on the integrity of Government, and it should be cut out. Logging communications at specified locations might be helpful in that respect.

Senator KENNEDY. You used to be a general counsel?

Mr. GELLER. Yes.

Senator KENNEDY. Didn't you go to lunch?

Mr. GELLER. I went to lunch. I always paid for my own lunch.

Senator KENNEDY. What kinds of pitches come at the end of lunch?

Mr. GELLER. Usually it is on a rulemaking policy matter. Let us say, broadcaster spokesmen urge that you ought to stop cable development in the major markets, because it is unfair competition. Or, the cable people will say that the FCC ought to permit such development, in order to bring new diversity. It is that type of thing.

Senator KENNEDY. What is your impression, having given this a good deal of thought, is it your impression—or anyone else's on the panel—that industry feels that there is a better climate and atmosphere during lunch to make a pitch than during normal office hours?

Mr. GELLER. I think its establishes a relationship. It cannot help but do it, psychologically. For if you are being taken to lunch, it means a cozier relationship and you are kind of beholden. I know that people argue that nobody is going to be bribed on the basis of a lunch, but it seems to me it is an inappropriate way to proceed.

Mr. CLARK. Mr. Chairman, I would like to add that during hearings, Mr. Kleindienst's confirmation hearings, that part of the testimony submitted for the record included job descriptions of ITT employees. It was repeated in those job descriptions that social contacts, both in the evening and over lunch, were a regular part of the job description.

So I echo some of the sentiments made previously that this kind of contact certainly should be part of whatever logging provision is provided.

Mr. GELLER. Let me finish one other thought. When you have these continuing contacts by the industry representatives in these important, informal rulemaking proceedings, you cannot help but have the agency tend to resolve the matter in that context. And there has been criticism by the second circuit, for example, that the result is a compromising among the various industry groups, and a glossing over of the essential public interest.

The public interest groups are not in on this final crucial decisional stage and I think, again, this is bad policy and maybe it is bad law. Thank you.

PREPARED STATEMENT OF HENRY GELLER

My name is Henry Geller, and I appear here at the subcommittee's invitation to testify concerning S. 1289. While I am associated with the Rand Corporation, the views expressed are my own. They necessarily reflect my Government experi-

ence, and particularly my service with the Federal Communications Commission. I was Deputy General Counsel of the FCC from 1961-64, General Counsel for six years, 1964-70, and special assistant to the Chairman for Policy and Planning until 1973.

First, I fully support the basic purpose and thrust of S. 1289. Indeed, on October 18, 1974, I filed with the FCC a petition urging the Commission to adopt logging requirements along the lines of S. 1289. To date the Commission has not acted upon the petition.

In the petition, I stressed—as you did in your introductory remarks, Mr. Chairman—that logging does not seek to isolate the agency from outside contacts. As the FCC has stated “. . . legitimate informal contact between the Commission and the industries it regulates . . . serves a useful purpose and should not be unnecessarily inhibited.”¹ Logging would not inhibit such informal contacts: Since they are perfectly legitimate, no reason exists why they should not be openly engaged in and logged. In effect, the agency would be saying to those who urge positions upon it, “Our doors are open for all proper contacts, and because we and you have nothing to hide, there is no reason why the public we serve should not be aware of all the contacts.”

I also pointed to the experience with logging of agencies like the Consumer Product Safety Agency:

Informal contact with the agencies who now log, indicates that officials generally seem to welcome the logging process. While it presents some burden, it is not an undue one, and it does serve to emphasize the “openness” of the agency. No legitimate contact is cut off, and the officials appear to take comfort in the resulting “goldfish bowl” nature of the agency operation. Some indicated their belief that it inhibits the improper approach—the one that cannot stand publicity.

I see logging as having the following advantages:

Because it promotes openness in governmental process, logging would make a significant contribution to maintenance of confidence in governmental process. The Court of Appeals for the Seventh Circuit in a 1970 opinion stated:²

The history of the United States regulatory agencies . . . seems to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate.

The logging requirement will not, in itself, cure the above deficiency. But it may be a help. For example, suppose industry representatives have made a practice of lobbying the agency officials through intensive private contacts during the crucial decisional stage. Logging—with its public disclosure—may inhibit or cut down on this undesirable last minute lobbying process.

And on that score, I should like to quote briefly from a recent speech of FCC Chairman Wiley:³

There is one other lobbying technique which disturbs me although I would acknowledge that it is largely due to a somewhat unfortunate practice on the part of the FCC. I mention it today because I want to put you on notice of my intention to change this practice wherever possible. When the Commission holds an oral argument on some rulemaking matter, we carefully divvy up the advocacy time available among various parties. When the argument is completed, the Commissioners should then be in the best position possible to make a tentative decision on the merits. Typically, however, such a decision is not made until long after the conclusion of the formal argument. During the delay until decision, oral argument often continues informally in the privacy of individual Commissioner and staff offices. I simply do not think this is a good practice and, accordingly, and to the extent practicable, I hope to have the Commission making tentative judgments very quickly following oral argument, thus obviating the possibility of any further *seriatim* presentations . . . Compromises, fall-back positions, and the so-called “real facts” are often reserved for supplemental filings and, perhaps, subsequent visits to Commission offices.

¹ Report on Ex Parte Rules, FCC 65-598, at par. 19; see also pars. 23-24.

² *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264, 273 (7th Cir. 1970). See also R. Coase, “The Economics of Broadcasting,” in D. W. McAvoy, *The Crisis of the Regulating Commissions*, W. W. Norton and Company, Inc., New York (1970), page 96; Noll, *Reforming Regulation*, Brookings Institution, pp. 43-44.

³ Speech to the Federal Communications Bar Association, on Apr. 30, 1974 (FCC Mimeo. 21343, p. 4).

The logging requirement, if it specifies time and place, would assist agencies like the FCC in enforcing several aspects of rules or policies designed to protect the integrity of agency process. Thus, in the Report adopting the ex parte rules, the FCC stated: "... it should be clear that presentations should not be made if the person making the presentation has knowledge of matters which will warrant the classification of the proceeding as a restricted proceeding. Ex parte presentations should not be made, for example, by a person who is planning to file a petition to deny or a mutually exclusive application, if the same presentation would be prohibited after the petition or application has been filed ..."⁴ This provision has been the source of some controversy.⁵ With logging requirements, the Commission would for the first time have a significant check on parties who might be tempted to make inappropriate advances. For example, a party who broke off negotiations in a potential petition to deny situation and rushed to Washington to advance his position to the Commissioners before the petition was filed, would know that a log of that meeting would be made part of the public record; such knowledge would inhibit this improper presentation and thus assist the Commission, which might well be unaware of the crucial background facts leading to the presentation.

The specification of location might prevent inappropriate meetings at vacation spots such as occurred in the previous history of the FCC. Further, it would give the Commission its first enforcement tool as to Section 19.735 of the Rules (47 CFR 19.735). This section prohibits the acceptance by Commissioners or staff or "... any gift, gratuity, favor, entertainment ..." from those subject to agency regulation. It contains an exception that "food and refreshments of nominal value may be accepted on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where an employee may properly be in attendance".⁶ The Civil Service Commission (CSC), which has primary jurisdiction over agency rules of the nature,⁷ has indicated that an agency employee could not, for example, make a weekly practice of accepting industry hospitality at expensive restaurants—the rule means just what it says—meals of nominal value at infrequent occasions. But an agency like the FCC would not now know whether any of its employees were following such an improper practice. With logging requirements there would again be a salutary check and inhibition on inappropriate behavior.

The disadvantage to logging would appear to be the burden placed upon the agency official. That is of course an aspect that the subcommittee will be fully exploring. My own very sketchy contacts with agencies like the Consumer Products Safety Commission would indicate that the burden is not an undue one and is well worth the benefits described above.

In that respect, I believe that S. 1289 might be revised to afford the agencies some flexibility to exempt, where appropriate, officials or situations from the logging requirement. I realize that this is a matter of legislative judgment, and that the experience with the agencies in implementing legislation of this nature—for example, in the Freedom of Information area—has not been wholly satisfactory. Nevertheless, I would suggest, as a first step in the field, affording greater flexibility. My specific suggestions are attached in an appendix to this statement, and I would of course be glad to discuss them here or with the subcommittee staff.

There is one other important concept that I believe should be taken into account by the subcommittee. The thrust of the bill is not to stop ex parte presentations but simply bring them to light. That is a sound way to proceed generally, since as stated, except for the proceeding that must be determined strictly on the basis of a record, contacts with the public and the industries are usually both permissible and favored. But there is a serious question whether such contacts are either sound policy or lawful in one area where they occur frequently today—the informal rule making proceeding involving conflicting private industry claims to a valuable privilege. It seems to me that the subcommittee should focus on this important matter and consider clarifying legislation.

⁴ FCC 65-598, par. 9.

⁵ In re application of KSAY Broadcasting Co., 45 FCC 2d 348 (1974); FCC 74-647.

⁶ 47 CFR 19.735-202(b) (2).

⁷ All the agencies are required by the CSC to have certain basic regulations in this area; all have largely patterned their regulations on those of the Civil Service Commission. See, e.g., 18 CFR 3.735 (FPC); 14 CFR 370.735 (CAB); 17 CFR 200.735 (SEC).

These informal rulemaking proceedings are of enormous importance to the Nation. Let me give you some examples in the communications area. In the common carrier field, the FCC decided whether there should be competition to the Bell System in specialized private line services in an informal rulemaking proceeding, docket 18920. The licensing policy in the domestic satellite field—open competition or one chosen carrier—was resolved in an informal rulemaking proceeding, docket 16495. In the broadcast field, the Commission resolved the issue of prime time access—to the 7–8 p.m. time segment or network affiliates—in an informal rulemaking proceeding, docket 19622. And in its recent pay cable proceeding, docket 19554, the Commission decided how and under what restrictions the pay television industry should develop.

All of these proceedings are “open” in the sense that interested parties could not only file comments but could make ex parte presentations to the Commission. And all of these proceedings involve conflicting claims by private industry to valuable privileges. Thus, the two common carrier proceedings involved conflicting private claims—by parties such as AT&T, MCI, Datan, Comsat, Hughes, Western Union, etc.—to valuable privileges—the right to operate domestic satellite facilities or the right to initiate specialized common carrier services. The prime time access proceeding clearly concerned conflicting industry claims—advanced by large market network affiliates, independents, the small TV producer, the larger TV producer, the networks, etc.—to a valuable privilege—namely, access to a specified prime time period for particular types of programming. And there is a strong conflict of industry interests seeking valuable privileges in the pay cable proceeding: The cable and motion picture industries seek the “privilege” of unrestricted or less restricted exhibition of films on pay cable; the broadcast industry seeks to bar such exhibition and to promote conditions that insure the availability of the films first to networks and then, through syndication, to stations.

That brings me to the 1959 *Sangamon Valley* case. *Sangamon* involved a rulemaking proceeding proposing to reassign channel 2 from Springfield, Illinois to St. Louis, Missouri. The Commission believed that ex parte presentations were permissible in such an informal rulemaking proceeding, and had allowed such presentations to be made by the interested parties. Because of the presentations, the Supreme Court ordered a further hearing before the Court of Appeals (358 U.S. 49). In its opinion, that Court stated:

... On behalf of the United States, the Department urges that whatever the proceeding may be called, it involved not only allocation of TV channels among communities but also resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open. We agree with the Department of Justice. Accordingly, the private approaches to the members of the Commission vitiated its action, and the proceeding must be reopened.⁸

The Commission regards *Sangamon Valley* as restricted to its narrow factual situation, and it does have some support for this restrictive reading—a 1961 case, *Courtaulds*.⁹ I disagree. There does not seem to me to be any basis in law or logic to restrict *Sangamon* to its own narrow facts, a contest for a valuable frequency. As the language of *Sangamon* and common sense indicate, what matters is whether the proceeding—whether general or of particular applicability—calls for “resolution of conflicting private claims to a valuable privilege.”

I believe that *Sangamon* is sound policy. *Sangamon* does not cut off the Commission from discussion of “broad policy matters with industry representatives” (8 FCC F.2d at p. 1154), so important to the discharge of its legislative functions, when there is no pending proceeding. And when these discussions or other

⁸ *Sangamon Valley Television Corp. v. U.S.*, 269 F.2d 221, 224, 106 U.S. App. D.C. 30, 33 (1959). The Court distinguished the *Van Curler* case (*Van Curler Broadcasting Corp. v. U.S.*, 98 U.S. App. D.C. 432, 435, 236 F.2d 727, 730).

⁹ That case, *Courtaulds (Alabama) Inc. v. Dixon*, 294 F.2d 899, 904, n. 16 (D.C. Cir. 1961), involving FTC rulemaking to define the generic category “rayon,” does appear to give *Sangamon* a narrower cast. However, the footnote reference seems somewhat confused, since it appears to distinguish *Sangamon* “on its facts and in principle” on the grounds that *Sangamon* involved “a license to be available to only one competing applicant” and not rulemaking (whereas, as shown, the case involved rulemaking to assign channels among particular communities). Further, the footnote states that there is no “... suggestion here of what ‘competitors’ are advantaged by the Commission’s adoption of the broad generic category ‘rayon’,” thus indicating that in the Court’s view, *Courtaulds* did not involve “conflicting private claims to a valuable privilege.” In any event, the issue remains why, in law or in logic, basic fairness is required in only one type of rulemaking and not all that meet the above quoted *Sangamon* criteria.

circumstances do lead to a proceeding involving "conflicting private claims to a valuable privilege," *Sangamon* certainly does not prevent these industry representatives from making their views known to the Commission. Just to use one example, in the pay cable proceeding, docket 19554, the industries sought and were given several opportunities to advance their views, both in writing and orally (four opportunities to file written comments; two oral arguments; two panel discussions). What *Sangamon* does prevent is the last minute flurry of frenzied lobbying by the interested industry representatives, when word of the incipient Commission action is "leaked." As the FCC Chairman has noted, this is a stultifying process. It has probably been a contributing factor in Court reversals such as in the prime time access case, where the Commission's action was criticized by the Court as "simply compromis[ing] between the interests of different broadcasting groups and gloss[ing] over the more fundamental public interest." *NAITPD v. FCC*, 502 F.2d 249, 257-58 (2d Cir. 1974).

Nor does *Sangamon* require that the action be taken solely on the "record" submissions. The agency remains free to use materials in its files or to elicit information or data from noninterested outside sources (of course, if it relies on such material, it should disclose this in setting forth the basis of its decision).¹⁰ *Sangamon* simply requires that the interested private claimants to the valuable privilege proceed on the record.¹¹

This *Sangamon* problem remains a continuing one at agencies like the FCC. Chairman Wiley has been unable to eliminate the abuse by "locking" the Commission to some publicly announced tentative instruction issued immediately after the oral argument.¹² And, in any event, there is something amiss with a solution that depends on rushing to judgment and thus sacrifices the often useful process of extended discussion, negotiation, and compromise on important matters. To give but one example, the Commission was intensively lobbied by industry representatives prior to the issuance late last month of its new pay cable rules. On March 10, 1975, the trade journals state that "word of last week's changes . . . got out during the week, and both broadcast and cable lobbyists rushed to the Commission, unhappy with some facets"¹³—that broadcast representatives ". . . were calling on commissioners on Friday . . ." to oppose the changes.¹⁴ The following week, the trade press again reported that "various [industry] groups lobbied Commission, pressing for changes in the tentative decision"¹⁵—that National Association of Broadcasters ". . . staff members met with [FCC] Broadcast Bureau staffers to present data backing up asserted need for [more restrictive] standard." Public interest groups, which had filed comments and appeared at the oral argument, did not participate in this final crucial decisional stage. In such circumstances, the agency action all too often reflects ". . . simply compromis[ing] between the interests of different broadcasting groups and gloss[ing] over the more fundamental public interest" (*NAITPD v. FCC*, *supra*).

I will not labor this point further. The legal issue will eventually be settled by the courts. But the matter is also an important policy one, involving as it does a balancing of basic fairness concepts against the desirability of wide open discussions in resolving quasi-legislative matters. I believe, therefore, that it should concern this subcommittee.

Thank you for the opportunity to appear and present views on these important issues.

APPENDIX

DRAFTING SUGGESTIONS CONCERNING S. 1289

1. *Section 560(a)(1)—the definition of agency official.*—The introductory phrase might be clarified by the following: ". . . employees of the executive

¹⁰ See Attorney General's Manual on the Administrative Procedure Act, pp. 31-32 (1947).

¹¹ It would also seem appropriate simply to specify that *all* parties should proceed in accordance with the prescribed procedures for written or oral presentations. Thus, disinterested parties (e.g. law professors: "think-tanks") would also be required to follow the stated procedures. See *Sangamon Valley Broadcasting Corp. v. U.S.*, *supra*, 106 U.S. App. D.C. at pp. 33-34, holding that specified procedures must be adhered to.

Also, *Sangamon*, I believe, should be applicable only where there are conflicting claims by private industry entities to a valuable privilege, and not to rule making procedures where conflict stems from the participation of listener or other public groups.

¹² See speech of Chairman Wiley, p. 3, *supra*.

¹³ Television Digest, March 10, 1975, p. 2.

¹⁴ Broadcasting Magazine, March 10, 1975, p. 6.

¹⁵ Television Digest, March 17, 1975, p. 3.

branch or an independent agency . . ." While the use of the grade 15 or above benchmark has the advantage of certainty, it might encompass inappropriate employees or miss others who should be covered by the bill's provisions. In short, certainty also carries the disadvantage of rigidity. I therefore suggest for the subcommittee's consideration a more flexible approach, such as "all employees . . . who are engaged in significant policy decisions . . .", with a requirement that each agency, after consultation with and the approval of the Assistant Attorney General Office of Legal Counsel, adopt regulations specifying the employees encompassed (e.g., for the FCC, all those in the position of branch chief or above).

2. *Section 506(a)(5)(6)*.—The record should also specify the place where the communication was received.

3. *Section 506(b)(v)*.—It is difficult to determine what is meant by the phrase, ". . . pertaining to a substantive policy matter before the agency . . ." It is apparently to be ". . . prescribed in regulations promulgated by the agency . . ." This means that if, for example, a parents' group were to approach a senior FCC official to discuss the Commission's policy concerning children's television, there would be no need to log the meeting or communication unless it had by foresight been listed in some agency rule. This would lead probably to an ever expanding or changing list of "substantive policy matters." While one can appreciate the desire to cover all bases, this provision appears too vague or difficult of implementation. The question is therefore raised as to the need for it, particularly in light of the consideration that the bill does cover *all* agency proceedings, including in the policy area petitions to institute rule making or inquiry proceedings. While this does leave a gap—the issuance by the agency of a policy statement without prior petition or notice—there are serious limitations on such abrupt agency process, in view of the APA's general requirement for notice as to substantive policy matters.

Section 506(b)(2).—Here again the scope of the provision may be too encompassing, and flexibility may be desirable. For example, parties such as public interest groups may wish to consult with Bureau Hearing Division attorneys as to tactics and manner of proceeding in some renewal hearing—yet if the Bureau attorneys are grade 15 (and a number are), all these perfectly normal litigation conferences would be logged and publicly disclosed. Other instances where logging and disclosure are uncalled for could undoubtedly arise. Therefore, it might be appropriate to permit agencies to except by rule—after consultation with and approval of the Assistant Attorney General Office of Legal Counsel—situations where logging could serve no useful purpose in promoting openness in governmental decision making. Provision could also be made for appropriate annual reports to the Congress concerning such exemption regulations.

Section 506(d).—There is also the question whether civil remedies (suspension, discharge) are not more appropriate than criminal penalties.

Senator KENNEDY. Mr. Asher?

STATEMENT OF THOMAS R. ASHER, ATTORNEY, FORMER ATTORNEY WITH ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. ASHER. I would like to apologize to you, Senator Kennedy, for not having prepared remarks. I would like to submit them afterward, if I may. I was tied up in litigation last week.

Just to explain my background, since I do not have any official status at the moment, I was with the Antitrust Division of the Justice Department from April 1966 to December 1969. And, after a short interlude in private practice of law, I ran a public interest law firm here in Washington called Media Access Project which was concerned, basically, with communications and freedom of information.

I think you have probably had a glut of references to the Federal Communications Commission, so I will not allude to my experiences there. I would also like to point out that I will be devoting the bulk

of my time during the next 2 years to writing a book on political influence. The primary focus is why public interests—which we all have an extremely difficult time defining—come out on the very short end of the stick as to the degree of influence they are able to wield.

So, from all of those perspectives, I have an interest in this legislation, which I do endorse. You mentioned during Peter Hutt's statement, that there might be some "chilling" effect on the first amendment right to petition for redress of grievances, if those who do petition the Government must do so openly.

This same argument was made in regard to the 1946 Lobbyist Registration Act and the Supreme Court rejected it in *Harriss v. United States*. It stated that the act was designed to prevent:

The voice of the people from being drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.

I think that the first amendment right to petition the Government for redress is exercised only by those who can gain access to Government decisionmakers and that the public has a right to know to whom they gain access, how and when they gain access, and that this bill is a step in the right direction in terms of casting some light onto these factors.

I would like to illustrate three instances in my own experience, two at the Justice Department and one as a public interest lawyer engaged in litigation, where situations that should have been known to the public were not, where the potential for serious abuse and undue influence took place.

The first—and I do not have the exact dates, but I can provide this all in my written submission—was when the Department was investigating the proposed acquisition by First National City Bank of New York of a large insurance firm called Chubb Corp. I was in charge of the investigation within the Department. There were at least three contacts made by either the chairman or the president or both of the First National City Bank with John Mitchell who was Attorney General.

These were meetings in the Attorney General's office. At least one of those meetings was not attended by anyone from the Antitrust Division, including Mr. McLaren who was the Assistant Attorney General, who found out about that meeting after it took place.

At the two other meetings, Mr. McLaren was present, but no member of the Justice Department staff was present. Now the Justice Department is not an adjudicatory agency. On the other hand, in the prelitigative stage of proceedings, there is an adversarial relationship. The Department staff on the one hand, pushing for some sort of action; the industry involved, pushing not to have that action take place, or at least to minimize it. And, the key policymakers, certainly the Attorney General and the Assistant Attorney General as well, sit to some extent as arbitrators, trying to decide what the Department is going to do.

The fact of the matter was that in the First National City Bank (Chubb matter, Mr. Mitchell ultimately decided to bring the suit anyway; but I, for one, being in charge of the investigation had no idea except for what Mr. McLaren told me as to what took place at

two of those three meetings that he attended. And he had no idea of what took place at the third meeting—at least that is what he told me—and none of us on the staff did.

So, we do not know what transpired between the bank and Mr. Mitchell. Based on Mr. Mitchell's track record one can draw what inferences one would like. Maybe nothing was offered to him. Maybe something was and it was not adequate to meet his price, I do not know.

Senator KENNEDY. Well in this case the case was not dropped.

Mr. ASHER. The case was not dropped, that is right, but nonetheless we do not know what took place. The fact of the matter is the public had no way at all of knowing that while this matter was under investigation at the Antitrust Division level, there was an ongoing contact between the top management of the bank which was under investigation and the Attorney General. That is something the public certainly should have known about throughout. Assuming that we can get around the question of whether the public should know about these investigations at all, which I think they should—

Senator KENNEDY. You do not know how many cases might have been dropped?

Mr. ASHER. We do not know that, and we do not know of how many other contacts by the bank, or other banks, or other outside interests took place with Mr. Mitchell.

Taking one step down from the Attorney General to the Assistant Attorney General, when Donald Turner was Assistant Attorney General there was what I regarded as an extremely uncomfortable—from the point of view of being a staff attorney—level of contact between himself and certain private members of the bar, and one in particular.

CITATION OF PERSONAL EXAMPLES OF EX PARTE CONVERSATIONS

This member of the bar, Lloyd Cutler, who is an outstanding lawyer. When I told him last week the substance of my testimony, he was quite upset at my suggestion that he had virtually unlimited access to Turner, both as to matters which were pending before the Department in which Mr. Cutler had involvement, and in addition on matters where he had no direct involvement at all.

But the fact is that Mr. Turner would simply call up Mr. Cutler and seek his advice on very important matters before the Department, and in turn, Mr. Cutler was freely able to communicate with Mr. Turner about such matters. No one else that I knew of was able to gain this degree of virtually openended entry via telephone, via meetings, and, in addition, through regular social contacts.

On a number of matters that I was working on, and Mr. Cutler was on the other side, I learned from Mr. Turner after the fact that he had learned certain facts from Mr. Cutler. Mr. Cutler had made certain presentations to him and I, in fact, was in Mr. Turner's office on numerous occasions when phone calls came in from Mr. Cutler. Just because the call was from him, it was deemed so important that Mr. Turner dropped everything and twice I was asked to leave. However, on several occasions perhaps Mr. Turner was not wise enough to ask me to leave, and I overheard the conversations.

Again, the public had no idea at all that these contacts were taking place. I think that it is terribly important that the public know what type of access is involved since access is the first step toward any influence really being brought to bear. If you cannot get to the person who is going to make the decision, it is impossible to really influence them.

Whether or not an untoward influence took place, we do not know.

Senator KENNEDY. Now how do you handle that in a situation where a case is brought against some individual and they have the wrong guy? He comes down to Justice after receiving a subpoena and just says, "Listen, you wanted Jimmy Jones. You have Jimmy Q. Jones instead of Jimmy T. Jones." Someone writes this down some place, and then it becomes public that Justice has had a subpoena issued, and quashed. In this situation, it is as though Justice had announced that Jimmy Jones does not beat his wife anymore.

Then, it is out in the public record. There is a public document on it and everybody knows. Is this a problem? Does this concern you at all? How do you reach what Mr. Wertheimer was urging—a balance of judgment? Or, is that a problem?

Mr. ASHER. It clearly is a problem. And clearly persons who are unjustly accused, or persons who feel they may be unjustly accused and want to plead their case to a Government decisionmaker before some legal action is instituted, do have a privacy interest which has to be weighed against the public's interest in knowing how the Government is transacting its business.

I think that the legislation, as drafted, attempts to draw a balance between those two conflicting interests. Once a suit is started, if it turns out you have got the wrong person or if you have subpoenaed the wrong person, that is a matter of public record anyway.

And, if we look to the degree of public injury or degree of injury to individuals which results from the wrong person being subpoenaed, getting up on the witness stand in open court and saying "it is not me, it is someone else," that being established is a fact that is clear. It goes on all the time and the level of injury suffered by individuals there I do not see to be extraordinarily high.

Senator KENNEDY. Is that true of investigations, too?

Mr. ASHER. I think it probably is. Certainly based on my experience in the Justice Department, I rarely found us investigating the wrong person, except—well, no, that is not quite accurate. We usually were investigating the wrong person or usually investigating some minimal aspect of competitive conduct, rather than talking about the structure of an industry. It did not really require little meetings to set prices, because as in the case of the automobile industries, they could do it by tacit consent. But, in terms of locating the wrong individuals, I rarely found that to be the case. And, usually, when that was so it was clarified very easily and if this were on the public record I doubt if anyone would suffer any great injury.

There will be certain instances, no doubt, where this is not so. In S. 1289, you have an "informer" exception. I am curious whether the informer exception would include General Motors coming in and complaining that American Motors was competing too hard and trying to drive GM out of business? Would General Motors be an "informer" in that situation? There is a definitional problem, but I acknowledge

the problem and I think I come out with Mr. Wertheimer on the trade-off situation there.

The last instance I would like to cite involves Freedom-of-Information Act litigation which I am now involved in representing several public interest groups. In fact, there are several cases, each involving equal employment data submitted by major corporations to the Government, which the Government agreed to release.

The corporations then brought suit to enjoin the release of their data. After the suits were brought, we found out that—in one case it was Sears, Roebuck and in another case it was Westinghouse and in another case it was U.S. Steel and General Motors—in each instance they had numerous meetings with top and slightly lower than top decisionmaking officials in the Government, trying to persuade them not to release the data.

On the other hand, the individuals and groups requesting the data—the National Council of Churches, the Legal Aid Society of Alameda County, a group called Council on Economic Priorities, and so on—had filed their request and never heard another thing until after some telephone calls back and forth and they were told that the data would be released.

Whereas, the industry representatives that were trying to prevent the release of the data under the Freedom of Information Act, had numerous formal and informal meetings, made written and oral submissions to the Agency, and these were never even shown to the entities that were requesting the data.

Once again, the type of legislation that you are proposing at least would have alerted those members of the public that were requesting the data to the fact that there were some very heavy submissions being made, both verbally and in writing, by the original source of the information, trying to prevent its release.

I would urge upon you, though, to keep in mind the statement that Mr. Hutt made earlier. And that is, with all of this disclosure, we have to realize that in terms of the resources, manpower, economic resources available to special interests—industrial and labor interests on the one side, and public interests which tend to be diffuse, tend to be very underfinanced, very penalized by the existing tax laws in terms of the amount of money and staff that they have available—you are always going to find the kind of disparity that Mr. Wertheimer pointed out. Even monitoring the types of logs that this legislation would require would probably take all of the public interest organizations in Washington fulltime just to keep abreast of them to see if anything was going on that should not be.

Thus, the fundamental problem is a much more profound one. It is that we have an enormous disparity in resources between those who would influence the Government on behalf of industry, on behalf of labor organizations, those we tend to call special interests on the one hand, and public interest on the other hand who, at best, even with all of the information spread on the record, are at enormous disadvantages.

And so recognizing that this is merely a step in the direction that I hope would ultimately lead to major legislative reform of a number of processes that the public could more effectively participate in all of the decisionmaking areas of Government, in efforts to influence Gov-

ernment, I do endorse the legislation as a worthwhile step in that regard.

Mr. WERTHEIMER. Mr. Chairman, could I add just one more point? While I share what Mr. Asher said, the fact of the matter is that even the logs of this information could not be comprehensively monitored. People tend to conduct themselves differently when they feel and know that their activities are subject to public review and public scrutiny.

And one potential out of this kind of legislation is that you would have Government officials and agency officials conducting themselves in a manner that is different than the way they do it now, because they know there is no potential for accountability, no potential for the public to know anything is going on.

Mr. ASHER. I agree completely. I do not think Mr. Mitchell would have met with those executives of the bank if he had known that it would have appeared on the public record.

Senator KENNEDY. Well we want to thank all of you. I think these hearings have been important in getting some of these arguments out on the table—some of the principles and some of the problems, as well.

We want to work closely with all of you, as we develop the legislation. We agree there is an obvious necessity for greater openness in Government. On the basis of some present agency practices, greater openness is both necessary and entirely practical.

The real challenge is for us to develop some legislation that will bring the 74 percent figure that Mr. Wertheimer quoted down to the incidental, perhaps double-digit figure that we associate with inflation.

Let me just thank you very much. We will be staying in touch with you. I think it has been a useful and helpful beginning and I want to thank you for your appearances here. We will stand in recess.

[The prepared statement of Thomas Asher follows:]

PREPARED STATEMENT OF THOMAS R. ASHER

Mr. Chairman, I appreciate the subcommittee's invitation to testify in support of the proposed Open Communications Act of 1975. Its purposes are indeed salutary—to help restore public confidence in governmental processes by opening to public scrutiny one of the most serious sources of mistrust: special interest influence.

It is not hyperbolic to say that the public's confidence in government's responsiveness and openness to the voices and needs of most citizens is at an alarmingly low level. A recent survey found that over 60 percent of the nation's young adults, both college and noncollege educated, "believe that the country is democratic in name only and is run by special interests."¹ Most view "big business as the most influential special interest, followed closely by financiers and organized labor."² Numerous other polls of the population at large at large reinforce these conclusions, often with the mistrust percentages substantially higher.

Even if these perceptions were incorrect, even if individual citizens possessed access and the ability to influence federal decisionmakers proportionate with their numbers, the broad-based impression that that is not the case constitutes a danger signal which warrants immediate attention.³ And, since secrecy is the midwife of suspicion, S. 1289 represents a meaningful step in the right direction by seeking to lift the veil of secrecy behind which interests of all sorts work daily (and often effectively) to influence public policy.

¹ D. Yankelovich, *The New Morality: A Profile of American Youth in the Seventies*, McGraw Hill Paperbacks, 1974, pp. 45, 116.

² *Id.*

³ See, e.g., *Conflict of Interest and Federal Services*, by the Special Committee on the Federal Conflict of Interest Laws of the Association of the Bar of the City of New York, Harvard University Press, 1960, pp. 19-20.

Every casual newspaper reader is aware of the high level of access to government possessed by special interests. Regardless of whether this access affects Federal decisions, it creates the opportunity for and appearance of undue and unfair influence. Madison said that the public's role in a democracy is "keeping the several departments of power within their due bounds."⁴ But unless citizens at least know the facts about who is gaining access to which public officials at what times, the public will feel that it cannot fulfill that role and confidence in government will further erode and with it the stable underpinnings of constitutional democracy.

The broader question of political influence which underlies S. 1289 is highly complex and its abuses are not likely to be solved simply by the passage of a disclosure law. I make this point not to discredit S. 1289, which I heartily endorse as a step in the necessary direction of greater openness in government. Rather, I feel it necessary to emphasize that disclosure is only one step toward solving the problem that "some people have much more of a voice in what government does than do others."⁵

Underlying the entire phenomenon of political influence is the fact that money can and does buy political power. It purchases influence both overtly, such as by purchasing issue-oriented advertising in the mass media on subjects ranging from oil imports to "socialized medicine," and covertly in a wide variety of fashions affecting every branch and office of government. It is toward this covert influence that S. 1289 is directed in the expectation that, by exposing avenues of influence, they will either be closed or else opened to all.

As my preceding remarks indicate, I do not believe that lifting the veil of secrecy will so fundamentally realign political power in America that the notion of majority rule and equal access to Government for all citizens and interests will become a reality. However, as Mr. Nixon has taught us so well, secrecy can rarely if ever promote public confidence in Government or Government responsiveness to the popular will; almost invariably it has the opposite effect.

I have observed the interplay between Government officials and advocates for private causes from several perspectives. As a law clerk to a Federal District Judge I saw regular efforts by lawyers and their clients to utilize social and political relationships to ex parte reach the judge with arguments and "facts" regarding pending litigation; efforts which were consistently and firmly rebuffed. As an attorney in private practice representing corporate interests I sought to influence Government decisionmakers and as an attorney with the Antitrust Division of the Justice Department⁶ I was not only the object of such efforts but observed them taking place at the highest levels above me. Finally, as the executive director of a public interest law firm for over 3½ years,⁷ I represented those weak minorities and diffuse majorities of citizens who lack the money to hire lawyers and others skilled at influencing Federal policy. In each of these roles I saw much going on secretly which the public would not have tolerated and much more contact between Government officials and outside advocates which, although not inherently nefarious or corrupt, should have been matters of public record if the notions of an informed electorate and public participation in the governmental process are to be realities rather than rhetoric.

I will cite two specific situations which occurred during my Justice Department years to illustrate the types of contacts which should, and if S. 1289 becomes law largely will, be spread on the public record. First, during Donald F. Turner's tenure as Assistant Attorney General in charge of the Antitrust Division⁸, there were certain attorneys who regularly were involved in an adversarial relationship with the Division, both litigative and prelitigative, who had ready access to Mr. Turner. The most conspicuous of these was Lloyd Cutler, of the firm of Wilmer, Cutler & Pickering in Washington, D.C.

This situation would not warrant my singling it out except for several key factors. Mr. Cutler enjoyed (and continues to enjoy) a flourishing antitrust practice, basically representing major corporations which are under investigation or have been sued by the Justice Department. I should add parenthetically that Mr. Cutler is a lawyer of the highest ability and his clients received superb legal counseling quite apart from any ex parte influence Mr. Cutler was able to exert on their behalf. However, the fact of the matter was that Mr. Cutler,

⁴ The Federalist Papers, no. 50, Mentor Books, 1961, p. 317.

⁵ V. O. Key, Politics, Parties, and Pressure Groups, 1958.

⁶ April 1966–December 1969.

⁷ Media Access Project, Washington, Aug. 1971–Feb. 1975.

⁸ June, 1965–June, 1968.

who was a close personal friend and long-time professional associate of Mr. Turner, was able to reach Mr. Turner both via telephone and in office meetings in a manner both qualitatively and quantitatively different from virtually any other lawyer.

I overheard several telephone conversations initiated by Mr. Cutler regarding matters under consideration by the Division in which Mr. Turner quite freely discussed his views and instincts and, in turn, was quite open to hearing Mr. Cutler's arguments. I also overheard Mr. Cutler's views on cases and policies being considered by the Division, many of which directly affected his clients and almost all of which were of great importance to at least some of those clients.

I should make clear that I do not fault Mr. Cutler for seeking access to Mr. Turner in order to plead his case. I cannot imagine that he offered bribes or otherwise did anything more than act as a vigorous advocate addressing the merits of particular matters. However, the fact that he possessed extraordinary access to the nation's chief antitrust enforcer, while widely known or suspected in some corporate and legal circles, was not known to the public at large and, I would posit, would not have been tolerated had it been known. At the least the public would have demanded that Mr. Turner's contacts with outside counsel be more openly conducted and more evenly distributed.

Since dealings which take place behind a veil of secrecy always lead to suspicion of chicanery all parties who have nothing to hide should welcome the requirements of S. 1289 that the veil be lifted. In fact Mr. Cutler, with whom I discussed this testimony last week, while not welcoming my references to him, stated that he has nothing to hide and that he endorses the basic principles of S. 1289 because they would remove any appearances of impropriety on his part and on the part of any private advocate who deals with high Government officials.

The second instance I would like to cite involves extraordinary access to Attorney General John N. Mitchell on a matter under investigation by the Antitrust Division in 1969. It involved the proposed acquisition by First National City Bank of New York of Chubb Corp., a major insurance firm; the question being considered by Justice was whether the acquisition would raise serious enough competitive dangers to warrant suit under section 7 of the Clayton Act. Since I was in charge of the Antitrust Division's investigation during its final stages, I was privy to the contacts between both firms and the Division. Richard McLaren, the Assistant Attorney General in charge of the Antitrust Division, held no meetings and, to the best of my knowledge, permitted the parties no *ex parte* contacts with him except in meetings attended by the staff, including myself, and on several occasions rebuffed efforts by counsel for the bank and Chubb to meet with him alone. On the other hand, Mr. Mitchell apparently had an open door policy in regard to the bank's highest officials; he permitted them to plead their cause on at least three occasions, one of which Mr. McLaren learned about only after it took place. At the other meetings Mr. McLaren was present, although no other members of the Division's staff, who possessed far greater knowledge of the facts than did Mr. McLaren, were present.

In this situation, unlike the now notorious ITT matter, outside influence did not result in the abandonment or attenuation of antitrust enforcement. Rather, Mr. McLaren, on June 12, 1969, recommended to the Attorney General that suit was warranted and Mr. Mitchell promptly endorsed that recommendation. However, we cannot determine, because the type of public information which S. 1289 would require is not available, if extraordinary *ex parte* access to Mr. Mitchell in other matters did substantially alter Justice Department actions.

In regard to the Justice Department's law enforcement processes, I should note several factors which will hopefully clarify the implications of my foregoing statements and may warrant this subcommittee's attention in drafting legislation designed to assure the integrity of administrative procedures. First, within the Justice Department's antitrust enforcement scheme, the Division's staff generally stands in an adversarial posture to the firms under investigation. Because investigations are supposedly highly confidential matters, the public at large rarely possesses the knowledge to make its views known to the Department except via the efforts of or access to investigative staff.

Second, top policymaking officials within the Department, including the Assistant Attorney General who must decide whether to recommend suit and the Attorney General who must authorize it, serve in a quasijudicial role: they hear staff arguments which usually propose the filing of suit and arguments of the firms under investigation to the effect that suit is neither legally nor factually warranted.

Third, to the extent the staff is excluded from high-level policy decisionmaking, or feels that it is excluded, this leads to a sense of demoralization which, coupled with the other phenomena which drive most of the better attorneys out of Government service after a short stay, seriously undermines the Government's ability to effectively enforce the laws.

Fourth, during my tenure at Antitrust, I never found more than incidental benefit resulting from verbal, in contrast to written, submissions by firms under investigation during the prelitigative stages. This suggests that much dangerous influence or appearance of influence could be avoided by requiring that all contacts with firms under investigation be in writing. If verbal contacts can be minimized, one of the major potential loopholes in S. 1289, requiring Government officials to make "a brief characterization of the subject matter under discussion," would be closed and, at the same time, administrative burdens would be lightened.

Fifth, I have serious doubts about the closed process for handling prelitigative matters, at least in the antitrust and trade regulation areas. The fundamental question is why the public should be excluded from input on matters of weighty economic policy which affect individual citizens as much as (and often more than) the corporations involved. Without public input, the views of minorities, consumers, environmentalists and numerous other public interests often are overlooked or given short shrift in the prelitigative process. Since, as noted above, the decisions regarding whether to file antitrust suits and how to shape their terms and requested relief are basically quasijudicial, there is no reason why the public should not be afforded as much input at that often decisive stage of the proceedings as it is afforded once a matter reaches the courts.

I do not feel that principles of corporate privacy or possible stock market implications justify the present closed process. In fact, the securities laws require full disclosure of litigation and other factors which are relevant to investment decisions and, in reality, any serious antitrust investigations are known to and have impact upon the securities markets well before any official statement is issued by the Justice Department or the FTC. An open process would therefore assure that the securities markets function more intelligently and fairly by making all relevant information available to all persons at the same time.

Finally, I would suggest that the subcommittee remove the limitation of the Bill's disclosure and logging requirements to contacts "initiated by persons outside the agency." Donald Turner often called Lloyd Cutler to discuss matters of departmental concern. Similarly, Government officials at all levels generally "initiate" contacts with outside parties in order to gather important information and insights. Moreover, once a line of communication exists between a Government official and someone "outside the agency," the question of initiation becomes not only irrelevant to what the public ought to know but, as a matter of law, is a concept so vague as to constitute an enormous and unnecessary loophole.

In sum, I urge the subcommittee to refine S. 1289 to assure maximum public knowledge of agency proceeding and outside contacts, operating on the principle so well put by Voltaire that "a well-governed society turns every vice to account."⁹

[Whereupon, at 12:50 p.m., the subcommittee recessed, subject to the call of the Chair.]

[The draft comments on the Consumer Product Safety Commission's proposed openness regulations follow:]

⁹ Voltaire, *Philosophical Dictionary*, in *The Portable Voltaire*, Viking, 1968, p. 87.

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COMMENTS ON
CONSUMER PRODUCT SAFETY COMMISSION
PROPOSED OPENNESS REGULATIONS (DRAFT) *
TITLE 16 -- COMMERCIAL PRACTICES

CHAPTER II -- CONSUMER PRODUCT SAFETY COMMISSION

SUBCHAPTER A -- GENERAL

PART 1012 -- MEETINGS, PRIOR PUBLIC NOTICE, & RECORDS OF PROCEEDINGS

ADOPTION OF MEETINGS POLICY

The purpose of this document is to promulgate the procedures set forth below regarding requirements of the Consumer Product Safety Commission (CPSC) for advance public notice, public attendance, and records for meetings that are of substantial interest involving Commissioners and/or CPSC staff and outside parties. In developing a meetings policy, the Consumer Product Safety Commission has followed the principle that the public interest is best served when regulatory affairs are open to the fullest extent practicable. To that end, meetings of substantial interest will be announced in advance and all meetings and records will be open to the public unless they fall within exceptions required by law or established in this policy.

The Commission has explicitly detailed its requirements for advance public notice and its requirements that the public be permitted to attend meetings of substantial interest in order to make clear the conditions and exceptions that exist relative to this policy. In addition to the specified exceptions, the Commission acknowledges that extraordinary circumstances arise which might require either that advance notice cannot be given or that a meeting be closed or both.

* Subcommittee staff underscored material in this document for emphasis.

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To ensure that no one claims the existence of such extraordinary circumstances without justification, the policy set forth below requires: (1) approval from the Chairman whenever CPSC staff, other than personal staff of Commissioners, wish to hold or attend a meeting of substantial interest to the public without giving prior public notice, and (2) approval from a majority of the Commission whenever CPSC staff, other than personal staff of Commissioners, wish to hold or attend a closed meeting of substantial interest.

BACKGROUND

In the FEDERAL REGISTER of October 24, 1974 (39 FR 37780), the Consumer Product Safety Commission proposed an interim and amended procedures policy (16 CFR 1001.60 through 1001.67) regarding public notification and disclosure of meetings to serve as its interim policy until finalized. Previously, on October 1, 1973 (38 FR 27214), the Commission had promulgated 16 CFR 1001.60 prescribing a basic procedural policy for meetings, prior public notice, and records of proceedings.

With the expansion of the material for procedural policy on meetings proposed October 24, 1974, from 16 CFR 1001.60 into 16 CFR 1001.60 through 1001.67, the material became an appropriate size and nature to constitute a part. Thus, the material is adopted below as 16 CFR Part 1012.

RESPONSE TO PROPOSAL

In response to the proposal of October 24, 1974, 16 comments were received from interested parties, including the Chemical Specialties

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Manufacturers Association, Inc.; Consumer Electronic Group of the Electronic Industries Association; the National Cash Register Co.; Glass Container Manufacturers Institute; Power Tool Institute; J. I. Case Co.; Walker Manufacturing Co.; Thomas K. Wilka, Public Interest Seminar, Georgetown University Law Center; Allen S. Saeks, consumer representative, Product Safety Advisory Council, Consumer Product Safety Commission, a consumer, and members of the CPSC staff. reflecting experience with implementation of the proposal.

Significant changes. The more significant changes made in the regulation in response to comments involve the more precise definition of the terms "meeting," "outside party," and "substantial" interest" and clarification of conditions that permit exemptions from the policy.

Two of the comments supported the proposal as published. The main issues raised in the remainder of the comments and the Commission's conclusions thereon are as follows:

1. Definitions — a. Meeting. Regarding proposed 16 CFR 1001.61(d), CPSC staff point out that the definition is too broad and ask for clarification and specificity.

The Commission does not intend that everyday encounters of its staff with the public, such as discussing the merits of artificial turf at a football game with a friend, constitute a "meeting" that would be of public interest. The Commission also does not intend that substantive

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discussions between staff and the public not be construed as a meeting simply because they are held in a nonbusiness environment such as a football game.

The Commission has therefore redefined "meeting" to include any assembly of its staff with the public for the purpose of discussing specific subjects relating to the business of the Commission.

b. Outside party. Regarding proposed 16 CFR 1001.61(e), one industry comment suggests that in the definition of "outside party," the exemption of news media and not of all persons when they are acting in a news-gathering capacity is discriminatory.

Another industry comment predicts that members of the news media will meet privately with Commission employees for news-gathering purposes and requests that industry representatives be allowed to attend.

The Commission believes that the public interest is best served when regulatory affairs are open to the fullest extent practicable. To that end, the Commission opens, whenever possible, all its meetings to the public. Since all interested persons are not able to attend these meetings, the Commission believes that the news media will make important aspects of the proceedings public knowledge. Consequently, the public will learn of Commission activities and be more able to assist the Commission in the goal of reducing the risks of injury associated with consumer products.

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The Commission also recognizes that media will meet privately with Commission staff for news gathering and intended that the exemption of persons engaged in news-gathering should not exclude industry representatives from this type of news-gathering meeting. Since many industries receive trade journals that have editors and staff who are news-gatherers, the Commission is therefore subject to questions from industry, segments of the business community, and the consuming public, as well as from media news-gatherers. The Commission believes that the interest of industry is adequately served by its present policy. However, the term "news media" is broadened to the term "person engaged in news-gathering," to clarify that it includes persons affiliated with all news media including industry news-gatherers when the activity is for the purposes of publication.

An advisory council member contends that the definition does not make clear whether an individual member of a CPSC advisory council meeting with a Commissioner to discuss a substantial interest matter is an outside party.

Another comment states that it is not clear whether an offeror, preparing a standard for CPSC, is a contractor or an outside party.

The Commission concludes that when advisory council members and offeror personnel are not acting in an official capacity, they are outside parties. The examples of outside parties listed in the definition are not inclusive, but rather are illustrative and wording has been changed to reflect these findings.

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A consumer comments that the definition of outside party is vague and dangerous because there is no definition of "inside party." The consumer asks what are the people under contract who do work for the Commission? The Commission considers contractors doing work for the Commission as not being within the scope of outside parties, therefore 16 CFR 1012.4(c)(11)(F) below has not been changed. Also, the Commission considers it unnecessary to define "inside party" because it has defined "outside party."

As explained in this discussion, the definition (16 CFR 1012.2(e) below) has been changed.

→ c. Substantial interest matter. One individual's comment suggests redefining the term "substantial interest matter" in proposed 16 CFR 1001.61(f) to include any topic of discussion between CPSC staff or Commissioners and a party potentially subject to CPSC regulatory action and suggests requiring advance notice and a meeting summary for all meetings between CPSC personnel and an "outside party" as defined in proposed 16 CFR 1001.61(e).

Another comment from an individual points out that this definition includes more than pending matters and asks if this broad definition is intentional.

One industry and three staff comments urge the Commission to clarify the definition and/or expand the list of examples of meetings and activities that are not substantial matters.

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The Commission agrees that it should clarify when a matter is or is not of substantial interest. Substantial interest depends on not only the subject itself, but also on how that subject will be discussed. There is a distinction between inquiries or meetings for general informational purposes and contacts or meetings for purposes of commenting on matters before the Commission, which constitute substantial interest matters. In addition, the Commission concludes that additional examples of matters that are, and that are not, substantial interest matters should be given. Therefore, the Commission has revised the definition (16 CFR 1012.2(f) below) and has given additional examples.

2. Forms of advance public notice. A staff comment questions whether advance notice and meeting summaries are required for speeches given before outside parties.

The Commission concludes that speeches generally do not meet the definitions of substantial interest matters since they simply convey information about the status of matters before the Commission and do not involve significant discussions about such matters. However, the Commission encourages the staff to list notices of upcoming speeches in the public calendar for informational purposes. The Regulation (16 CFR 1012.4 below) has been revised accordingly.

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An industry comment urges the Commission to consider providing a period of overlap when the interim meetings policy is finalized during which the Commission's day-to-day meeting activities would be published in the FEDERAL REGISTER in addition to being listed in the public calendar.

The Commission has not used the Federal Register for the above purpose since October 1974, and makes it possible for all those who request to receive the CPSC's public calendar regularly free of charge. The Commission therefore concludes that the suggested accommodation is unnecessary.

The regulation (16 CFR 102.3 below) accordingly has not been changed.

3. Location of meetings between CPSC and outside parties.

Regarding proposed 16 CFR 1001.63(c), a comment suggests that the regulation would be more comprehensive if the requirements for meetings between Commissioners or CPSC staff and outside parties applied not only to meetings at CPSC premises and at the premises of outside parties, but also to other premises at which the Commissioners or CPSC staff would likely meet with outside parties.

The Commission intended the Regulation to cover such meetings. The regulation (16 CFR 1012.4(c) below) has been changed accordingly to clarify that it includes meetings between Commissioners or CPSC staff and outside parties at any location.

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4. Notice requirement for section 15(b) notifications .

a. Initial notifications. Regarding proposed 16 CFR 1001.63(c)(1) (i)(b), an individual commenter objects to the exemption of initial section 15(b) notifications from the advance notice and open-meetings requirements.

The Commission finds that prior notice of and public attendance at meetings involving initial section 15(b) notifications would be impossible because with many initial notifications under section 15(b) of the Consumer Product Safety Act it is necessary for the CPSC staff to act immediately upon the notification in the interest of public safety. Also exempting the initial notification will protect manufacturers who may report potential possible hazards which will later turn out not to require CPSC action from adverse publicity. Subsequent meetings and negotiations, however, are not excepted from the notice requirement. The regulation (16 CFR 1012.4(c)(1)(ii)(B) below) has been revised to so state.

b. Subsequent meetings. Regarding proposed 16 CFR 1001.63(c)(1) (i)(b), an individual comment suggests that the exemption from advance notice and open-meeting requirements not be limited to meetings involving initial section 15(b) notifications. The commenter contends that the meetings following the initial section 15(b) notification meeting also require frank negotiations without the defensiveness and caution likely to be generated by the presence of outsiders.

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The Commission believes that the suggested change would be inappropriate since the intent of the regulation is to give public notice on substantial interest matters whenever practical. Since negotiations leading to the settlement of cases are open, the public should be given advance notice of such negotiations. The Commission will give all interested persons the opportunity to observe its regulatory affairs and exempts initial 15(b) notifications in the interest of speed and to permit frank exploratory reporting and discussion that may take place at that time.

5. Criteria of closed meetings. -- a. Proprietary data.

Regarding proposed 16 CFR 1001.63(c)(4)(1)(a), which provides for closed meetings to protect the confidentiality of proprietary data, a comment of an individual states that the concept of "proprietary data" is much broader than that of a trade secret and other material protected by law. The comment contends that unless the term "proprietary data" is defined in the regulation, the public could be excluded from many meetings.

The Commission recognizes the term "proprietary data" may encompass various materials protected by law, including trade secrets. The Commission directs that its Office of the General Counsel shall determine whether materials are proprietary data and thereby fall within exceptions of the law or the subject regulation. The regulation (16 CFR 1012.4(c)(2)(11)(A) below) has been changed accordingly.

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b. Lack of Space. Regarding proposed 1001.63(c)(4)(1)(b), a consumer objects to permitting a meeting, open to the press or other news media, to be otherwise closed due to lack of space. The commenter suggests that many meetings involving substantial interest matters could easily be closed to interested consumers by simply claiming there is room only for the press and news media.

The Commission when accepting invitations, requests that every effort be made to accomodate observers and when space is limited the public can be informed of details of the meeting by members of the press and media. The regulation (16 CFR 1012.4(c)(2)(ii)(B) below) therefore has not been changed.

c. Initial section 15(b) notifications. Regarding proposed 16 CFR 1001.63(c)(4)(1)(c), which provides for a closed first meeting dealing with initial 15(b) notifications, an industry comment suggests a definition be provided for the term "initial notification" and recommends that subsequent meetings or contact between the Commission and the notifying manufacturer be permitted to be closed.

Two industry comments recommend modifying the requirement that opens to the public all subsequent meetings pertaining to section 15(b) notification because confidential information or trade secrets might be discussed at the subsequent meetings.

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An individual commenter objects to the exemption of initial section 15(b) notification meetings from the open-meeting requirements.

The Commission finds that open meetings involving initial section 15(b) notifications would be impossible because with many initial notifications under section 15(b) of the Consumer Product Safety Act it is necessary for the CPSC staff to act immediately upon the notification in the interest of public safety. Also exempting the initial notification will protect manufacturers who may report potential possible hazards which will later turn out not to require CPSC action from injuring their business because of adverse publicity. Subsequent meetings and negotiations, however, are not excepted from the notice requirement. Accordingly, the regulation (16 CFR 1012.4(c)(2)(ii)(C) below) has not been changed.

d. Negotiations for settlement. Proposed 16 CFR 1001.63(c)(4)(i)(d) provides for closed meetings held during the normal course of field surveillance, inspection, or investigation of a person or company, but not for negotiations leading to settlement of individual cases. The closed meetings are necessary to maintain the confidentiality of proprietary data such as formulations, design specifications and

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other information that could work to eliminate the firms' competitive advantage if disclosed to the public. Two industry comments suggest that the regulation be revised to exclude the public from the settlement negotiations.

An industry comment objects to public access to negotiations for settlement on the basis of imperiling the confidentiality of data and because the public presence would hamstring productive settlement discussion where offers may be held against the parties if the settlement does not work out.

The Commission believes that the right of the public to attend negotiations leading to the settlement of any case will not imperil the confidentiality of proprietary data because under 16 CFR 1012.4(c)(2)(ii)(A) the Office of the General Counsel will determine whether proprietary data will be discussed in such a manner as to imperil their confidentiality. Also, the Commission concludes that the concern that negotiations may be hamstrung is overridden by the need to have the public fully informed as to how and why settlements are reached. Therefore, the subject regulation (16 CFR 1012.4(c)(2)(ii)(D) below) has not been changed as suggested.

e. Meetings with other government officials. Regarding proposed 16 CFR 1001.63(c)(4)(i)(e), which provides for closed meetings held with other government agency officials when they request a closed meeting and when the CPSC employee involved finds that extraordinary circumstances so warrant, an individual commenter contends that the

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test of "extraordinary circumstances" does not delineate a clearly and narrowly drawn exception to the open meetings policy. Similarly, another individual commenter objects to such an exception in any "openness" policy.

Several staff comments ask that specific other-government meetings be exempt from the openness requirements.

The Commission believes that close working relationships are required with other government agencies, state and federal, that often approximate the working relationship among members of CPSC's own staff. While it is the intent of the Commission to give public notice and open all such meetings to the public that it can, it is recognized it is not practical to open meetings when the other agency requests that they be closed to protect the confidentiality of its information, when cooperative efforts or emergencies require meetings that can not be anticipated, or when a CPSC or other agency position could be compromised. The regulation (16 CFR 1012.4(c)(2)(ii)(E) below) has been changed in order to clarify these matters.

f. Meetings between CPSC staff and outside parties. Proposed 16 CFR 1001.63(c)(4)(i)(g) provides for a meeting between agency staff (other than Commissioners and their personal staff) and an outside party to be a closed meeting if a majority vote of the Commission

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determines that extraordinary circumstances so require and the reasons therefore are detailed in the public calendar. An industry commenter objects to said having to be detailed in the public calendar and suggests instead that the reasons be given in the public calendar in appropriate general terms.

An individual commenter suggests that a test of "extraordinary circumstances" that delineates a clearly and narrowly drawn exception should be added.

The Commission does not agree with these suggestions. The Commission also finds no validity in one commenter's contention that it may be as damaging to a manufacturer as conducting an open meeting if the reasons for closing the meeting are detailed in the public calendar. For example, if the meeting is closed in order for a corporation to seek the views of CPSC staff with respect to the safety of a product, a short statement to this effect should not be damaging.

The regulation (16 CFR 1012.4(c)(2)(ii)(G) below) has, therefore not been changed.

g. Meetings between Commissioners and outside parties. Proposed 16 CFR 1001.63(c)(4)(i)(h), provides for a meeting between a Commissioner or his or her personal staff, and an outside party to be a closed meeting if the Commissioner finds that extraordinary

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circumstances so require and the reasons therefor are detailed in the public calendar. One industry comment suggests that rather than detailed, the reasons be given in appropriate general terms in the public calendar.

For the reasons set forth in paragraph (b) above, the Commission does not agree with the commenter's suggestion. The regulation (16 CFR 1012.4(c)(2)(ii)(H) below) has therefore not been changed.

6. Meeting Summaries. Regarding proposed 16 CFR 1001.64(a), which prescribes requirements for meeting summaries, one industry comment suggests that summaries of closed meetings be kept confidential. One industry and one staff comment suggest not requiring that summaries of authorized closed meetings be made available to the public.

The Commission intends that the regulation not require meeting summaries of closed meetings or portions of meetings that are closed to contain any proprietary data or information otherwise protected by law from disclosure to the public.

An industry commenter suggests that outside parties participating in open meetings be given an opportunity to review and comment on the meeting summary before it becomes part of the public record. He also suggested that meeting participants be permitted to submit their own meeting summary for the public record when they disagree with the Commission's meeting summary.

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The Commission believes the suggested provisions unnecessary since all members of the public have the opportunity to communicate in writing with the Commission on matters before it and such correspondence becomes a part of the Commission's public record. Accordingly, the regulation (16 CFR 1012.5(a) below) has not been changed.

7. News media. Proposed 16 CFR 1001.65 exempts the news media from the meetings policy requirements when meeting with Commission representatives to be informed of Commission activities. An industry comment complains that parties with a direct interest in a specific matter pending before the Commission should be informed by the Commission about a decision rather than by the news media.

The Commission agrees with this comment and will attempt to avoid any instance where a Commission decision on a matter does not reach a party with a direct interest before a news media release thereon.

Another industry comment suggests deleting from the regulation the exemption of the news media from the requirements of the meetings policy.

For reasons discussed under 1.b. (exempting the news media from the definition of outside party) the Commission does not agree. The regulation (16 CFR 1012.6 below) therefore has not been changed to delete the exemption as suggested.

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A third industry comment asks if the public will be excluded from planned interviews and briefings between the Commissioners, the staff, and the news media.

The Commission does not intend to exclude the public from planned briefings between the Commissioners and the news media; for reasons given in 1.b.

8. Telephone conversations. Regarding proposed 16 CFR 1001.66, which prescribes the meetings policy requirements on telephone conversations, an industry commenter suggests that the regulations should be revised to eliminate the requirement that summaries of telephone conversations be made available to the public in cases where closed meetings are authorized.

The Commission believes that its regulation 1012.7(c) eliminates the need for this consideration.

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Another industry commenter contends that a participating outside party should be permitted to review and comment on any summary of a telephone conversation before the summary is incorporated in the record.

The Commission finds such permission unnecessary because all members of the public have the opportunity to communicate in writing with the Commission on matters before it and such correspondence becomes a part of the Commission's public record.

An industry comment suggests that proposed 16 CFR 1001.66(b) be modified so that it will not discourage the use of CPSC as a source of information.

The Commission does not intend nor expect the regulation to interfere with the availability of CPSC staff to discuss informational matters over the telephone. The regulation (16 CFR 1012.7 below) is thought to permit this exchange and is not changed.

In addition to the changes specified above, various portions of the proposed regulation have been changed for clarification, correction of inadvertencies, and general improvement.

Having considered the proposal, the comments received, and other relevant material, the Commission concludes that the proposed regulations, changed as described above, shall be promulgated as set forth below.

Accordingly, pursuant to provisions of the Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act

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(15 U.S.C. 1261-74), the Flammable Fabrics Act (15 U.S.C. 1191-1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-76), and the Refrigerator Safety Act (15 U.S.C. 1211-14), Title 16, Chapter II, Subchapter A, is amended by deleting s. 1001.60 and by adding a new Part 1012 as follows:

PART 1012 -- MEETINGS, PRIOR PUBLIC NOTICE, AND RECORDS OF PROCEEDINGS
Sec.

1012.1 General policy consideration.

1012.2 Definitions.

1012.3 Forms of advance public notice and attendance at meetings.

1012.4 Types of meetings and requirements for meetings

1012.5 Recordkeeping categories.

1012.6 The news media.

1012.7 Telephone conversations.

1012.8 Chart summary of meetings policy.

AUTHORITY: Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act (15 U.S.C. 1261-74), the Flammable Fabrics Act (15 U.S.C. 1191-1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-76), and the Refrigerator Safety Act (15 U.S.C. 1211-14).

S 1012.1 General policy consideration.

(a) In order for the Consumer Product Safety Commission to carry out its mandate to protect the public from unreasonable risks

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of injury associated with consumer products, the Commission must involve the public to the fullest possible extent in its activities.

(b) To ensure the public confidence in the integrity of its decision making, the Commission must conduct its business in an open manner that is free from any actual or apparent impropriety.

(c) To achieve the goals set forth in paragraphs (a) and (b) of this section, the Commission believes that, wherever practicable, it should notify the public in advance of all meetings involving matters of substantial interest held or attended by its personnel and should permit the public to attend such meetings. Furthermore, to ensure the widest possible exposure of the details of these meetings, the Commission should keep records of them that are freely available for inspection by the public.

S 1012.2 Definitions.

As used in this Part 1012:

(a) "CPSC" means the entire organization that bears the title of the Consumer Product Safety Commission.

(b) "CPSC staff" means the employees of CPSC other than the five Commissioners.

(c) "Commission" means the five Commissioners of the Consumer Product Safety Commission acting in an official capacity.

(d) "Meeting" means any face-to-face encounter in which one or more employees, including the Commissioners of the agency assemble with one or more non employees for the purpose of discussing a specific subject, or subjects relating to the business of the Commission.

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(e) "Outside party" means any person not an employee of CPSC, under contract to do work for CPSC, or acting in an official capacity as a consultant to CPSC. Examples of persons falling within this definition of outside party are representatives from industry, consumer groups, and government. Persons are not considered to be outside parties when acting in a news-gathering capacity or exercising freedom of information privileges.

(f) "Substantial interest matter" means any matter of public interest that, due to the subject and/or the nature of discussion, pertains in whole or in part to any issue that is likely to influence the content of a regulation or a policy decision by the Commission. Substantial interest matters are not limited to pending matters; however, discussion related to pending matters (matters before the Commission in which the Commission is legally obligated to make a decision) automatically constitute substantial interest subjects. Examples of pending matters are: scheduled administrative hearings; matters published for public comment, petitions under consideration, and mandatory standard development activities. The following examples do not constitute substantial interest matters: data collection; discussions of the status of a pending matter; discussions relative to interpretations of existing laws, rules, and regulations; inspection of non-confidential CPSC documents by the public; negotiations for contractual services; and routine CPSC activities such as recruitment, training, meetings involving consumer deputies, or meetings with hospital staff and other personnel involved in the National Electronic Injury Surveillance System.

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S 1012.3 Forms of advance public notice and attendance at meetings.

Advance notice of CPSC activities is provided to the public so that it may know of and participate in these activities to the fullest extent practical. The following two types of notices are utilized by CPSC.

(a) Public Calendar. (1) The printed public calendar is the principle means by which CPSC notifies the public of its day-to-day activities. The public calendar provides advance notice of public hearings, Commission meetings, meetings with outside parties, selected staff meetings, Advisory Committee meetings, and other related events and items such as speeches and participation in panel discussions regardless of the location. The public calendar also lists recent CPSC FEDERAL REGISTER notices and advisory opinions issued by the Office of the General Counsel.

(2) Upon request, any person or organization will be sent the public calendar on a regular basis free-of-charge by writing to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. In addition, interested persons may contact the Office of the Secretary to obtain information from a master calendar kept current on a daily basis.

(3) The master calendar, supplemented by meeting summaries, is intended to serve the requirements of section 27(j)(8) of the Consumer Product Safety Act (15 U.S.C. 2076(j)(8)).

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(4) The Commissioners and CPSC staff, when required by this Part 1012 are responsible for reporting meeting arrangements to the Office of the Secretary so that they may be published in the calendar 7 days prior to the meeting. Such reports shall include the following information:

- (i) The date, time, and place of the meeting.
- (ii) Probable participants and their affiliations.
- (iii) Subject of the meeting (as fully and precisely designated as possible).
- (iv) Who requested the meeting.
- (v) Whether the meeting involves matters of substantial interest.
- (vi) Statement that the meeting is open or reason why the meeting or any portion thereof is closed (for example, discussion of trade secrets).
- (vi) The name and telephone number of the CPSC host or contact person.

(b) FEDERAL REGISTER. The FEDERAL REGISTER is the publication in which official CPSC notices, proposals, and promulgations are published. Because the public calendar is the primary device through which CPSC notifies the public of its routine daily activities, the FEDERAL REGISTER will be utilized to give notice of meetings only when required by law, or when the Office of the Secretary or Commission determines that additional coverage is in the public interest.

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S 1012.4 Types of meetings and requirements for meetings.

For the purpose of implementing CPSC's meetings policy, meetings involving CPSC staff or the Commissioners shall be classified in the following categories and shall be held according to the procedures outlined within each category:

→ (a) Hearings. Hearings are public forums held by direction of the Commission for the purpose of fact finding or to comply with statutory requirements. The Office of the Secretary is responsible for providing transcription services at the hearings. Notice of a forthcoming hearing will appear in the public calendar and when possible will be published in the FEDERAL REGISTER at least 30 days in advance of the hearing date.

(b) Meetings of the Commission. Meetings of the Commission are held for the purpose of conducting the formal business of CPSC, including the gathering of information and the rendering of official decisions by the Commission. Such meetings may be of the following types:

(1) Executive sessions. Executive sessions are sessions at which policy and regulatory decisions are made by the Commission. They are normally attended only by the Commissioners and are held by majority vote of the Commission and without advance notice. Formal minutes are the responsibility of the Commission and usually are made available to the public.

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(2) Closed sessions. Closed sessions are usually attended only by the Commissioners and CPSC staff. Closed sessions may be held at the direction of a majority vote of the Commission and without prior notice. The Office of the Secretary is responsible for the minutes.

→ (3) Open sessions. Open sessions are attended by the Commissioners, CPSC staff, and any other individual or group desiring to observe. Active participation of the public at these meetings is at the option of the Commission. Any individual desiring to attend an open session is encouraged to contact the Office of the Secretary at least one day before the meeting. Notice of an open session will usually be furnished through the public calendar at least 7 days before the session. The Office of the Secretary is responsible for the minutes.

→ (c) Meetings between Commissioners or CPSC staff and outside parties. The following requirements shall apply to meetings between Commissioners or CPSC staff and outside parties whether hosted or attended at CPSC premises, the premises of outside parties, or any other location.

(1) Notice. (i)(A) Notice of meetings with outside parties involving substantial interest matters shall be furnished through the printed public calendar at least 7 days in advance. Any CPSC employee planning to host or attend such a meeting must notify the Office of the Secretary immediately upon making arrangements for the meeting.

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(B) When there is no opportunity to give 7 days advance notice of a meeting, CPSC staff (other than the personal staff of Commissioners) who desire to hold or attend such meeting must obtain approval from the Office of the Chairman. Personal staff of Commissioners must obtain approval from their respective Commissioners. Because it could unduly compromise the independence of individual Commissioners, they need not obtain the permission of the Chairman to hold or attend an emergency unscheduled meeting. If approval is granted, the person holding or attending the meeting must notify the Office of the Secretary to record the meeting on the master calendar. The Office of the Secretary shall publish notice of the meeting as an addendum to the next public calendar.

(ii) Exceptions. The notice requirement is not applicable to:

(A) Meetings with outside parties not involving substantial interest matters (although such meetings should be listed where the public interest would be served).

(B) Initial notification meetings pursuant to section 15(b) of the Consumer Product Safety Act (15 U.S.C. 2064(b)); however, subsequent negotiations are not excepted from the notice requirement.

(C) Discussions held with a person or company in the normal course of field surveillance, inspection, or investigation, including informal citation hearings under the Federal Hazardous Substances Act or the Poison Prevention Packaging Act. However, advance notice is required for any negotiations leading to settlement of any case.

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(D) Discussions with, or at the request of, members of Congress relating to legislation or appropriation matters.

(E) Meetings with Department of Justice attorneys regarding litigation matters.

(F) Consultations with other Federal Agencies that are not required to be open to the public.

(G) Routine speeches given by CPSC personnel before outside parties. However, personnel are encouraged to submit these notices of upcoming speeches to the public calendar for informational purposes.

(2) Attendance by the public. (1) Any individual, group or organization may attend any meeting listed in the master calendar unless that meeting has been listed as a closed meeting. Generally, all meetings between CPSC employees and outside parties are open to the public for observation subject only to space limitations. Participation by the public may be permitted at the discretion of the person holding the meeting. When feasible an individual, group, organization, or individual desiring to attend should give at least one day advance notice to the employee holding or attending such meeting.

(1) The following meetings are not open to the public, but, advance notice must be given.

(A) Meetings or, if possible, portions of meetings where the Office of the General Counsel has determined that proprietary data are to be discussed in such a manner as to imperil their confidentiality.

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(B) Meetings held by outside parties at which limits on attendance are imposed by lack of space provided such meetings are open to the press or other news media.

(C) Initial notification meetings pursuant to section 15(b) of the Consumer Product Safety Act. All subsequent meetings shall be open.

(D) Meetings held during the normal course of field surveillance, inspection, or investigation of a person or company, including informal citation hearings under the Federal Hazardous Substances Act or the Poison Prevention Packaging Act of 1970. The public may, however, attend negotiations leading to settlement of individual cases.

(E) Meetings held with other Government officials when they request that the meeting be closed; when in the opinion of the CPSC employee holding the meeting, it will not subvert the purpose of this Part 1012 to close the meeting, or when in the opinion of the CPSC employee, extraordinary circumstances warrant closing the meeting. Examples of meetings that would not subvert the purpose of this Part 1012 are meetings with Federal, State, and local government officials for planning, information sharing, problem identification, or program evaluation and meetings with CPSC state designees or Federal Executive Board meetings. Enforcement discussions with the Department of Justice and discussion of legislative or appropriation matters, with or at the request of, members of Congress are included in the exceptions.

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(F) Meetings with contractors in connection with the negotiation and administration of competitive and noncompetitive contracts.

(C) Meetings between CPSC staff (other than the Commissioners and their personal staff) and an outside party when, by majority vote, the Commission determines that extraordinary circumstances require the meeting to be closed. In such a case, the reasons for closing the meeting or a portion of the meeting shall be detailed in the public calendar.

(H) Meetings between a Commissioner, his or her personal staff, and an outside party when in the opinion of the Commissioner extraordinary circumstances require that the meeting be closed. In such cases, the reasons for closing the meeting or portion of a meeting shall be detailed in the public calendar.

(d) Staff meetings. Staff meetings are usually attended only by employees of CPSC. At the discretion of the participants, such meetings may be listed in the printed public calendar and may be open to the public. Recordkeeping is at the discretion of the participants.

→ (e) Advisory committee meetings. Meetings of CPSC's advisory committees are scheduled by the Commission. Notice will be given both in the public calendar and the FEDERAL REGISTER. Advisory committee meetings serve as a forum for discussion of matters relevant to the agency's statutory responsibility with the objective of providing advice and recommendations to the Commission. The agency's advisory

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committees are the National Advisory Committee for the Flammable Fabrics Act, the Product Safety Advisory Council, and the Technical Advisory Committee on Poison Prevention Packaging. The Office of the Secretary is responsible for the recordkeeping for such meetings. All meetings of advisory committees are open except as specified by the Federal Advisory Committee Act (P.L. 92-463, 86 Stat. 770-76; 5 U.S.C. App. I).

S 1012.5 Recordkeeping categories.

Depending on the type and purpose of meetings, different types of recordkeeping are appropriate. The following is a list of the types of and requirements for the categories of recordkeeping utilized by the agency.

(a) Meeting summaries. (1) Meeting summaries are written records setting forth the issues discussed at all meetings with outside parties involving substantial interest matters. A meeting summary should detail the essence of all substantive matters relevant to CPSC, especially any matter discussed that was not listed in the public calendar, and should describe any decisions made or conclusions reached regarding substantial interest matters. A summary should also indicate the meeting date and the identity and affiliations of persons at the meeting.

(2) A meeting summary or notice of cancellation of the meeting must be submitted to the Office of the Secretary within 20 days after the meeting for which the summary is required. The Office of the Secretary shall maintain a public file of meeting summaries in chronological order for review and copying.

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(3) Meeting participants may submit their own versions of or additions to a meeting summary to the Office of the Secretary to include as part of the public record.

(b) Commission minutes. (1) Commission minutes document the decisions of the Commission. Minutes may be taken verbatim when necessary or desirable and may include attachments such as Commission opinions, briefing papers, or other documents presented at the meeting.

(2) Minutes recorded at executive sessions are subject to the final approval of the Commission. When filed with the Office of the Secretary, the Commission's final minutes and attachments constitute the official means of recording the decisions of the Commission and the votes of the individual Commissioners.

(c) Transcripts. A transcript is a verbatim record of a meeting. Transcripts may include exhibits submitted to be part of the formal record of a meeting. Transcripts are generally taken at public hearings and certain public meetings where complex subjects indicate verbatim records. Copies of transcripts are placed on file for public inspection in the Office of the Secretary.

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S 1012.6 The news media.

The Commission recognizes that the news media occupy a unique position relative to informing the public of its activities. While the inherently public nature of the news media allows that meetings with them be exempt from the requirements of Part 1012 when such meetings are held for the purpose of seeking information about CPSC activities, meetings are not exempt in the event that any representative of the news media attempts to influence any CPSC employee on a substantial interest matter.

S 1012.7 Telephone conversations.

The Commission recognizes that persons outside CPSC have legitimate rights to obtain information and to present their views on CPSC activities. The Commission also recognizes that these persons may be unable to travel to meet with CPSC employees and therefore must utilize the telephone for contact with CPSC staff. Since telephone conversations are not susceptible to advance public notice or to attendance or participation by the public, CPSC staff must ensure that telephone conversations are not used to circumvent the requirements of Part 1012. The following rules apply to telephone conversations.

(a) Any telephone conversation in which substantial interest matters are discussed with outside parties must be detailed in a meeting summary.

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(b) A summary detailing telephone conversations must be submitted to the Office of the Secretary within 5 days after the telephone call for which a summary is required. The Office of the Secretary shall maintain a public file of telephone call summaries in chronological order for reviewing.

(c) CPSC personnel must exercise sound judgment in discussing substantial interest matters during a telephone conversation. They should not hesitate to terminate a telephone conversation if the matters being discussed can be postponed and a meeting with appropriate advance public notice scheduled or until the matter is presented to the agency in writing if the outside party is financially or otherwise unable to meet with the agency employee.

S 1012.8 Chart summary of meetings policy.

The following is a chart summary of the meetings policy of this Part 1012:

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CHART SUMMARY OF MEETINGS POLICY

MEETING CATEGORY	NOTICE			ATTENDANCE		RECORDS		
	Federal Register	Public Calendar	No advance notice	OPEN	CLOSED	Minutes	Transcript	Meeting Summary
PUBLIC HEARINGS INVOLVING COMMISSION:	X	X	---	X	---	---	X	---
Executive Session	---	---	X	---	X	X	---	---
Closed Session	---	---	X	---	X	X	---	---
Open Session	---	X	---	X	---	X	---	---
Involving outside parties	---	X ¹	---	X ²	---	---	---	X ³
Advisory committees	X	X ⁴	---	X	X ⁴	---	X	X ⁴
Staff meetings	---	X	---	---	---	---	---	---

¹/ Notice in the public calendar is required for all meetings between Commissioners, CPSC staff, and outside parties, involving matters of substantial interest, except: See 16 CFR 1012.4(c)(1)(ii).

²/ Meetings between Commissioners or CPSC staff and outside parties are open to the public, except: See 16 CFR 1012.4(c)(2)(ii).

³/ Meeting summaries are required for meeting where matters of substantial interest are discussed.

⁴/ At the discretion of participants.

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Effective date. The regulation promulgated above, 16 CFR Part 1012, shall become effective _____. (insert date that is 30 days after publication hereof in the FEDERAL REGISTER)

(Consumer Product Safety Act (15 U.S.C. 2051-81), the Federal Hazardous Substances Act (15 U.S.C. 1261-74), the Flammable Fabrics Act (15 U.S.C. 1191-1204), the Poison Prevention Packaging Act of 1970 (15 U.S.C. 1471-76), and the Refrigerator Safety Act (15 U.S.C. 1211-14))

Dated: _____

SADYE E. DUNN, Secretary
Consumer Product Safety Commission

THE OPEN COMMUNICATIONS ACT OF 1975 (S. 1289)

WEDNESDAY, NOVEMBER 12, 1975

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE
PRACTICE AND PROCEDURE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m. in room 4221, Dirksen Senate Office Building, the Honorable Edward M. Kennedy (chairman of the subcommittee) presiding.

Present: Senator Kennedy (presiding).

Also present: Thomas Susman, chief counsel; James Campbell, assistant counsel, and Karen Buck, legal intern.

OPENING STATEMENT OF SENATOR KENNEDY

Senator KENNEDY. The Administrative Practice and Procedure Subcommittee is today concluding hearings on S. 1289, the Open Communications Act. This bill will continue the healthy trend of congressional efforts over the last decade to open the activities of the Federal Government to public scrutiny and understanding, while at the same time enhancing responsibility and accountability among Government officials.

President Lincoln once told his Cabinet, "When we try to hide Government business from the people, we are betraying them." This is as true today as it was over 100 years ago.

Government secrecy is as much an enemy of the people as Government corruption. For secrecy not only provides a breeding place for corruption, but it often lends to official action the appearance of impropriety even where none actually exists.

The Open Communications Act should not, however, be viewed simply as a reaction against the particular abuses involved in the Watergate and related scandals. Forty-nine of the fifty States have open meeting laws, most of which predate Watergate. Congress began the process of opening the activities of the agencies of Government in 1966, with enactment of the Freedom of Information Act. In 1972 we enacted the Federal Advisory Committee Act, requiring open meetings by the multitude of advisory committees existing in every nook and cranny of the Federal Establishment.

Watergate has left its legacy also. In 1974 Congress passed the campaign finance reform law, opening to the public and press records of

campaign contributions and expenses. Also in 1974 Congress strengthened the Freedom of Information Act and enacted the Privacy Act, both of which paved the way for greater public access to Government records.

Just last week the Senate endorsed a resolution to open committee meetings and conference sessions. And it overwhelmingly approved S. 5, requiring most meetings of collegial agencies to be opened to let the sunshine in.

Today, we turn our attention to casting some sunlight on the communications between Government officials and those outside Government who would influence their decisions. S. 1289 attempts to strike a balance between the public's interest in knowing what kind of influence policymakers are being subjected to, and the Government's interest in carrying out its business efficiently and effectively. The kinds of procedures required by S. 1289 cannot, of course, prevent all forms of improper influence. The scope of this bill is modest; it is only aimed at providing a summary record on nonsocial contacts between high agency officials and outsiders. Other bills before other Senate committees are directed toward different aspects of the same fundamental problem.

We do not expect to be able to legislate honesty or morality on the part of either lobbyists or Government officials. We realize that mere laws cannot accomplish that. We are hopeful, however, that these new procedures will help clear the air for the vast majority of honest agency officials and persons who deal with them, while significantly hindering those who may be less than honest.

In our first day of hearings on S. 1289 last April, some Government agencies expressed reservations about the bill based upon fears of excessive paperwork and interference with desirable communication between agency officials and outsiders. In light of many thoughtful objections, the subcommittee staff has substantially rewritten the bill, and the committee print will be the focus of today's testimony.

Of course, Federal agencies, like all organizations, tend to be non-enthusiastic about scrutiny from outsiders. The hearings on the Freedom of Information Act amply demonstrate this reluctance. Nevertheless, in last spring's hearings we found that several agencies have already put into effect regulations similar to those that would be required by S. 1289. These agencies, the FTC, FEA, FDA, and Consumer Product Safety Commission, reported very favorably on the actual operation of such procedures. As Chairman Simpson of the Consumer Product Safety Commission told us:

I believe what industry really wants from a Government agency is predictability, honesty, consistency, competency, and integrity. I do not believe industry wants a regulatory agency which is susceptible to either political or special interest pressures. If one honestly weighs the advantages and disadvantages of an open agency, I believe one will conclude, as we did, that openness is the only effective way to operate in today's world.

S. 1289 may add marginally to the workload of government officials, but these minimal burdens will be more than offset by the bill's ventilating effect.

Public confidence in Government is indispensable in a democratic society. Increasing public confidence in Federal agencies is what S. 1289 is all about.

[A copy of the staff working draft of S. 1289 follows:]

[COMMITTEE PRINT]

STAFF WORKING DRAFT

SEPTEMBER 19, 1975

94TH CONGRESS
1ST SESSION**S. 1289**

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 12), 1975

MR. KENNEDY (for himself, Mr. CLARK, Mr. PERCY, Mr. RIBICOFF, and Mr. STAFFORD) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*
 3 That this Act may be cited as the "Open Communications
 4 Act of 1975".

5 SEC. 2. Subchapter II of Title 5, United States Code, is
 6 amended by adding at the end thereof the following:

7 "§ 560. Maintenance of records of *ex parte* communications

8 "(a) For the purpose of this section, the term—

9 "(1) 'agency official' means all employees of the

1 executive branch who are compensated in grade 15 and
2 above under the General Schedule under section 5332 of
3 this title 5, or under the Executive Schedule under sub-
4 chapter II of chapter 53 of this title;

5 “(2) ‘person’ includes an individual, partnership,
6 corporation, association, firm, society, joint stock com-
7 pany, Member of Congress, officer or employee of the
8 executive branch, or any party to a proceeding;

9 “(3) ‘informant’ means any person who offers
10 incriminating information, under an assurance of con-
11 fidentiality, to the agency official for use in a civil or
12 criminal enforcement proceeding;

13 “(4) ‘pre-adjudicative stages of a proceeding’
14 means agency activities prior to the commencement of
15 an administrative or judicial enforcement proceeding
16 held to determine punishment for or to prevent the
17 violation of Federal law or agency regulation;

18 “(5) ‘record of communications maintained for
19 internal disclosure’ means a record of communications
20 received by the agency official which shall contain—

21 “(A) the name and position of the official who
22 received the communication;

23 “(B) the date upon which the communication
24 was received;

1 “(C) an identification, so far as possible, of
2 the person from whom the communication was
3 received and of the person on whose behalf such
4 person was acting in making the communication;

5 “(D) in the case of communications through
6 letters, documents, briefs, and other written mate-
7 rial, copies of such material in its original form;

8 “(6) ‘record of communications maintained for
9 summary disclosure’ means a record of communications
10 received by the agency official which shall contain—

11 “(A) the name and position of the official who
12 received the communication;

13 “(B) the date upon which the communication
14 was received;

15 “(C) an identification, so far as possible, of
16 the person from whom the communication was
17 received and of the person on whose behalf such
18 person was acting in making the communication;

19 “(D) a brief characterization of the subject
20 matter under discussion;

21 “(E) in the case of communications through
22 letters, documents, briefs, and other written mate-
23 rial, copies of such material in its original form. In
24 the case of materials which fall under section 552

1 ~~(b)~~, a summary of the communication or a copy
2 of such material with suitable deletions will suffice
3 in lieu of the original;

4 “(7) ‘record of communications maintained for full
5 disclosure’ means a record of communications received
6 by the agency official which shall contain—

7 “(A) the name and position of the official who
8 received the communication;

9 “(B) the date upon which the communication
10 was received;

11 “(C) an identification, so far as possible, of the
12 person from whom the communication was received
13 and of the person on whose behalf such person was
14 acting in making the communication;

15 “(D) a brief summary of the subject matter or
16 matters of the communication, including relevant
17 docket numbers if known;

18 “(E) in the case of communications through
19 letters, documents, briefs, and other written mate-
20 rial, copies of such material in its original form. In
21 the case of materials which fall under section 552
22 ~~(b)~~, a summary of the communication or a copy of
23 such material with suitable deletions will suffice in
24 lieu of the original;

25 “(F) a brief description, when applicable, of

1 any action taken by the official in response to the
2 communication.
3 communications maintained for summary disclosure for each
4 oral or written communication initiated by persons outside
5 the agency, pertaining to a substantive policy matter before
6 the agency, except any such communication from informants
7 or members of the working press. For the purpose of this
8 paragraph, a 'substantive policy matter' means any impor-
9 tant agency action or policy issue as prescribed in regula-
10 tions promulgated by the agency, except that no such regu-
11 lation shall apply to agency proceedings as defined in sec-
12 tion 551(12) of this chapter.

13 “(2) Each agency official shall prepare a record of com-
14 munications maintained for full disclosure for each oral or
15 written communication, initiated by persons outside the
16 agency, during the pre-adjudicative stages of a proceeding
17 or pertaining to a pending agency proceeding, except (i)-
18 any such communication from informants or members of the
19 working press and (ii) any such communication initiated by
20 the party to an enforcement proceeding during the pre-
21 adjudicative stage. With respect to communications initiated
22 by the party to an enforcement proceeding during the pre-
23 adjudicative stage the agency official shall prepare a rec-
24 ord of communications maintained for internal disclosure,

1 “(c) (1) Each agency shall assure that records of
2 communications maintained for summary disclosure and re-
3 ords of communications maintained for full disclosure shall
4 be prepared and furnished for inclusion in a public file within
5 five working days of the receipt of the communication. Pub-
6 lic files containing such records shall be located in the public
7 reading room of the agency. Such records for which no pub-
8 lic file already exists shall be placed in public files located
9 in the public reading room, appropriately indexed pursuant
10 to regulations promulgated by the agency. All public files
11 shall be maintained for a period of five years, and shall be
12 available for public inspection and copying.

13 “(2) Each agency shall assure that records of communi-
14 cations maintained for internal disclosure shall be prepared
15 and furnished for permanent inclusion in the case or other
16 appropriate file and that a copy of such record shall be
17 furnished for inclusion in a centrally located file in the agency
18 within five working days of the receipt of the communication.

19 “(d) Each agency official who is compensated under
20 the Executive Schedule under this title shall provide for
21 the maintenance of his prospective and retrospective calendars
22 for public inspection in the public reading room of the agency.
23 Such materials shall be submitted, and updated, the first
24 working day of each week.

25 “(e) Any agency official who knowingly and willfully

1 falsifies, forges, or fails to file any record required by this sec-
2 tion shall be fined not more than \$1,000 or imprisoned not
3 more than one year, or both.”.

4 (b) The analysis of chapter 5 of title 5, United States
5 Code is amended by adding after item “559” the following
6 new item:

“560. Maintenance of records of ex parte communications.”.

7 SEC. 3. One year after the effective date of this Act, the
8 Administrative Conference of the United States shall pre-
9 pare a study of the procedures established under this section
10 and offer suggestions to agencies and to Congress for their
11 modification or improvement.

12 SEC. 4. The amendments made by this Act shall take ef-
13 fect ninety days after the date of enactment.

14 “§ 560. Maintenance of records of communications

15 “(a) For the purpose of this section, the term—

16 “(1) ‘agency official’ means any appointed officer
17 or employee of the executive branch who is compensated
18 in excess of the rate prescribed for GS-14 under the
19 General Schedule under section 5332 of this title;

20 “(2) ‘person’ includes an individual, partnership,
21 corporation, association, firm, society, joint stock com-
22 pany, Member of Congress, officer or employee of the
23 executive branch, or any party to a proceeding.

24 “(b)(1) Each agency official shall prepare a record of

1 each oral or written communication received by such official,
2 except written communications routinely available for public
3 inspection, initiated by persons outside the agency pertaining
4 to (A) any matter that is the subject of agency proceedings
5 as defined in section 551(12) of this title, (B) other im-
6 portant agency actions, or (C) policy issues. Each such rec-
7 ord shall contain—

8 “(i) the name and position of the official who re-
9 ceived the communication;

10 “(ii) the date upon which the communication was
11 received;

12 “(iii) an identification, so far as possible, of the
13 person from whom the communication was received and
14 of the person on whose behalf such person was acting in
15 making the communication; and

16 “(iv) a brief summary of the subject matter or mat-
17 ters of the communication, including relevant docket
18 numbers if known.

19 “Whenever any written communication is provided in con-
20 junction with an oral communication, a brief description
21 of the document shall be noted.

22 “(2) Each agency may by regulation issued pursuant
23 to section 553 of this title (notwithstanding subsection (d)
24 of that section)—

25 “(A) apply the requirements of this subsection to

1 agency employees other than an agency official described
2 in subsection (a)(1) of this section whenever such em-
3 ployees participate in the formulation of policy or in
4 the making of decisions affecting the public;

5 “(B) provide clarification and guidance with re-
6 spect to the meaning of important agency actions or
7 policy issues subject to paragraph (1) of this sub-
8 section;

9 “(C) designate an agency employee to monitor
10 compliance with this section by agency employees;

11 “(D) apply the requirements of subsection (d) to
12 agency employees other than an agency official de-
13 scribed in section (d) whenever such employees par-
14 ticipate in the formulation of policy or in the making of
15 decisions affecting the public.

16 “(3) This section shall not apply to requests for infor-
17 mation by members of the press.

18 “(c)(1) Each agency shall assure that records of com-
19 munications required to be prepared under subsection (b)
20 of this section shall be prepared and, unless excluded under
21 clause (2) of this subsection, furnished for inclusion in a
22 public file within five working days of the receipt of the
23 communication. Public files containing such records shall
24 be located in the public reading room of the agency. Such
25 records for which no public file exists at the time the com-

1 *munication is received shall be placed in public files appro-*
2 *priately indexed, located in the public reading room. All*
3 *public files shall be maintained for public inspection and*
4 *copying. Any document referred to in such records shall*
5 *be available in accordance with the provisions of section*
6 *552 of this title.*

7 “(2) *Records of communications prepared under sub-*
8 *section (b) of this section shall not be subject to the require-*
9 *ments of paragraph (1) of this subsection if the communica-*
10 *tion is made by—*

11 “(A) *any person who provides incriminating*
12 *information under an assurance of confidentiality, or*
13 *under circumstances from which such an assurance*
14 *can reasonably be implied, to the agency officials for*
15 *use in a civil or criminal enforcement investigation*
16 *or in an administrative or judicial enforcement pro-*
17 *ceedings;*

18 “(B) *any person who is the subject of a civil or*
19 *criminal enforcement investigation, or the counsel for*
20 *such person;*

21 “(C) *an employee of another agency where the*
22 *record of the communication would not be available*
23 *to the public under section 552(b)(5) of this title.*

24 “(D) *any person who is requesting in writing ad-*
25 *vice from the agency relating to a confidential proposed*

1 *financial or commercial transaction where disclosure*
2 *of such request at the time made would result in im-*
3 *mediate and substantial competitive injury to that per-*
4 *son or lead to serious financial speculation in currencies,*
5 *securities, or commodities, if (i) that person has spe-*
6 *cifically requested that the communication not be pub-*
7 *licly disclosed, and (ii) the agency office receiving such*
8 *request is the office designated by the agency routinely to*
9 *receive such requests.*

10 *"Each agency shall assure that records of communications*
11 *subject to the provisions of this clause shall be furnished for*
12 *inclusion in a case or other appropriate file within the*
13 *agency.*

14 *"(d) Each agency official who is compensated under the*
15 *Executive Schedule under this title shall provide for the*
16 *maintenance of his prospective and retrospective calendars*
17 *for public inspection in the public reading room of the agency.*
18 *Such calendars shall contain—*

19 *"(1) the name and affiliation of participants or*
20 *probable participants;*

21 *"(2) date of the meeting;*

22 *"(3) location of the meeting;*

23 *"(4) who requested the meeting; and*

24 *"(5) the subject of the meeting, as fully and pre-*
25 *cisely designated as possible.*

1 *"Such materials shall be submitted, and updated, the first*
2 *working day of each week. Such calendars shall not include*
3 *any meeting involving communications which are not re-*
4 *quired to be recorded under subsection (b) of this section or*
5 *the records of which are not required to be publicly disclosed*
6 *under subsection (c) of this section.*

7 *"(e) Any agency official who knowingly and willfully*
8 *falsifies, forges, or fails to prepare or file any record re-*
9 *quired by this section shall be fined not more than \$1,000*
10 *or imprisoned not more than one year, or both."*

11 *(b) The analysis of chapter 5 of title 5, United States*
12 *Code is amended by adding after item "559" the following*
13 *new item:*

"560. Maintenance of records of communications."

14 *SEC. 3. The Administrative Conference of the United*
15 *States shall conduct a study of the procedures established*
16 *under this section and two years after the date of enactment*
17 *of this Act shall furnish each agency and the Congress the*
18 *findings of the study, together with such recommendations as*
19 *the Conference deems appropriate.*

20 *SEC. 4. The amendments made by this Act shall take*
21 *effect ninety days after the date of its enactment.*

I would like to welcome our first witness, Mary Lawton, who is the Deputy Assistant Attorney General for the Office of Legal Counsel, Department of Justice. She has been with the Department since 1960. Ms. Lawton testified before the subcommittee last spring on the Government Employee Disclosure Act. We are glad to have you back.

STATEMENT OF MARY C. LAWTON, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Ms. LAWTON. We sent the prepared statement up in advance. Do you want me to read it?

Senator KENNEDY. Why not just summarize it? We will include it in its entirety in the record, and I appreciate the fact that you sent it up ahead of time.

Ms. LAWTON. Well, basically the thrust of the testimony, Senator, is that we have no problem with the concept of recording ex parte contacts. Our problem is with the drafting of the committee bill, S. 1289. We see ambiguities and questions there. We think some of the exceptions from public availability of the records made are inadequate to protect some areas where legitimately people coming to the Government should be able to expect that their communications will be held in confidence. We have difficulty with the numbers of people that will be covered by the bill, the use of what I assume to be the bottom level of the GS-14 rate as the cutoff point for those involved.

Our biggest problem, I suspect, is the inclusion of a criminal penalty in a bill that is less than clear on the types of contacts that are required to be covered. We fear it will produce a panic reaction out of proportion to what is intended, but nevertheless a panic reaction that will have an adverse effect.

That is essentially it, Senator. Our problem is with drafting and not with the concept.

Senator KENNEDY. I appreciate the Department's willingness to share their comments with us. We have given a good deal of time to the drafting of this legislation, and I know you have also. We find ourselves in a dilemma. If this bill is too vague, we ought to expect suggestions from the Department of Justice as to how to be more specific. If we make accountable GS-15 level employees and above, and you think it is not an appropriate level to start, then you ought to make recommendations to us about what you do think is right.

If the sanctions are wrong, then you ought to make recommendations as to how they should be changed. But we are not going to let the Department of Justice come up here and testify that they approve of the idea, but do not like the legislation. You have to take a stand on it. We are going to press this legislation forward, and we are going to report that the agency is either for or against it. I mean to be quite clear on this.

If you want to take the position that this legislative effort cannot be changed, altered, or adjusted to meet those specific kinds of observations you made, then you are opposed to it. We cannot expect to have testimony both ways today. I do not believe that you can take a position favoring the bill's idea and concept, and then criticize it without offering constructive suggestions. That is obviously how the record is going to stand. However, I want to be very frank in terms of my

own reactions to it, and the position that I am going to take in light of the Department's position.

Ms. LAWTON. I can appreciate that, Senator, but we have attempted to draft for our own Department only.

Senator KENNEDY. Why do you think this bill is solely for your Department? You are for it for your own Department, and not for the other departments?

Ms. LAWTON. No, that is not it, Senator. What I am trying to point out is that we have been attempting for 2 or 3 years——

Senator KENNEDY. Two or 3 years?

WHY JUSTICE DEPARTMENT CANNOT COME UP WITH AN ACCEPTABLE FORMULA

Ms. LAWTON [continuing]. Yes, to refine the original outside contact order that Attorney General Richardson issued in a way that would avoid the problems that we have identified within the 26 components of the Justice Department and have been unable to come up with an adequate formula for ourselves. We do not know enough about other agencies to suggest text for a governmentwide bill. We have been unable to formulate one for ourselves.

Senator KENNEDY. Why can other agencies accomplish that, and you cannot? What is the difference between the Consumer Product Safety Commission's proceedings for recording contacts and those of the other agencies I have mentioned and the Department of Justice?

Ms. LAWTON. Well, Product Safety is a regulatory agency, not a traditional executive agency.

Senator KENNEDY. We are talking about contacts. How does it differ or vary? We are talking about logging.

Ms. LAWTON. Well, the type of contact that a complaining witness in the civil rights case would make is different from a regulatory contact, and that is different again from the type of contact that perhaps an employee of a corporation would make in an antitrust case when offering to be a witness for the Government, which is different still from the type of contact that a witness in a criminal case would make.

And then we have the functions of the pardon attorney which are totally different again from the other parts of the Department of Justice, and it is the diversity of our Department that I think makes it more difficult to draft than it does for a regulatory agency with a single mission because we have a highly diverse mission.

Senator KENNEDY. The Food and Drug Administration has enforcement requirements. They have a number of different functions which I am very much aware of, and they have both enforcement and regulatory. The FDA is able to establish logging procedures just as FEA is. The Federal Trade Commission also has multiple functions. I am not sure I would buy theirs, but at least they have instituted some logging requirements. I cannot understand why it has taken the Justice Department 3 years; I do not see where you have a creditable position. You say that you are interested in this, but for 3 years you have not been able to institute procedures for your own department. Yet you say it is a good idea in general terms and criticize this legislation without proposing specific recommendations.

We are trying to cope and deal with what has been a situation which was flagrantly obvious to the Justice Department during the past years in light of various improper contacts that were made. Why

we cannot get something better, quite frankly, I find enormously frustrating. I do not think it is easy, but I think that there has been adequate time since this bill was introduced last March for corrections and recommendations. In terms of the Justice Department, obviously I am sure that you are personally very much committed. I don't sense that this legislation has a very high priority down there. You believe in it, but I cannot believe that the Department is giving it much attention down there.

Ms. LAWTON. Well, we do have the Richardson order still in effect, but we have discovered problems. We have had questions from employees who do not understand the terms of that order as applied to the specific sorts of contacts that they receive, and what we have been trying to do is clarify that order. That order still stands.

Senator KENNEDY. Is it being complied with now?

Ms. LAWTON. I think probably unevenly because it is not understood. It is not clear to every employee what is considered a "pending case or matter"—and that is the language we use in the outside contact order—the "pending matter," language is particularly unclear. "Pending case" of course is relatively easy to determine. "Pending matter" is not easy to determine. The logging of continuing contact with counterparts in other agencies as distinguished from a single record of a long-term association on a single subject is a matter of some confusion, and these are the sorts of things that we try to sort out. But thus far have been unable to come up with an adequate verbal formulation of what is required that will be clear to every covered employee of the Department performing these diverse duties.

Senator KENNEDY. Therefore, so your answer is that some employees are and some are not, and there has been no clarification as to the meaning of the order.

Ms. LAWTON. Essentially.

Senator KENNEDY. Are you complying with it yourself?

Ms. LAWTON. Unevenly.

Senator KENNEDY. What do you mean "unevenly"?

Ms. LAWTON. Well, I am not certain, for example, whether continuing calls asking for my interpretation of a statute would be "pending matter" within the meaning of the order, and the volume of them is such that I have not complied. In my own mind, I have satisfied myself that the order does not apply to these, so I do not list them. Other contacts, actual attempts to influence a decision pending or testimony, yes, those I know are covered by the order, and those are listed. But I have to work off my own interpretation of the order because we do not have a uniform interpretation of it.

Senator KENNEDY. Do you comply with it in terms of cases?

Ms. LAWTON. We do not handle cases in my office, Senator, so I do not have a problem.

WHY JUSTICE DEPARTMENT HAS NO GUIDELINES

Senator KENNEDY. Well, we have looked at it. The FEA, for example, has only been in operation for less than 2 years, and they have been able to devise some guidelines. Other agencies have been able to do so also. Some are a good deal better than others, but the Justice Department's efforts seem to have been minimal, yet it complains about our efforts to try and deal with this problem. I find the Department's position rather unconvincing.

I cannot believe that this is not a very high priority at the Department. That is just my observation, and I may be very wrong about it. As I mentioned, I do not question your own commitment to it but I do think that the Department has failed to meet these kinds of standards over a 3-year period. But then they complain about the effort that Congress is making to provide for the total range of different agency activities and while we have seen other independent agencies take positive steps in this direction. I think the Justice Department is falling way behind on this; that is my observation about it. Are you familiar with the Special Prosecutor's recommendations on this matter?

Ms. LAWTON. Yes, I am, Senator.

Senator KENNEDY. And they were to reissue that Richardson order for clarification; is that correct?

Ms. LAWTON. Reissue and clarify.

Senator KENNEDY. And has anything been done on that?

Ms. LAWTON. Well, there has been no reissuance yet.

Senator KENNEDY. Do you know why not?

Ms. LAWTON. Drafting difficulty.

Senator KENNEDY. I want you to understand that I am going to continue to press for this legislation. We would welcome any drafting suggestions you have to try to clarify the Department's objections. We would welcome the support of the Department. I think your recommendations and support would be very helpful, and I believe it would set a good example for other agencies. We are going to ask you again to give us help and assistance in trying to meet the objections you have mentioned, and I am hopeful that we can achieve that. But we are equally interested in reaching our stated goal, which you have indicated support for, and I am hopeful that we can call on you to see if we can remedy these apparent imperfections that you have observed. Thank you very much.

[The prepared statement of Mary Lawton follows:]

PREPARED STATEMENT OF MARY LAWTON

I appreciate the opportunity to present the views of the Department of Justice on S. 1289. The bill is designed to provide for the recording of ex parte contacts with Federal officials, and the revelation of those contacts in a public record. We support this objective and have, as you know, attempted to achieve it by the issuance of an internal order directed at the same end. We have not been entirely successful because of the difficulties in defining precisely the types of outside contacts to be reported. S. 1289 is even less precise and applies to all executive branch agencies. We oppose its enactment.

The reasons for our opposition may be briefly summarized. The coverage of the bill is unnecessarily broad, resulting more in the harassment of vast numbers of Federal officers and employees than in the discouragement of secret attempts to influence the decisionmaking process. The provisions describing what must be recorded are so vague as to raise questions whether a criminal statute of this nature would be constitutional. The bill may well have the effect of discouraging contacts that are absolutely necessary for the conduct of the Government's business. And finally, the burdens imposed are out of all proportion, in terms of cost, time and burden, to the objection intended. An analysis of the terms of the bill will illustrate these objections.

S. 1289 would add a new section 530 to title 5 of the United States Code, the chapter governing administrative procedure. That new section would do two basic things. First, it would in subsection (b) require medium- and upper-grade executive employees to record and, with a few very narrowly defined exceptions, disclose in a public file all contacts or communications initiated by persons

outside their agency. This would be required whenever the subject matter discussed concerned either a pending agency proceeding, "other important agency action," or something called "policy issues."

Secondly, the bill's subsection (d) would also require that each person who is compensated under the executive schedule maintain his or her past and future appointment calendars in another public file, open for inspection in a public reading room of the agency. It also provides that anyone who knowingly and willfully fails to do so, or files a false record, is subject to criminal punishment.

The heart of S. 1289 lies in sections (b) and (c) of proposed 5 U.S.C. 560. Those sections apply to every "agency official," defined in section (a) (1) as "any appointed officer or employee of the executive branch who is compensated in excess of the rate prescribed for GS-14 . . ."

Section (b) (1) would require each such official to prepare written record of each oral or written communication received if initiated by persons outside the agency, whenever the communication pertained to (A) any matter that is the subject of agency proceedings, (B) other important agency actions, or (C) policy issues. Each such record of outside contacts must then include the name and position of the recipient, the date of receipt, an identification of the person initiating the contact and of the intended beneficiary of the discussion, and a summary of the subject matter of the communication. Section (c) (1) requires that these records be placed in a file open for public inspection in the agency reading room unless the subject matter of the communication falls within one of the narrow exceptions of section (c) (2).

The bill does not define "agency," presumably relying on the general APA definition. But that definition is susceptible of varying meanings—sometimes including whole agencies and other times applying to particular components of agencies. Theoretically, then, an "outside contact," within the meaning of S. 1289, could occur within a department or agency.

The bill defines "agency officials" in terms of compensation received rather than in terms of responsibility or of exposure to the possibility of outside pressure or lobbying. As a result, it would appear to include nearly 150,000 persons in its reporting requirements. The Civil Service Commission advises that, as of March 30 of this year, there were in excess of 77,000 persons in the Civil Service alone in grade GS-14 or above. And this figure does not include the large number of GS-12's and 13's whose upper-grade salaries or additional compensation raise their annual receipts to the range covered by the bill. Nor does it include the even larger numbers of doctors, technicians, Wage Board employees, and officers of the armed services who make salaries equivalent to GS-14 compensation and who would also be covered. As it now stands, this bill would cover doctors in Public Health Service hospitals and every military officer in the rank of lieutenant colonel or commander and above. We question both the necessity and desirability of applying the bill so broadly.

Using a salary figure to determine who is covered by the bill at least offers some precision even if it sweeps too broadly. And determining what is "inside" and "outside" the agency may also be capable of resolution. We have grave difficulty, however, understanding exactly what types of communications are covered. Of the three categories of subject matter covered by the bill, "agency proceedings" is, perhaps, the easiest to understand. The cross-reference to the definitions in 5 U.S.C. 551(12) clearly encompasses rulemaking, adjudications and licensing. Although these terms, themselves, raise questions of interpretation in some instances, there is at least a body of law suggesting the types of proceedings covered.

I frankly have no idea what the phrases "other important agency actions" and "policy issues" are designed to encompass. If the President were to urge the Attorney General to report back to him on possible new initiatives the Department of Justice might take to combat organized crime would this be an outside contact concerning important agency actions or policy issues? If Civil Service Commission should inquire whether we plan to testify on a particular bill or submit a written report on it, is this covered? Would procurement decisions be included as "agency actions?" Questions like this, Mr. Chairman, cannot be left open in a criminal statute. A Federal employee, no less than the average citizen, is entitled to know what is required of him if the penalty for failing to meet those requirements is a year in jail.

Whatever "outside" contacts are required to be recorded must be set forth in some detail within 5 days and made available on the public record. There are only four exceptions to the publicity requirements.

Section (c) (2) exempts from public disclosure only records of communications in which:

(A) incriminating information was supplied under a promise or expectation of confidentiality,

(B) a subject of enforcement investigation or his counsel is involved,

(C) the matter would be an exempt interagency communication under section 552(b) (5), or

(D) the matter involved a confidential request for financial or commercial advice.

These exceptions would exclude many normal and valuable reports which the Department of Justice and other agencies receive from persons who supply information under conditions which do not amount to incrimination. The investigation of a major antitrust case or a serious criminal complaint is a lengthy and involved process, requiring many diverse pieces of information before an incriminating pattern may emerge. This Department has enjoyed considerable confidence and cooperation from many persons outside it, information and contacts which contribute significantly to its operation yet which, of themselves, incriminate no one. This information may no longer be forthcoming if the potential witnesses, the complainants, the sources of information realize that their efforts to assist the Government will become part of the public record within 5 days of their conversation.

The impact of the disclosure requirements is not limited to law enforcement. Presumably, contacts between foreign officials and this Government on a wide range of subjects would have to be recorded on the public record in every instance. I question the value of such communication arrangements as the "hot line" if all messages originating with the foreign government must be publicized in 5 days. One wonders if the Cuban Missile crises could have been resolved under these circumstances.

The provisions in subsection (d) relating to the maintenance of desk calendars of public officials in public reading rooms seem both unnecessary and unduly burdensome. If these officials are obliged to record and publicize all outside contacts in any case, what purpose is to be served in posting their calendars for public scrutiny as well?

The usual calendar I would assume, would encompass not only internal meetings, such as staff meetings, and appointments with officials from other agencies and private citizens, but also such personal matters as dental appointments, dinner engagements and birthday and anniversary reminders. I question the public need to know the first three categories and its right to know the last.

I would also point out that the constant rescheduling of meetings and appointments of a busy executive and the frequent calling of unscheduled meetings would result in an hourly updating of any "public calendar," if it is to be sufficiently current to provide any real information. The weekly up-dating called for in the bill, while less burdensome, is also unlikely to provide an accurate picture of the meeting schedule of an executive until after the fact.

The effect of S. 1289 as written would, I think, be far different than its intent. The first effect would be on the executive branch employees themselves and can readily be predicted from the early experience with the Privacy Act. That Act, like this bill, carries a criminal penalty for failure to comply with some of its provisions. Fear of the penalty has resulted in refusals to make perfectly legitimate disclosures to the press and public and has led to somewhat panicky confusion among Federal employees. The requirements of S. 1289 can be expected to do the same, particularly given the uncertainty as to which contacts must be recorded.

The cautious, meticulous bureaucrat will, of course, log every single contact in an abundance of caution and, if he averages twenty to thirty calls a day, as I do, will have time for little else. The harried bureaucrat who is already overloaded with recordkeeping will probably stop answering the phone, thereby losing important contact with his colleagues in government and the public at large. The busy and innovative employee who has little patience with recordkeeping may simply look for some form of employment outside Government where performance not recordkeeping, is the key to survival. I suggest the public, particularly the taxpayer, would be the loser.

Lobbying of the executive branch, like lobbying of the legislative, should be subject to public scrutiny. But as we learned from the Lobbying Act, a vaguely worded bill will either be so narrowly construed by the courts to save its constitutionality that its effectiveness is diminished, or will be so confusing to the

regulated as to make even good faith compliance extremely difficult. Given the variety among government agencies and the differences in roles they perform, it would seem wiser, as a first step, to mandate the adoption by each agency of regulations dealing with ex parte contacts, tailored to the work of that agency. Congress, or somebody designated by it, could then undertake to study the development of more general rules that would serve the executive branch as a whole. This approach, we believe, would at least minimize the problems of scope and definition posed by S. 1289.

Senator KENNEDY [continuing]. Our next witness is Bruce Brennan who is vice president of the Pharmaceutical Manufacturers Association.

Mr. Brennan.

**STATEMENT OF BRUCE BRENNAN, VICE PRESIDENT,
PHARMACEUTICAL MANUFACTURERS ASSOCIATION**

Mr. BRENNAN. You invited our president, Mr. Stetler, here this morning, but he already had a previous commitment which he just could not break, and he extends his good wishes and asks me to pinch-hit for him. I have submitted a statement, Senator, and I know your time is short. I would like to summarize that and have the entire statement put in the record if I may.

Our association supports the objectives of S. 1289 as rewritten by your staff. As you noted in your letter inviting our testimony, the pharmaceutical industry has had substantial experience in dealing with the Food and Drug Administration whose procedures are similar to those contained in S. 1289 as it has been rewritten.

I would say that although FDA's procedures are workable we have had and continue to have a genuine concern that safeguards against needless disclosure of information of a competitive nature are inadequate, and that is one of the principal suggestions which we make with respect to the bill as it is now written.

We think some additional safeguards ought to be included. The importance of avoiding overly demanding reporting requirements is illustrated by the fact that communications between the FDA and the drug industry comprise hundreds of thousands of contacts annually. I know that in Commissioner Schmidt's testimony before you in April, he testified that, "Most everyone in the Agency believes that most everything we do is important and therefore must be recorded."

His general counsel, Mr. Hutt, noted that the FDA makes over 33,000 inspections every year. We are concerned that an overzealous interpretation of the law might assume that the substance of all of these conversations and contacts that related to such inspections should be the subject of a report, as might be hundreds of thousands of telephone conversations which are regularly conducted with the regulated industry. I think that those concerns of ours can be taken care of by amendatory language, and we certainly would like to work with you on that.

Let me turn, just for a moment, to discuss with you, Senator, the particular provisions of the bill which we think offer—still offer some concern. S. 1289 would require only that employees of the Government whose compensation exceeds GS-14 would be required to make reports, unless the Agency decides otherwise. As Commissioner Schmidt testified, such a limitation is not included in the FDA procedures because the decisions are made by employees below that level. We suggest that the test ought to be changed so that it is the com-

munication or the nature of the communication which would be the basic requirement and not at the executive level which the employee is located. To that extent, I think our testimony will differ from most of the other witnesses here. We have had no problem living with a set of circumstances where any employee at FDA we deal with records a conversation or a letter communication so long as—and I think the employees at FDA would have no problem—if the guideline or the criteria were the importance of the communication.

Senator KENNEDY. Excuse me. I missed the second part.

Mr. BRENNAN. I say from the industry's point of view, we have no problem with there being records, and those records being available to the public of contacts that we make with them, as long as the safeguards such as those set forth in the Freedom of Information Act are there. I think from the Government's point of view, at least this Agency which we deal with regularly has no difficulty having all of their employees record such contacts, as long as the criteria is set as clearly as possible, set at some level of importance to screen out all of those hundreds of thousands of calls which are of a relatively minor nature, but which are constantly recurring.

Senator KENNEDY. I think that is a very encouraging attitude and a very responsive one. The industry deserves a great deal of credit for their willingness to face this particular issue.

I agree that the question of where you draw the line, what the cut off level is going to be, presents a drafting problem. We are open, to whatever suggestions you might have on that; we are obviously committed to the safeguards which have been outlined in the Freedom of Information Act. I think that we can emphasize very clearly that this bill should not allow transgression in those particular areas. We are not interested in having the substance of matters recorded if it would expose trade secrets. I think the attitude of the industry is very encouraging, and that is good.

WHERE CLARIFICATION OR AMENDATORY LANGUAGE IS NEEDED

Mr. BRENNAN. My statement indicates those precise areas where we think there should be some clarification or amendatory language; and we will, with your permission, submit such language to your staff for the consideration of the subcommittee. I would like to note one final suggestion that we have, and that is concerning the timeliness of the agencies recording and preparation for the public record of these contact reports.

Section 560(c) of the bill notes that the records of communications be made available for the public record within 5 days. We suspect that that requirement will be very difficult to meet for many agencies. It certainly has proven to be the case at FDA, and we would suggest that this provision be liberalized to some extent, and perhaps relying on the existing requirements in the Freedom of Information Act. That would conclude, Senator, our suggestions for modifications of the bill as it stands.

Senator KENNEDY. Tell us where we ought to draw the line in the logging of these various kinds of contacts. You mentioned this in your testimony. These are obviously difficult decisions to make. For example, if you attend a football game or similar social event, you may or may not discuss business matters. Should you log that? If you go out to

dinner, or go away on a trip, you may get into the substance of some matters which are of importance. Should you log that communication?

We live in a city where I suspect a good deal of business is actually conducted outside of both business and official hours. What criteria would you suggest be established, as to when logging ought to occur?

Mr. BRENNAN. I think, Senator, that the criteria ought not relate to the mechanism or the medium through which the communication is passed. I think it would be extremely difficult to use that type of criteria, whether it be a social contact, or a more formal contact from a business office. But I think that the degree of importance of communication can be set down with a certain degree or precision.

I guess, looking back at S. 1289, in its original state as you first introduced it, it would seem to us that there was possibly a greater degree of precision at that time. I think that it is very difficult to describe with the degree of precision that I am sure you would like today, but I think it can be done. I think the last witness indicated that there is such diversity between agencies of the Government, that you certainly would need a number of suggestions on this, in this area.

We could give you our suggestions with respect to the regulatory type of agency. But I think you would have to look beyond that to come up with a sufficient definition.

Senator KENNEDY. Let me ask you something a bit outside of this, which I think is of related importance. Do you think that the amount of money that is actually spent by industries or associations in making these kinds of contacts—both social and business contacts—should be reported, listed, or filed?

Provisions concerning contacts outside business hours have obviously not been incorporated in this bill, but it is not unrelated to the objective of S. 1289. Do you have any thoughts or opinions on this?

Mr. BRENNAN. I think that if there is a reason for concern, that the amount of funds that are being—the amount of money that is being spent by industry or labor or any other organized group or individual is impacting Government in a manner adverse to the public interest, then there ought to be serious consideration given to that. I think there again, you must and you can describe some kind of definition of importance.

The FDA is in Rockville and I think it would be unnecessary for me to log all my cab fares between Washington and Rockville, where I go to try to influence the FDA in taking a certain course of action.

There again, I think a definition could be made if it seems that money is being spent in a manner which may not be appropriate.

Senator KENNEDY. Do you have any further ideas for determining a cutoff level?

Mr. BRENNAN. Senator, I am sorry, but we have only recently become aware of this legislation, and I have really not had a chance to study it sufficiently.

Senator KENNEDY. Well, if you do, we want you to take additional time if you want to suggest precise recommendations. We would welcome your recommendations as we are interested in working with the companies.

Mr. BRENNAN. You can be sure we will follow up with some specifics.

Senator KENNEDY. There is probably no industry that has a more important relationship with any agency as the pharmaceutical industry does with the FDA. Why don't you feel this logging provision would have a chilling effect on the contacts that are made by the industry.

PHARMACEUTICAL CONTACTS WITH FDA

Mr. BRENNAN. You just indicated one reason why it might not chill our relationship: it is, because like it or not, we have to communicate with the FDA or our products do not get approved, so that the circumstances are such that we have a need to communicate. But for the general communications, where there is not a demand from the agency that we communicate. A couple of years ago we might have answered as other industries, I think, would say today, that there would be a chilling effect.

I am only reporting that having gone through the first stages of what we thought were going to be winter, we find that it is more like spring. So there has not been that chilling effect. And I think that prior to our experiencing this regulatory attitude by FDA, we did have the same attitude. But we have found that we are able to communicate and we would hope that the burden on the agency officials is not so great that it is going to really interfere seriously with their efforts. To the extent that it might, we would want them to control it.

Senator KENNEDY. The formal regulations have been in effect for about 1 year, isn't that right?

Mr. BRENNAN. No, the FDA procedural regulations, which precisely spell out their approach, have actually been in effect only a few months. But they have followed the procedure. They have adopted the policy over a period of, I guess, a couple of years now.

DO FDA'S PROCEDURES CONFORM WITH PROVISIONS OF THIS BILL?

Senator KENNEDY. Do the FDA's procedure basically conform to the provision we are talking about here?

Mr. BRENNAN. I think that their procedures follow closely the program outlined in your bill, with the exception that they do try to control to a greater degree, within the confines of their agency, the importance of the matter which is required to be recorded.

Senator KENNEDY. Have you been able to operate well under those provisions?

Mr. BRENNAN. Well, I guess it is not so much the burden on us, as the burden on them. They are the people that have the difficulty living with it. From our point of view, it has not exerted a chilling effect. The only serious problem which we have had is—and it is a concern now more than a problem—is that information might be divulged which should be protected under the Freedom of Information Act. But that is something that can be worked out.

Senator KENNEDY. Do you think it has helped you at all?

Mr. BRENNAN. I note in my statement, Senator, that I think it has a possibility of help. I think that this is true generally for industry; the record of these communications would indicate to the public at large and to those portions of the public which are critical of industry-Government relations, that there is a very healthy communication between industry and government, from both sides. To the extent that that is made known to the public, it will help us.

Senator KENNEDY. That is a very important point. It seems to me that this system is extremely helpful to the industry when there are allegations of improper influence. In such cases the industry is able to say, "Look, we have supported the logging concept right from the beginning. We understand that the nature of our contacts should be open and we are prepared to live accordingly."

I think that this is a positive attitude which gives credibility to the industry and to the Food and Drug Administration as well. We want to express our appreciation for your position and we would welcome any specific comments which you may wish to make in any of these areas. We value your comments highly since you obviously have to try and live with a difficult situation.

Thank you very much. Give my best to Mr. Stetler.

[The prepared statement of Bruce Brennan follows:]

PREPARED STATEMENT OF BRUCE J. BRENNAN

I am Bruce J. Brennan, Vice President and General Counsel of the Pharmaceutical Manufacturers Association.

I am here to present PMA's views on the September 19 staff working draft of S. 1289, as requested in your letter of November 4. We welcome and appreciate the opportunity to work with you and your staff to enact responsible legislation requiring public disclosure of important communications between Government agencies and persons outside the agency.

Our Association supports the objectives of S. 1289. As you noted in your letter inviting our testimony, the pharmaceutical industry has substantial experience in dealing with the Food and Drug Administration, where procedures similar to those contained in S. 1289 are in effect.

I would say that although FDA's procedures are workable, we have had, and continue to have, genuine concerns that safeguards against needless disclosure of information of a competitive nature are inadequate. And we believe that the procedures represent a very material cost to the agency, and therefore to us all. I believe that it would be most difficult to demonstrate that the disclosure practices now followed by the FDA have benefitted the public to a degree which completely offsets their time and costs to the agency. It must be kept in mind that it takes a significant amount of time for an executive to keep records of all contacts, to synopsize their content, and to compile and publish them. The people involved are busy enough as it is, and we should avoid imposing massive additional burdens.

The importance of avoiding overly demanding reporting requirements is illustrated by the fact that communications between the FDA and the drug industry comprise literally hundreds of thousands of contacts annually. I note that in Commissioner Schmidt's testimony before you on April 14, he reported that "most everyone in the agency believes that most everything we do is important and therefore must be recorded." Mr. Hutt, the FDA General Counsel, added that the agency conducts over 33,000 inspections of industry establishments annually. An overzealous interpretation of the law might assume that the substance of every conversation or document related to every contact and inspection should be the subject of a report, as might the hundreds of thousands of telephone conversations with regulated industry. It seems clear that were so extreme a practice encouraged by a new law, Government employees would have little time for the performance of their basic responsibilities.

We realize that it is impossible to define in legislation what is important in the business of public agencies. But we believe that it would be constructive to establish clearly that it is the intent of the Congress that recordkeeping be confined to those matters which bear significantly on matters important to the public interest, and which are not protected by the confidentiality provisions of existing law.

It is the regulated industries, rather than the press or the general public, which make the great majority of requests for information and other contacts with the FDA. This is not to say, let me stress, that the FDA policies should be abandoned, or that they should not be adopted by other agencies of Government. On the contrary, the openness suggested by such practices can probably serve to improve public confidence in the Government, and may help to demonstrate that government agencies and the industries they regulate share a level of integrity worthy of the public trust.

I should note, in passing, that the FDA procedures have been instituted within existing law and regulation. It is not clear to us that a new law is needed, at least insofar as FDA is concerned. But, of course, a relatively uniform approach throughout the Federal establishment may indeed require such legislation.

I would like to turn now to a discussion of the pertinent provisions of the bill, as we view them.

We note that S. 1289 would require only that employees of the government whose compensation exceeds that of GS-14 would be required to make records, unless the agency decides otherwise. As Commissioner Schmidt testified, such a limitation is not included in the FDA procedures, because decisions important to the public interest are regularly made at lower levels. We suggest that the test as to which communications should be placed on public record should relate to the importance of the matters, discussed, regardless of the executive level of the discussants.

Incidentally, there appears to be an inconsistency in one of the bills' definitions of the individuals affected by it. The term "person" is defined in section 560(a)(2). That definition is to apply to this term throughout the new section 560. This new section is to be included within subchapter II of title 5 of the United States Code. There is a different definition of the term "person" set forth in subchapter II, title 5, which is stated to be applicable to all portions of that subchapter. While we have no quarrel with the definition of the term "person" set forth in S. 1289, we wish to bring to your attention the possibility of inconsistency or differences of interpretation if the bill is enacted in its present form.

Perhaps our major concern regarding S. 1289 concerns sections 560(c). It provides that records required under subsection (b) must, in fact, be prepared and furnished for inclusion in an agency public file, and that any document referred to in such records is available in accordance with the public information section of the title 5 of the United States Code.

Section 552(b) of the existing law is the Freedom of Information Act, which includes nine exemptions to public disclosure, if the particular agency wishes to invoke nondisclosure. It is unclear from the wording of section 560(c)(1) of S. 1289 whether documents referred to in a record prepared by the agency official are, in fact, exempt from disclosure in accordance with the Freedom of Information Act provisions. We urge that the bill be amended to expressly provide that any documents in the possession of the agency, which are exempt from disclosure under the Freedom of Information Act, need not be made publicly available under proposed section 560(c)(1).

Moreover, while the bill specifies a number of limited situations under which records need not be made public, it does not exempt from public availability any records prepared by the agency in response to inquiries regarding, for example, the status of investigational new drug exemptions or new drug applications; communications about the legal or marketing status of products; or communications involving other confidential matters or trade secrets exempted from disclosure under the Freedom of Information Act. Such communications are a regular and necessary part of the daily business between the FDA and our industry. We believe that it is absolutely essential that there be amendments to the bill to bring it into conformity with the protections offered under the Freedom of Information Act. We would be pleased to offer suitable amendatory language for that purpose.

The timeliness with which Government agencies respond to the public interest is a problem for all of us, and we can, therefore, well appreciate the subcommittee's reasons for requiring, in section 560(c) of the bill, that certain records of communications be furnished for inclusion in a public file within five working days of the communication. We suspect that that requirement will be very difficult to meet for many agencies. That has certainly proven to be the case at FDA. We would, therefore, suggest that this provision be liberalized moderately, perhaps relying on the existing requirements in the Freedom of Information Act as to the timeliness of disclosure.

This concludes our prepared statement, Mr. Chairman. I will be pleased to respond to your comments and questions.

Senator Kennedy [continuing]. Mr. Godown is our next witness. He is senior vice president and general counsel, National Association of Manufacturers. Mr. Godown has been with the association since 1965.

STATEMENT OF RICHARD GODOWN, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL ASSOCIATION OF MANUFACTURERS

Mr. GODOWN. Senator, good morning. I wonder if I might set the tone for my testimony, a copy of which has been sent up in advance,

by saying this. We have been in touch both in person and on the phone a number of times, with your staff, discussing this matter.

Senator KENNEDY. I thought we were going to get your support there for a while.

Mr. Godown. My attitude is this: we have no difficulty with the concept if anybody is doing anything he should not, if he is communicating in a fashion that he should not be, then there is all the more reason to make it public.

Senator KENNEDY. Well, you are not going to get those comments made public when someone is doing things he is not supposed to do, are you?

Mr. Godown. We have been asked to have a critical look at S. 1289, put it under a microscope, as it were, and we have done so. And I am here this morning to reflect our comments. I would like to summarize my written statement. You know who I am and that I represent the National Association of Manufacturers. It is NAM's view that while this bill, S. 1289, may be grounded upon a valid and reasonable purpose, it is heavily weighted with practical difficulties, the ramifications of which must be considered.

It could present an undermining force to both the Privacy Act and the Freedom of Information Act and most importantly, S. 1289 could create a chilling effect, inhibiting important communications between the public and the executive branch.

The necessity for operating our Government in the sunshine is not questioned; neither do we imagine anyone would seriously question the need to weigh the effect of restrictions placed on free speech. As a net result, however, we must insure that every citizen's essential right to speak out and to communicate with his Government remains intact.

I would like to begin specific discussion of 1289 by referring to the definition section. Here we note that the term "agency official" means any appointed officer or employee of the executive branch, GS-15 or higher. We checked the law on this and then we called the Civil Service Commission and we come to the conclusion that this would include anybody who is not elected. And that would include Cabinet officers, at least that is our conclusion, and we think, the Civil Service conclusion.

Still dealing with the definition section, I note that while communications from Members of Congress would be covered, it is not altogether clear whether one from a congressional staff member to an executive branch official must be included.

We have some questions about the list of exemptions and I would like to address that.

STAFF COMMUNICATIONS WOULD BE INCLUDED

Senator KENNEDY. Yes, staff communications would be included; they are "persons" too, are they not?

Mr. Godown. Yes, sir; and I am pleased to have the record indicate that members of the congressional staff would be included. We thought so, we thought it should be that way.

Senator KENNEDY. What about the other definitions?

Mr. Godown. No difficulties there. The reason I raised the question is that Members of Congress are specifically set forth and I wanted to make sure that there is no intention not to include members of congressional staff.

Senator KENNEDY. We can try to clarify that. We have a letter from the Civil Service Commission which interpret those definitions. They seem to be able to interpret that particular provision. But if there are any further kinds of ambiguities, we would be glad to consider the points you raise. Let us proceed.

Mr. Godown. Yes, sir.

Well, essentially section 560(c) (2) would not compel public disclosure of communications received by an agency official, if such communications provided incriminating informations for use in civil or criminal enforcement proceedings, or administrative or judicial enforcement proceedings. Inter- or intraagency memorandums or letters, not available by law to an outside party, would also be protected; as would information declared confidential, dealing with proposed financial or commercial transactions.

I daresay at first blush, this appears to be an impressive list of exemptions. But it must be pointed out that significant protections afforded by the Administrative Procedure Act, first, and then reinforced by the Freedom of Information Act, are missing. A full list of those exemptions, which I have just referred to, is attached to my prepared testimony.

I would like to review quickly some of the more important exemptions in the Freedom of Information Act, which do not appear in S. 1289, and the protections which could therefore be lost. These exemptions refer to matters specifically authorized by Executive order to be kept secret in the interest of national security or foreign policy matters specifically exempted from disclosure by statute, trade secrets, personnel and medical files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, investigatory records compiled for law enforcement purposes, and reports for the use of an agency regulating financial institutions.

Senator KENNEDY. Why is the NAM interested in whether national security is included or excluded? I am glad to get their views in general on that, but I think that we are responding to your point of view in light of the industries that you represent. I think your point is obviously of some value in terms of clarification. But your strongest objections with all due respect, appear to be insignificant ones.

What we are interested in are the real concerns of many of the industries, including those of my own State, that are members of the NAM. What are the problems that they have with this bill?

Now if your position is that there are definitional ambiguities, that is fine. However, I am interested in finding out, as a spokesman for industries in my own State, what the problems are. I feel that so far I have not been told of these problems.

Mr. Godown. Senator, we submit that the exemptions in the Freedom of Information Act are important, and the ramifications that might flow from them are indeed of great importance. A Government contractor, for instance, could be in touch with the Secretary of Defense talking about a matter, and that very conceivably would have to be logged under the bill, and then disclosed. And hence, you would have potential damage to the country. That is why I think the definitional section is important, and the exemptions are terribly important.

Senator KENNEDY. But those secrets will be protected. The conversation would be listed, but the secrets themselves would be safe. Is

your position that because it is not specifically clear the secrets would be detected?

Mr. GODOWN. Yes, sir. I think that the bill would afford a great deal more protection if, indeed, the full list of exemptions which appears in the Freedom of Information Act were included, instead of having been picked apart and part of it included and part of it not included.

NO OBJECTION TO LOGGING

Senator KENNEDY. You do not mind the fact of a contact being logged?

Mr. GODOWN. No.

Senator KENNEDY. Good.

Mr. GODOWN. I would like to discuss the difference in language concerning the APA and the Freedom of Information Act. Both use identical language to protect trade secrets and commercial or financial information obtained from a person, and privileged or confidential. Under S. 1289, in order to obtain a similar exemption from disclosure, one must be prepared to demonstrate immediate and substantial competitive injury, or predict serious financial speculation before one's confidential inquiry to a Government agency would be protected. This seems to us to be unfair and unwarranted diminution of protection, and one which would forestall future inquiries, perhaps with the result that jobs planned would not be created, facilities would not be built, et cetera.

We find a potential conflict with the Privacy Act as well as the Freedom of Information Act. In an interview with Ronald J. Ostrow of the Los Angeles Times, excerpts of which were printed in the Washington Post on Wednesday, November 5, in an article entitled "Post-Watergate Proposals Hit," Deputy Attorney General Harold Tyler discussed some difficulties he finds with logging proposals.

One difficulty is the interaction of requiring written notice of all contacts with the freedom of information and privacy laws. I quote him:

Are people going to like it when suddenly they find out that this stuff may have to be reproduced later on and disseminated? This is something that is not quite as simple as everyone seems to think it is. I am wondering if it is really the most desirable thing for the body politic. I am not so sure it is. It may cutoff the flow of proper public communications to bureaucrats like me in the Department. I am not sure that is what the public wants.

That is a rather colorful statement of some of our own concerns. There are two purposes of the Privacy Act of 1974. One is to provide that individuals be granted access to records concerning them maintained by Federal agencies, and the other is to safeguard individual privacy from misuse of Federal records.

Senator KENNEDY. How do you respond to Chairman Simpson's views at the Consumer Product Safety Commission? He has indicated that logging has worked well. They had been living with good regulations for some time; likewise, the FDA, the FTC and FEA. You are quoting one person; Mr. Tyler has not really had much experience. We have just heard from the Justice Department that they are unclear about what the interpretation of their own regulations is. Why are you quoting Deputy Attorney General Tyler as a source

for the problems of logging? I do not understand why. In terms of getting a balanced view, why don't you consider what is happening in some of the other agencies that are working with logging requirements, as Commissioner Schmidt or Commissioner Simpson? These officials have reached entirely different conclusions on the issue. The source of your concern seems one-sided to me.

Mr. GODOWN. It is not so intended. I think that is a fair question. I deal with it like this. The Food and Drug Administration does, in fact, have a logging requirement, the Product Safety Commission and others. What we are attempting to address ourselves to is the concept in S. 1289 which would spread this logging provision to the entire executive branch of the Government, and on terms which would be different from those which now pertain in the agencies mentioned. I do not know that it is a fair comment to say that, because it is working well in FDA, it will work well under 1289 throughout the entire Government. We do not think so.

LOGGING IS NOT WORKING AT JUSTICE DEPARTMENT. [WILL LOGGING WORK AT OTHER AGENCIES?]

Senator KENNEDY. Because logging is not working in Justice Department is it as fair to say it will not work in the other agencies? Is that what you are saying?

Mr. GODOWN. I think there are difficulties with the concept, and you have to juxtapose precisely what is being done in FDA and the Product Safety Commission with what would be done under this bill, before you can determine whether or not S. 1289 would produce a fair result.

Let me go on to discuss some practical difficulties, and these have to do with enforcement. It is very difficult to conceive how this bill would be enforced, how violators will be found, and how they will be prosecuted. Again, the Deputy Attorney General had something to say on that. I will not quote it; it is in my prepared statement. He indicated that enforcement would be very difficult. We think there is really no satisfactory way to enforce the bill as written, and it may be that executive branch officials would choose to record what they want to record, and not record what they do not want to.

The witness who preceded me from the Department of Justice was asked whether she was complying with the order which now pertains in Justice, and she said she was complying unevenly. I think she was probably being very fair and honest.

Taking the practical aspects of what would be demanded of employees in the executive branch, it would be very difficult, in fact, to comply with the letter of the law under those circumstances. They might spend a considerable time every day making logs, or having their secretary make logs, and that bothers us. We are not sure that that is a good use of public funds and public energy, if you will.

Senator KENNEDY. You do not mind your contacts being logged? You are just worrying about the bureaucracy that is developing in the various agencies?

Mr. GODOWN. No, Senator. When you say you, if you are talking to the business community, if you will, or the totality that I represent—13,000 NAM member companies and their employees—

yes, sir; we do have some grave concerns about their contacts being logged, as I pointed out in the statement.

Senator KENNEDY. Why does this present such a problem for you?

Mr. GODOWN. I think the basic problem would be this. There is a great deal of interchange of information. There is a great deal of information requested by business, and I dare say by the Federal Government of business, which now flows rather freely. A person feels perfectly at home in calling up or coming down to see a bureaucrat, concerning a matter that the regulatory agency will be forced to take some action on.

And there is nothing wrong with that. It helps the process of Government, and it helps business to run smoothly. We feel that if as a natural result of that, the individual's name would be logged, and some public record made of the discussion, and inferences drawn by Jack Anderson or Ralph Nader or whomever, comments on this kind of thing, obviously the inferences would be wrong. Or they would be susceptible to being wrong; I should not be that flat. I think it is unfair. The fact that that might happen, or could happen, would forestall a great number of these contacts and communications. And I think that the Government would be ill-served thereby, and I submit to you that industry would be ill-served.

Senator KENNEDY. Do you think that recording contacts is worse than the inferences that are made about such contacts when they are secret?

Mr. GODOWN. I would quarrel with the word secret, Senator.

Senator KENNEDY. Call it nonpublic.

Mr. GODOWN. OK; unrecorded, if you will. There is certainly nothing secret about, I venture to say, the vast majority of the contacts that go on between industry and the Federal Government. Very frequently the NAM is in contact with the Federal regulatory agencies. If and when we do, we ordinarily accompany our visit with a position paper, and that paper is made public.

Senator KENNEDY. If it is nonsecret and public, then what is the objection to logging? It ought to be either one way or the other. These contacts are generally known. If logging does not inhibit then why not record the fact that the contacts are taking place, so that the public can understand, they have occurred over a period of time? I think these contacts are going to be mentioned in any event, and probably to the disadvantage of industry.

Over a period of time logging would become business as usual. This is certainly the experience of the pharmaceutical companies, and also the impression that you get from other agencies that are instituting these procedures.

Mr. GODOWN. I think there are two questions pending. One is, as long as everything is in the open, what is wrong with recording it? As long as it is accompanied by a piece of paper, why not make that piece of paper available on the public record? Not every contact; there could be any number of phone calls setting up a meeting. There could be some followup phone calls and that sort of thing, and what is now a free interchange of information could turn into a maze of recording and public disclosure with inferences drawn. That would be the first problem.

PUBLIC IS INTERESTED IN EX PARTE CONTACTS AGENCIES HAVE WITH THE
INDUSTRIES THEY REGULATE

Senator KENNEDY. Well, do you think that it is in the public interest to know that CAB members had 600 different contacts with the airlines industry, and 3 with consumer groups? Do you think the public would be interested in this? Should not the public know the CAB members are spending a lot of time with industry and not as much with consumers? Is it not reasonable to expect that it would be a matter of some general interest to the public? And would that fact that those communications are eventually going to be made public—no one is questioning what they may or may not have been talking about—possibly make agency officials more interested in talking to various other kinds of groups?

Mr. GODOWN. Well, again, Senator, I think that the Civil Aeronautics Board, if it were not in contact with the airlines whom it regulates, there would be something wrong. There is nothing wrong with their being in contact.

Senator KENNEDY. There is nothing wrong with that.

Mr. GODOWN. Are we to infer that because there were 600 contacts, to use your illustration, by the airlines, and only three by consumer groups, that the consumer groups were forestalled with getting in touch with CAB? I doubt that very much. They probably just did not take the initiative. And probably they would be invited in if they had a position to represent, but they are not being regulated by the CAB.

Again, the kind of inference which you have just drawn in your illustration is exactly that which I think is a derogatory one and which is not inaccurate, but I think is unfair.

Senator KENNEDY. Why should we not know that? Why should we not find out what the basis of those contacts were? The CAB is supposed to be serving the public. Why is it not reasonable, if they have 600 contacts, that they be asked about the nature of those kinds of contacts?

Why is that not in the public's interest?

Mr. GODOWN. Because it may result in those 600 contacts being reduced to 100, and 500 being lost—essential information the airlines would want to come forward with.

Senator KENNEDY. Why would a responsible member of the CAB refuse to even meet with any of the airline industries to obtain important kinds of information?

Mr. GODOWN. I expect he would not.

Senator KENNEDY. Then what is the problem?

Mr. GODOWN. Well, there is a difference, perhaps, in the frankness of the interchange which might occur, and the number of interchanges which might occur, if they are going to be held up to public view and their motives questioned. Why did you meet with them? Why did this industry meet for 600 times? What did they have on their mind? They met, maybe, because they were invited 300 of those times.

Senator KENNEDY. Fine.

Mr. GODOWN. Well, if I may add one or two other points that I

would like to cover. We are concerned about the chilling effect that information, the contacts, will be forestalled if, in fact, logging and public foreclosure follows as a matter of course along every kind of contact which would be included under S. 1289. Let me move now to one point which I am particularly concerned about, and that is the possibility for later incorporation of the logging provisions as contained in S. 1289 into some lobbying legislation which you are cosponsor of, Mr. Chairman. Both Houses of Congress have under current consideration legislation which would amend or replace the Federal Regulation of Lobbying Act of 1946. This includes S. 2477 and a prior version, S. 815. Another bill similar to these two measures, S. 774, actually contains a logging provision.

In testimony before the Senate Government Operations Committee, we opposed inclusion of a logging provision in lobbying legislation, and repeat that opposition here. The practical effect of combining lobbying of and logging by the executive branch would be to subject individuals to the fear that their information-seeking, or other normal communications as reported in logs, would be construed improperly as lobbying contacts, subjecting them to all sorts of reporting and recording requirements. These individuals obviously will choose not to communicate with the executive branch officials. Hence, the chilling effect comes about.

Thus, we have considerable misgivings about the provisions of S. 1289 being swept into S. 2477 or its possible successors at some later date. And for the record, we state our opposition here. These are the problems that we encounter with S. 1289, Mr. Chairman.

Senator KENNEDY. If you had a choice of either logging or registration and reporting, which would you take?

Mr. GODOWN. Concerning the executive branch of Government?

Senator KENNEDY. Yes.

Mr. GODOWN. Probably logging. The stigma of being a lobbyist is even more deleterious than having communications logged which are susceptible in some minds, in the minds of some members of the public.

Senator KENNEDY. Has this been a problem for you?

Mr. GODOWN. No, sir.

Senator KENNEDY. You just registered this year, did you not?

Mr. GODOWN. NAM registered in May of this year as an organization, one of whose principal purposes is to directly influence legislation; yes, sir.

Senator KENNEDY. Has it been disadvantageous to you?

Mr. GODOWN. Senator, it has been a huge pain in the neck. The reporting requirements under the current legislation are onerous, and I would say useless; and the act itself is useless as a guide to anyone as to whether or not you have to register or not.

As you know, we testified before the Senate Government Operations Committee on your bill. We favor amendment of, or reformation of, the lobbying laws, and are working very hard with the staffs to attempt to come up with a satisfactory solution.

Senator KENNEDY. Thank you very much.

Mr. GODOWN. Thank you.

[The prepared statement of Richard Godown follows:]

PREPARED STATEMENT OF RICHARD D. GODOWN

My name is Richard D. Godown, and I am here to testify on behalf of the National Association of Manufacturers, of which I am senior vice president and

general counsel. The National Association of Manufacturers is composed of over 13,000 manufacturing members, large and small, located throughout the United States. I have been invited to present NAM's views on S. 1289, a bill which would require executive branch employees and officers GS-15 and above to log practically all oral and written communications initiated by persons outside the agency. It is NAM's view that while S. 1289 may be grounded upon a valid and reasonable purpose, it is heavily weighted with practical difficulties the ramifications of which must be considered; it could present an undermining force to both the Privacy Act and the Freedom of Information Act; and, most importantly, S. 1289 could create a "chilling effect," inhibiting important communications between the public and their executive branch officials.

The necessity for operating our Government in the sunshine is not questioned. Neither do we imagine any one would seriously question the need to weigh the effect of restrictions placed on free speech. As a net result, however, we must ensure that every citizen's essential right to speak out and to communicate with his Government remains intact.

I. THE DEFINITIONS USED IN S. 1289 PRESENT SOME POTENTIAL DIFFICULTIES

I should like to begin discussion of S. 1289 by turning to its definition section (section 560(a)).

Here I note that agency official means any appointed officer or employee of the executive branch GS-15 or higher. Since the bill requires logging of each oral or written communication by such an official (whenever and wherever received) when the communication deals with agency proceedings, important agency actions or policy issues, I wonder what the effect would be if Cabinet level officers, such as the Secretary of State, or the Secretary of Defense, were called upon to comply. One literally envisions these extremely busy individuals having to employ an additional staff person to follow them from place to place and keep the necessary "log." Logging communications could be accomplished with some difficulty during office hours, but contacts at home, during social activities, at large gatherings, etc., would pose a more difficult problem. This is not to imply that in the context of this bill, such "contacts" should go unrecorded, but rather to bring into question the necessity for "logging" under any circumstances. One must also consider possible ramifications on foreign policy and national defense.

Still dealing with the definition section, I note that while a communication from a Member of Congress would be covered, it is not altogether clear whether one from a congressional staff member to an executive branch official would be included.

II. THE LIST OF EXEMPTIONS UNDER SECTION 560(C) (2) OMITTS NUMEROUS ESSENTIAL CATEGORIES RECOGNIZED FIRST BY THE ADMINISTRATIVE PROCEDURE ACT AND CONTINUED BY THE FREEDOM OF INFORMATION ACT

Essentially, section 560(c)(2) would not compel public disclosure of communications received by an agency official if such communications provided incriminating information for use in civil or criminal enforcement investigations or administrative or judicial enforcement proceedings. Inter or intra agency memorandums or letters not available by law to an outside party would also be protected, as would information declared confidential, dealing with proposed financial or commercial transactions. At first blush, this appears to be an impressive list of exemptions. But it must be pointed out that significant protections afforded by the Administrative Procedure Act and reinforced by the Freedom of Information Act are missing. A full list of exemptions referred to is attached to this prepared testimony.

Let me review very quickly some of the more important exemptions in the Freedom of Information Act which do not appear in S. 1289 and the protections which could therefore be lost. These refer to:

- 1). Matters specifically authorized by Executive order to be kept secret in the interest of national security or foreign policy.
- 2). Matters specifically exempted from disclosure by statute.
- 3). Trade secrets.
- 4). Personnel and medical files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
- 5). Investigatory records compiled for law enforcement purposes.
- 6). Reports for the use of an agency regulating financial institutions.

We would urge that these exemptions, so carefully protected in the Freedom of Information Act should be similarly preserved in S. 1289.

I would like to discuss for just a moment a difference in language concerning a particular exemption. The Administrative Procedure Act and the Freedom of Information Act both used identical language to protect "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Under S. 1289, in order to obtain a similar exemption from disclosure, one must be prepared to demonstrate immediate and substantial competitive injury or predict serious financial speculation before one's "confidential" inquiry to a government agency would be protected. This seems to us an unfair and unwarranted diminution of protection and one which would forestall future inquiries, perhaps with the result that jobs planned would not be created, facilities would not be built, etc.

III. THERE IS A POTENTIAL CONFLICT WITH THE PRIVACY ACT AS WELL AS THE FREEDOM OF INFORMATION ACT

In an interview with Ronald J. Ostrow of the *Los Angeles Times* (excerpts of which were printed in the *Washington Post* on Wednesday, November 5, 1975 in an article entitled "Post-Watergate Proposals Hit") Deputy Attorney General Harold R. Tyler discussed some difficulties he finds with logging proposals; one difficulty is the interaction of requiring written notice of all contacts with the freedom of information and privacy laws:

Are people going to like it when suddenly they find out that tl's stuff may have to be reproduced later on and disseminated? This is something that isn't quite as simple as everybody seems to think it is.

I'm wondering if it's really the most desirable thing for the body politic. I'm not so sure it is. It might cut off the flow of proper public communications to bureaucrats like me here in the department. I'm not sure that's what the public wants.

There are two purposes of the Privacy Act of 1974: one is to provide that individuals be granted access to records concerning them maintained by Federal agencies; the other is "*to safeguard individual privacy from misuse of Federal records.*" In order to comport with that intent, 5. U.S.C. section 552a(b) provides that no Federal agency shall disclose any record containing personal information about an individual, without his approval, to any person not employed by that agency or to another agency except under other special conditions. In the House report, this consent requirement was said to be one of the most important, if not *the* most important provisions of the bill.¹ The House report also stated that H.R. 16373 would make all individually identifiable information in government files exempt from public disclosure. The House Government Operations Committee went on to say, however, that it believed that the public interest requires the disclosure of "some" personal information, but that its intent was that the agencies should consider the disclosure of this type of information in a category-by-category basis "and allow by published rule only those disclosures which would not violate the Freedom of Information Act by constituting 'clearly unwarranted invasions of personal privacy'." And, two of the basic principles of privacy protection adopted in the House Report in H.R. 16373 were:

... There should be some way for an individual to amend or correct an inadequate record. ... An individual should be able to prevent information from being improperly disclosed.²

S. 1289 does not require approval under any conditions by the individual before his communication is disclosed; it provides no mechanism for the individual to correct or amend an incorrect logging report; it does not allow an individual the opportunity to prevent information from being improperly disclosed. In short, it adopts none of the safeguards which are part of the Privacy Act and are designed to protect individuals against "misuse of Federal Records."

We must conclude that there does not appear to be much attention in S. 1289 given to the obvious impact the bill will have upon the Privacy Act, which was enacted "because of the growing, distinct fear of Government in the minds of many Americans."³ Just how is the fear of Government going to be erased if executive branch officials are going to be keeping notes of every communication, and recording it for public view? We submit that anxiety in the relationships between the Government and the people will be increased by such a logging proposal, instead of diminished which was a goal of the Privacy Act.

¹ Privacy Act of 1974, House Report No. 93-1416 accompanying H.R. 16373, 93d Cong., second session, p. 12.

² *Id.*, at 9.

³ *Id.*, at 3.

IV. PRACTICAL DIFFICULTIES: ENFORCEMENT

It is very difficult to conceive how this bill will be enforced: how violators will be found, and how they will be prosecuted. Deputy Attorney General Tyler had these thoughts on this problem aspect of logging proposals:

Are congressional figures going to want me reporting every time they call me as Deputy Attorney General and tell me they would like to see so-and-so appointed such-and-such? I don't think they are. Anybody who wanted to be dishonest could easily evade the regulation. You just don't do it.

What are you going to do as a sanction? Are you going to make it a crime? If I were a prosecutor and I started thinking about prosecuting somebody for not making a memo of a call from a Senator or a White House official, I'd have great troubles given the requirements of Anglo-Saxon criminal law notions.⁴

S. 1289 would allow each agency to "designate an agency employee to monitor compliance by agency employees." Just how is this particular individual going to determine that Director X has not reported a phone call? Will the monitor use "monitoring" equipment, or a force of subagents that will prowl the hallways eavesdropping through the transoms? Since the Chairman (as well as Senator Sam Ervin) has expressed great concern in the past for the right of privacy of Federal employees, we believe that the possible threat to Federal employees privacy should also be considered herein.

It is NAM's view that there probably is no really satisfactory way to enforce this bill, and what will happen will be exactly what Deputy Attorney General Tyler predicts: each executive branch official will choose to record what he wants to record, and will not record what he chooses not to record.

Under section 3 of S. 1289, it states that *after* the bill is in effect 2 years, the Administrative Conference of the United States shall conduct a study of procedures established. It is our view that the practical difficulties inherent in such a broad scale undertaking as S. 1289 should be dealt with *before*, not after, enactment.

V. S. 1289 WILL PRODUCE AN INEVITABLE "CHILLING EFFECT" UPON IMPORTANT COMMUNICATION BETWEEN THE PEOPLE AND THE EXECUTIVE BRANCH

It is clear that a logging requirement will inject an inhibiting factor into the communication process between citizens and their government. Under S. 1289's broad coverage would be oral or written communications initiated by persons outside the agency pertaining to (A) any matter that is the subject of agency proceedings . . . (B) other important agency actions, or (C) policy issues.⁵ We believe that an individual expressing curiosity about a policy matter, or expressing a personal opinion, will possibly be inhibited from calling upon an executive branch official if his communication will be logged and placed in public files. He might believe that persons reading the logs might construe the conversation as an attempt to influence, when in fact no such purport was intended. The individual might be reticent to leave to the writing talents of the executive branch employee "a brief summary of the subject matter," particularly since there are no safeguards in the bill specifically allowing him to amend an incorrect or inadequate report. For example, one executive agency employee might write: "Mr. X phoned on such-and-such a day to ask how the ABC policy works, to ask whether he or his business will be affected, to express his opinion on the policy, and to ask the status of a related proceeding." Another employee with possibly less time and imagination might simply write: "Mr. X phoned on such a date and we discussed ABC policy." In the first instance, it is clear that information was sought as the main purpose of the call, and opinion-giving may have been incidental.

In the second instance, it is unclear whether the purpose of the call may have been to enlist support of the agency official for a particular policy, or solely to ask information. We submit that the public will be strongly concerned as to how their communications might appear to other persons, and unfortunately they may decide not to communicate rather than leave themselves at the mercy of the executive branch employee's pen.

In short, we believe that S. 1289 may unwittingly place a new barrier between the people and the executive branch, a barrier which needs to be removed, not reinforced.

⁴ "Post Watergate Proposals Hit," *The Washington Post*, Nov. 5, 1975, p. C-1.

⁵ We note parenthetically that (B) and (C) are undefined and suggest that leaving "clarification" to the individual agencies will produce a hodgepodge of regulations and will not result in clear guidance for citizens; certainly not when dealing with more than one agency.

VI. S. 1289 SHOULD NOT BE LATER INCORPORATED INTO LOBBYING LEGISLATION

Both Houses of Congress have under current consideration legislation which would amend or replace the Federal Regulation of Lobbying Act of 1946. The Chairman is a cosponsor of S. 2477 and of a prior version, S. 815. Another bill, similar to these two measures, S. 774, actually contains a logging provision. In testimony before the Senate Government Operations Committee we opposed inclusion of a logging provision in lobbying legislation and repeat that opposition here. The practical effect of combining lobbying of and logging by the executive branch would be to subject individuals to the fear that their information-seeking or other normal communications (as reported in logs) would be construed improperly as lobbying contacts, subjecting them to all sorts of recording and reporting requirements. These individuals obviously will choose not to communicate with their executive branch officials; hence, the "chilling effect" comes about. Thus, we have considerable misgivings about the provisions of S. 1289 being swept into S. 2477 or its successor at some later date and for the record, we state our opposition here.

CONCLUSION

On behalf of NAM we appreciate the opportunity to express our views on S. 1289. We suggest that the full ramifications of such an across-the-board requirement for logging be thoroughly considered: the possible collision course with the underlying notions behind the privacy and freedom of information laws; the enforcement problems and other practical difficulties inherent in the bill; the burdensome aspects of such a logging requirement; and most importantly, the "chilling effect" this bill could have upon communications between the people and the members of the executive branch. These are the problems that we encounter with S. 1289.

APPENDIX

EXEMPTION PROVISIONS OF THE
FREEDOM OF INFORMATION ACT AS AMENDED
IN 1974 BY PUBLIC LAW 93-502
 (Amendments are underscored)

§552(b) This section does not apply to matters that are--

- (1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (2) related solely to the internal personnel rules and practices of an agency;
- (3) specifically exempted from disclosure by statute;
- (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;
- (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Senator KENNEDY [continuing]. I would like to welcome our next panel of witnesses. Mr. Lloyd Cutler has practiced law in Washington since 1964; he is currently with the law firm Wilmer, Cutler, & Pickering; Mr. Alan Morrison, formerly the assistant U.S. attorney for the Southern District of New York, presently director of the Public Citizens Litigation group; Marcus Cohn, of Cohn & Marks, previously was counsel for the legal department, Federal Communications Commission; Matthew Hale was formerly staff director of the Senate Banking and Currency Committee and general counsel for the American Bankers Association. He is presently with the law firm of Cleary, Gottlieb, Steen, & Hamilton; and Lee Hydemman has been a partner in the law firm of Hydemman, Mason & Goodell in Washington. Prior to 1961, Mr. Hydemman spent 5 years as legal counsel for the Atomic Energy Commission. All these attorneys have had extensive contact with various agencies, and we look forward to hearing from them.

Mr. Morrison and Hydemman have prepared statements. Do you want to start, Mr. Morrison?

STATEMENTS OF ALAN MORRISON, DIRECTOR, PUBLIC CITIZEN LITIGATION GROUP, FORMER ASSISTANT U.S. ATTORNEY, SOUTHERN DISTRICT OF NEW YORK; LLOYD CUTLER, WILMER, CUTLER & PICKERING; MARCUS COHN, COHN & MARKS, FORMER COUNSEL, LEGAL DEPARTMENT, FEDERAL COMMUNICATIONS COMMISSION; MATTHEW HALE, CLEARY, GOTTLEIB, STEEN & HAMILTON, FORMER STAFF DIRECTOR, SENATE BANKING AND CURRENCY COMMITTEE, GENERAL COUNSEL, AMERICAN BANKERS ASSOCIATION; AND LEE HYDEMAN, HYDEMAN, MASON & GOODELL

Mr. MORRISON. Thank you. I would like to have my prepared statement placed in the record. I do not intend to read it in full. I would just like to make a few brief observations, in part based upon the statements of other witnesses this morning, and in part summarizing a few of the points in my testimony.

First, I think it is vital that the provisions in S. 1289 continue beyond formal adjudicative, formal rulemaking and licensing proceedings and they be contained into the final bill. I would only cite to Senator Kennedy something I am sure you are familiar with, and that is the long series of contacts involving the settlement of the ITT antitrust cases, in which various corporate officials met with persons ranging from the Deputy Attorney General to the Secretary of Commerce, to the Vice President of the United States, to the Secretary of the Treasury, all of whom had nothing to do with the pending antitrust case; and indeed, as you will probably recall, the chairman of the board of ITT, Mr. Geneen, indicated he had a conversation with John Mitchell during the time in which he was talking about "general antitrust matters."

Now, it seems to us, whether he was in fact talking to the Attorney General about general antitrust matters or ITT's problem, had the fact of the conversation been on the public record, a lot more questions would have been asked, and properly so. And if there is a chilling effect, that is the kind of chilling effect that ought to take place. Pro-

ceedings ought to be adjudicated in the courts, and not hidden from the public's view.

Second, we are very concerned about a provision which is not included here but which you mentioned earlier in a question this morning, and that is the whole question of gifts, entertainment, and so forth, for members of the executive branch. It is not covered, either in the present bills on lobbying, about which we testified on several occasions, and I certainly hope that this opportunity does not go by and have this important area fall between the cracks.

I saw in the paper just this morning that 22 employees of the Defense Department had been censured, and a permanent blackmark been put on their record for accepting favors from Northrop to go to hunting lodges—those contacts ought to be matters of public record, and all of that entertainment ought to be on the public record.

Reminding you of another matter I am sure you are familiar with, and that is Chairman Timm of the CAB's excursions to Bermuda, and his trips to Spain last year, all of which involved airlines, and some of which were paid for by airplane manufacturers.

One of the questions that is left open under the definition section of the bill now is whether or not off-business calls, contacts, would be covered. I would feel much easier about leaving those matters out of the bill, not subject to logging, although we think they ought to be, provided that you had strict reporting requirements of social entertaining so that one could assume that if there was business entertaining of a high official in the executive branch, that at least the possibility exists that there may have been some business discussions at that time. It is a difficult line to draw as to when business and social contacts overlap and when they should be recorded.

Senator KENNEDY. As I remember Chairman Simpson, from the Consumer Product Safety Commission, says that if he goes to a social situation, he does not log it unless someone mentions something. This has been a general rule of thumb to people within the Agency, and he says it has worked pretty well. I do not know how you might do it. I think your point, as I understand it, is that recording the amount that is used in business entertainment would be generally useful as well. That would have to be a part of the amendment to the lobbying bill, but I think that they are all tied in together. We have provisions in our earlier bill along those lines.

Mr. MORRISON. I think it is very important that these two bills be tied together.

Senator KENNEDY. Yes; we are going to try to combine the two.

PROBLEM OF INCORPORATING FOIA COMPLETELY INTO EXEMPTIONS IN THE BILL

Mr. MORRISON. With respect to the exemptions, I am very concerned about a problem of incorporating the Freedom of Information Act wholesale into these exemptions here. Let me cite you one example that has taken place with a similar provision, and that is the Federal Advisory Committee Act.

Near the end of the preparation of the Federal Advisory Committee Act, someone said, well, we cannot really have all this openness. We have got to have some exceptions, and somebody else said, well, why don't we just take the Freedom of Information Act and move all the

exceptions in there. And someone said, very good idea, and so they did it.

The trouble is that the Freedom of Information Act is written with documents in mind. The Advisory Committee Act deals with meetings, which are much more like contacts, and there are some provisions in the Freedom of Information Act, particularly those relating to inter-agency communications which have been asserted as wholesale reasons for closing all the Advisory Committee meetings. The case is now in the courts, but I simply urge you, as a matter of caution, to be very, very careful before incorporating wholesale the Freedom of Information Act exemptions. I think the approach you have taken so far, subject to the specific exceptions in my testimony, is the proper one.

With respect to coverage of the act, I feel very strongly that Cabinet officers ought to be covered, and that members of the White House staff ought to be covered. There seems to be no reason whatsoever for any exemption for either of those, and provided that we are talking about people at the level of GS-15, I do not have any difficulty dealing with that.

It has been suggested here this morning, for instance, that inquiries as to the status of a particular proceedings would be required to be logged and improperly so. I think you have to remember that this bill simply says, where you are contacting people at a GS-15 or above, you are going to have these requirements for logging. Now, you do not have to call a GS-15 to find out when a hearing is going to take place, or when the briefs are due, or simply to find out what the status is. If you want to know what the real status is, if you want to find out some inside information or get your views known, that is when you call the GS-15 or above, and that is the kind of contact that ought to be logged.

SENATOR KENNEDY. You do not think that, under the separation of powers, the President ought to be able to formulate his own policy decisions, without his advisers having logged their various contacts in the development of executive policy? Do you think those ought to be recorded too?

MR. MORRISON. I think there are some separation of powers problems, and some problems involved in some of the powers of the Presidency that would at least cause me to think several times before requiring the President himself to keep a log of everyone he sees and the subject of conversation, particularly with respect of national defense matters. And if you adopted a limited view on what the agency of the Presidency is, you might require, every time the Secretary of State called him on the phone, to log that conversation in.

I do feel that it would be beneficial, although I do not suppose it would probably change a great deal, to have the President's calendar made a matter of public record, and I do not think there would be any great objection or constitutional issue raised by that. But as far as dealing with the 400 people on the White House staff and the several thousand over at OMB, I want to be very sure that those conversations are recorded, because they are a key in what is going on in far too many areas of the Government as it is, and as I mention in my written statement, I am not sure that they are covered, and I feel very strongly that they ought to be covered.

With regard to enforcement, I am somewhat more sanguine than

others that officials of the U.S. Government, appointed or elected or whatever, at a GS-15 level or above, are basically going to try to do the job, to do an honest job of keeping the records. I do not think that we are going to have a situation where there are going to be wholesale violations, and I think that the statute is going to be largely self-enforcing, if for no other reason than that the person who makes the contact will know about it, and in most cases, if it is a letter, it will pass through a secretary and may even be recorded as a matter of routine entries in the office. And if it is a telephone call, it almost certainly will be recorded by the secretary, so that the notion of hiding these calls seems to me to be somewhat silly.

Last, we have also suggested that there be a provision for civil suits brought by interested citizens to enforce these provisions, since in many cases, the criminal law will be inappropriate or simply incapable of being utilized. for instance, if the Justice Department decided not to comply with the law and the only possible remedy was a criminal prosecution brought by the head of the Justice Department, the Attorney General. So for this reason, we have suggested a citizen suit provision, and we would like the opportunity to submit specific language on that, along with an amended definition of agency official, for your consideration.

Thank you very much, Senator.

[The following letter was subsequently received for the hearing record:]

PUBLIC CITIZEN LITIGATION GROUP

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November 17, 1975

Tom Susman, Esq.
Chief Counsel
Subcommittee on Administrative Practices and Procedures
Room 3218
New Senate Office Building
Washington, D.C. 20510

Re: S. 1289

Dear Tom:

Following up my testimony of last Thursday, I have a number of comments that I wanted to put before you concerning the present draft.

First, with respect to the definition of "agency official", I suggest the following language that will have the effect of applying the Act to all Executive branch officials, including the White House, and excepting only the President and Vice President and including them for purposes of the calendaring requirements under subsection (d). The definition would specifically include the independent regulatory agencies, Government owned corporations such as the Postal Service and TVA, but would exclude Government controlled corporations such as Amtrak.

"§ 560(a)1 'Agency official' means any appointed officer or employee of any agency as defined in section 551(1) of this Title (including any executive department, military department, Government corporation, other establishment of the executive branch of the Government, and any independent regulatory agency) who is compensated in excess of the rate prescribed by GS-14 under the General Schedule under section 5332 of this Title. Such term shall include individuals serving as consultants to an agency during such times as they are acting in that capacity but shall not include the President and Vice President except for the requirements under subsection (d).

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Second, my testimony suggested the inclusion of a private enforcement provision which could be included as a new subsection (f) in the following language:

"Any person may bring an action in an appropriate district court to enforce the provisions of this section. In any such action the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case in which the complainant has substantially prevailed."

The provision for attorneys fees is taken substantially verbatim from the 1974 Freedom of Information Act amendments as now contained in section 52(a)(4)(E).

In subsection (d) on page 12, line 2 of the Committee Print of September 19, 1975, I recommend the word "shall" be changed to "need" which will permit the inclusion of additional information rather than prohibit it as the provision now reads.

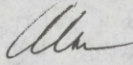
A further question has arisen in my mind concerning the provision of subsection (b)(1): Assume that an agency official initiates a conversation to a person outside the agency. As I read subsection (b)(1), that conversation would not be covered. That seems to me to be an unnecessary exception since it is the fact of communication, rather than who initiated it, that ought to be the determinative factor. In any event, the statute and/or its legislative history ought to make it clear that, even if the agency official initiated the conversation on topic A, if the outside person raises topic B or goes far beyond the original discussion in topic A, a report ought to be filed. If you are prepared to accept this latter approach, the added benefit from exempting agency initiated conversations would seem small, and would counsel in favor of a requirement that all such communications, regardless of the person initiating them, ought to be reported.

I am also returning my corrected copy of my testimony. In going over it, I had the impression that there may have been some additional interchanges in which I was involved that have not been included, but I am not certain of that.

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Thanks again for the opportunity to appear, and as
always, I stand ready to give you whatever assistance I can.

Sincerely,

A handwritten signature in dark ink, appearing to be 'Alan B. Morrison', written in a cursive style.

Alan B. Morrison

ABM:as

Senator KENNEDY. Mr. Hydeman.

Mr. HYDEMAN. Yes. Thank you, Senator. Let me try to briefly summarize the statement that I had and the attachment that goes with it. I do not think anybody can basically quarrel with the objectives of this bill. It seems to me that we have to have open Government, and this means the general public and public interest groups must be permitted to participate in what has heretofore been the sole preserve of private interests; namely, the Federal regulatory process. Essential to that is knowing who is contacting whom, outside of the public proceedings, and knowing who is being contacted.

Now, I looked at three basic issues, to see whether the bill made sense to me. First is the question of whether it is likely to inhibit desirable contacts between those being regulated and those doing the regulation. Frankly, I do not think it will inhibit communications in any way. Those being regulated have too much at stake to let the publicizing of communications impede necessary communication.

On the other hand, I think that public reporting hopefully will create a greater awareness—and I think the awareness is really more important than the kind of detailed questions of whether you can enforce or how effective enforcement will be on the part of those making private communications and those receiving such communications—of the propriety of the situation.

The second thing I looked at is whether the bill will impose an undue burden on Federal officials, and it seems to me whoever drafted it has found a reasonable line between balancing the burden on officials and providing adequate and essential information.

The third issue I looked at is whether the bill is broad enough in its coverage of Government employees. Frankly, at the CAB, GS-14 would be the proper level, because those are the senior policy staff people. But frankly, I think the bill as drawn is adequate. I think it hits the principal contacts on significant matters.

I might note that my own experience has been—and this may not be typical—is that at the lower levels, you do find people tend to be more circumspect, so that the cathartic effect of public reporting, which certainly is one aspect of your bill, I think is less significant at those levels.

In sum, I have no problems with the bill. I think you have taken care of any troublesome details by providing for a sensible review process a year after the bill is put into effect.

With your indulgence, Senator, I would like to get to another matter which I feel very strongly about, and is not significantly addressed by the bill, although in some respects it would cover the situation. This is private communications in a very critical area of the civil aviation field, and this is the area of contact during the Presidential review of Board decisions involving overseas and foreign air routes. These kind of decisions involve such significant matters as new route awards, route exchanges or mergers, which are important both to private interests and to the public. Under section 801 of the Federal Aviation Act, such decisions are now sent to the President prior to final action and indeed, prior to publication of the Board's orders.

During this process, there are numerous contacts between those representing private interests and those within the executive branch

who play a role in advising the President. Often, these contacts begin before the case is even docketed.

Over the past decade, I have personally witnessed massive pressure, manipulation and improprieties during this review process, which, in my view, denigrates the integrity of the administrative process created by Congress. The improprieties stem not only from private contacts but also from the failure of those within the executive branch to limit their review.

Generally, there has been a serious disregard for the fact that the Board's decision being reviewed is the product of an extensive, adjudicatory proceeding. In the name of foreign policy and national security, the ostensible reasons for Presidential review, the reviewers undertake what is, in effect, a *de novo* review, freely substituting their judgment for that of the Board.

This has been far more destructive to the integrity of the Board's process than any other area of private communication involving CAB proceedings of which I am aware.

The American Bar Association, at the urging of our Transportation Committee on Aviation, at its August 1974 meeting, adopted a proposal to eliminate Presidential review, except in cases involving foreign air carriers. The purpose was to restore integrity to the decisional process. That, in my judgment, is the only solution that will really clean up the process.

Short of that, there are some steps that can be taken to improve the situation. First, Presidential review could be made a more open process by publicizing the Board's proposed decision for all to see. Today, only those who know their way around town can learn about the contents.

Second, contacts by private parties should be eliminated during this review process. If they are to be permitted, the circumstances should be very compelling and all parties should be given notice that contacts are being permitted, and detailed public records should be maintained of such contacts. To that extent, I think the bill does deal with the situation, but as I say, I think that is a very narrow aspect of it.

Third, the scope of review and those involved in the review process should be limited and in keeping with the narrow role of executive review; namely, foreign policy and national security.

Let me emphasize in closing that while these steps may be helpful, I do not believe they will restore integrity to the decisional process or restore public confidence in the final decision. The only really satisfactory solution is the one adopted by the ABA, namely, to eliminate the Presidential review. Whatever legitimate foreign policy or defense considerations may be involved, and I must say, history shows there have been very few, if any, that can be presented to the Board, either in public or confidential hearings. Confidential hearings will permit the process of cross-examination and presenting contrary views.

At the present, the State Department and some other executive agencies are unwilling to even appear before the Board. Rather, they wait in the wings until the extensive hearing process is completed, and then step in, often to render the process annulity.

Hopefully, the Senate Aviation Subcommittee or this subcommittee will separately consider this critical problem promptly and implement the recommendation of the American Bar Association on this

matter. The material I have appended, Senator, to my statement is the submission that our Aviation Subcommittee made to the Subcommittee on Aviation of the Senate Commerce Committee, which attaches the bar association proposal and a discussion of its reasons. I thank you.

Senator KENNEDY. You have some proposals now, before the Aviation Subcommittee?

Mr. HYDEMAN. What we have done is we sent the chairman of the section on administrative law a letter on October 2, 1974 to Senator Magnuson, setting forth the ABA proposal.

Senator KENNEDY. It has to be done by changing the Aviation Act?

Mr. HYDEMAN. Yes, sir, it would involve an amendment of section 801 of the act.

Senator KENNEDY. Could it be accomplished by administrative order?

Mr. HYDEMAN. Yes; and I think in fairness, there has been, within the President's Counsel's Office, Mr. Buchan's office, specifically, Rod Hills, who was there and recently left, and an assistant of his by the name of Dudley Chapman. They have been very concerned over this area, and they are trying to get some control over it.

But I am presently in the process, on behalf of my client, Continental Airlines, involved deeply in another Presidential situation, review situation involving service between Micronesia and Japan. It has been going on for 3 months, and while they have had good intentions the process is working as poorly as ever, if not worse. I would be glad to come testify in detail after the decision is rendered.

Senator KENNEDY. Have you outlined for the Aviation Committee the kind of improprieties you are referring to, or do you prefer doing that after the decision?

PROBLEMS OF IMPROPRIETIES CITED IN PRIOR CASES

Mr. HYDEMAN. I can do it as to prior cases, one of which Mr. Cutler and I were involved in: namely, the *American-Western* merger case, the *Trans Pacific* case I was involved in back in 1968 and 1969. I know a little about what was going on in the *Eastern-Caribair* case, and the *Pacific Islands* case that preceded the service to *Saipan* case. But, in effect, there have been no hearings set on this matter, so there has really been no opportunity to publicly state what the problems are.

Senator KENNEDY. What kind of problems occurred in past cases?

Mr. HYDEMAN. Well, if you go back to the *Trans Pacific* case, you may recall that President Johnson signed a final Board order. It was pending a normal process of 30-day review for petitions for reconsideration before the Board. At the time President Nixon came in, through a substantial amount of pressure by a number of air carriers, the decision was very promptly overturned. Even the stated reasons given by the President were quite improper in my view. They stated the President's assistants had, at that time, I think, Bob Ellsworth, who was assisting in this area, held a public press conference and stated that those advising the President had redone the traffic forecast, which is a specific function of the regulatory agency, and was what most of the hearing involved. They had adjusted the traffic forecast down 21 percent to 33 percent; and, on that basis the President was nullifying the award, and, in fact, he gave the award that Continental had in the South Pacific to American. The route he gave to

American, and redesigned it—it did not work out, and American has pulled out. Now we are back in a new case.

I think that what the Board found in its expert area of judgment, which is traffic forecasting and establishing routes has proven historically to be accurate. I think what happened in the case was that there was a lot of pressure on the President to overturn the decisions. I am sure there were arguments made. I know there were arguments made that the prior decisions were somehow or other politically motivated.

In *American-Western* there were considerable efforts to contact people within the executive branch before the case even started to get them to take positions. In fact, there were substantial efforts to prevent the Department of Justice—were arguments that the Department of Justice should not take an independent position, and those failed.

I think in that case there were specific documents that were uncovered that were put into the record of the hearing that were presented within the executive branch that were at odds with the evidence of record.

I know, subsequent to the Board's decision, there were documents put in by American, for example, that showed that the economic impact of combining its system with Western's would be highly beneficial because of the use which it then could make of large aircraft over the two systems. They had not shown the specific information before the Board, so they were arguing essentially matters that should have been heard by the Board and had nothing to do with foreign policy or national defense.

I am not suggesting that contacts, per se, are today improper, because that is the process that is permitted. I am saying the whole process is improper in terms of rendering a nullity of the very extensive judicial process that goes on at the Board, and particularly foreign policy considerations can properly be presented before the since the so-called national defense and security considerations and Board on the public record.

Senator KENNEDY. Fine.

Mr. Cutler, I understand in a recent book they talk about your strong representation of American Airlines.

Mr. CUTLER. Mr. Chairman, I thought I was invited here to talk about your bill. I would be happy to, if you like a minute or two for me to respond to Mr. Hydeman's comments, I will respond to those, and I think I had better do it now in view of what you say.

I would agree with Mr. Hydeman about the provision of the Aviation Act giving the President the last word in cases involving foreign routes, and that it poses a serious set of problems for everyone involved in seeking or opposing the granting of those, because there are no procedures now published by which lawyers or parties are supposed to conduct themselves in trying to persuade the President either to approve or to upset the decision of the Board. In fact, in many cases, the Board decision is not even known to the parties until the President has had some prior look at it.

That should be cleared up, and there ought to be a set of ex parte rules on dealing with the President. I was not involved in the so-called Trans Pacific case. I know nothing about that. I do think that the

other case to which Mr. Hydeman referred is one in which, although he ties it to Presidential approval, that was not the issue involved.

As you know, the CAB has authority to decide whether a particular merger should be approved. This was the *American-Western* merger. That is an independent regulatory authority. The Board has the power to exempt any merger it approves from the antitrust laws, to apply antitrust criteria only to the extent that they find it consistent with the public interest in aviation. The other department of the Government are simply parties in a proceeding before the Board.

The other departments of the Government, like the Department of Transportation and the Department of Justice, appear before the Board as parties, and either favor the merger or oppose the merger. As a result, the parties in the case and their lawyers go to the Department of Justice and go to the Department of Transportation and seek to persuade them to take positions, one party to another, in a case pending before an agency that are favorable to that particular party.

We, as American's counsel went to both of those places. I have not the slightest doubt that Mr. Hydeman, as Continental's counsel, did the same thing. He was opposing the merger. In fact, this Congress passed a Transportation Act, the Department of Transportation Act, in which it assigned according to the Senate committee's report, I believe, the responsibility to the Department of Transportation for seeking to coordinate an executive branch position on transportation mergers before the CAB and the ICC. The issue involved was whether the various departments, the executive departments of the Government, should get together and adopt a common position before the Board.

We argued that they should be in support of the merger; Mr. Hydeman argued that they should not and that Justice should oppose it. Mr. Hydeman's view prevailed at the Department of Justice; but that did not involve anything, I think, that could properly be called an ex parte contact. These were contacts among the parties to a case and the lawyers for the parties to the case. I have no quarrel at all with the proposition that all such contacts, as proposed in your bill, should be made public.

Senator KENNEDY. That is the point I was driving at: That you would not have had any hesitancy in making those contacts.

Mr. CUTLER. Oh, not the slightest.

Senator KENNEDY. We are not trying to redecide that case. That is really the only point.

AGREEMENT WITH OBJECTIVES OF BILL, BUT DISAGREEMENT WITH CRIMINAL PROVISIONS

Mr. CUTLER. So far as your bill is concerned, Senator, like everyone else here, I agree fully with the objectives of the bill, and, but for the criminal penalty provisions of the bill, I think that a reasonable job has been done in trying to balance the burdens on the Government official and the importance of having the public know that particular contacts are being made.

I share the view that was expressed by the representative of the NAM that somehow or other contacts between citizens, corporate citizens and other citizens and the Government are treated as unclean and suspect to begin with. We do have a provision in the First Amendment

on the right of the people to petition for the redress of grievances, and that is entitled to as much respect, I think, as any other part of the First Amendment.

I do think, though, that the criminal penalties, the hydrogen bomb of a criminal penalty for failing to record a telephone conversation or the substances of it is just unworkable and that it is going to have a chilling effect not on citizens, but on the Government, and on the dignity and pleasure and self respect of working for the Government.

Senator KENNEDY. If we alter the sanctions to conform with other Civil Service remedies, would you feel that modification would be adequate?

Mr. CUTLER. I would strongly favor that.

It seems to me that the remedies of discharge, of reprimand are perfectly suitable for this kind of offense, and as others have indicated, they would probably bring about the kind of self-enforcement that you want. I would have no objection to Mr. Morrison's suggestion about a citizens enforcement suit although I do not think it would actually be needed.

I also agree with Mr. Morrison's comment that the last people you should take out of this bill are the Cabinet members. I agree with the doubt he expressed about whether—this was in his written statement, I think—whether your reference to the executive branch picks up the independent regulatory agencies like the CAB. I do not think it does as a technical matter, and that should certainly be corrected.

I think the question that Mr. Morrison addressed himself to, the ITT executives and bankers going to see the Attorney General or other people in the Government, has already been taken care of as a result of that case by the Tunney bill, by the amendments that have already been enacted, relating to consent decrees, which would require a statement before the consent degree court as to every contact that had been made except between the counsel of record on the side of the party, and the Attorney General and the Antitrust Division lawyers on the other side. So, a contact by Mr. Geneen would automatically now be picked up under the law you have already passed.

As a lawyer, I have to keep diaries every day. We have all used these little lawyer's time records. Sometimes a week or so goes by before I write them down. But I would hate to think that I was subject to criminal penalties for failing to remember a phone call or even a visit or putting down that I saw somebody at 2 o'clock one afternoon when, in fact, it was 3 o'clock the following or the preceding day. We are all going to make mistakes like that in those areas, and to make that sort of thing subject to criminal penalties seems to me to be the grossest kind of overkill.

I agree also with Mr. Morrison that it is high time we did something about gifts and entertainment. I do not think, though, you can do that on the Government side as well as you could on the private side. It seems to me that you could do something to require some sort of disclosure about reimbursed entertainment of one kind or another where a corporation or a client or someone is picking up the bill for what purports to be a social occasion. Some reporting system for that would be a perfectly desirable thing. I would suggest, myself, that rather than a self-executing law which the Department of Justice is supposed to enforce through the criminal code, it would be much better to lay

down some basic rules in this law, perhaps applicable to appointed officers who are subject to the confirmation power and also subject to the impeachment power. I certainly would include the White House staff, as Mr. Morrison suggested, even though they are not in most cases people confirmed by the Senate.

But, from then on, it seems to me what you should do is to require by law that each agency set up its own rules and that it enforce those rules, and that could be subject to some sort of congressional oversight, of course. It is very, very difficult to write in a statute exactly what these rules ought to be in a way that would cover every agency and every circumstance and every level of employee. A GS-14 might be right in one agency, and it might be all wrong in another agency.

Last, I would like to go back to a proposal that I made myself more than 20 years ago, namely that the Federal Government do something to establish a code of ethics, if you will, for exercising this constitutional right of petition, something that would work not only for lawyers—and lawyers do have their own disciplinary body—but also on accountants, on defense contract, salesmen, on company vice presidents who spend most of their time dealing on behalf of their company with the Government. But some sort of code of ethics could be enforced. Perhaps, first prepared along the lines of the American Bar Association's code of ethics, their code of disciplinary procedures, and then enforced by the bar associations, by the accountants, by other bodies, subject to an overall review by a Government panel that might consist of retired Federal judges, or some such thing, and would have some disciplinary procedures. Perhaps people could have their right to appear before a Government agency suspended for a period of time or they could be publicly reprimanded and the public would know, for violation of some ethical principles, such as excessive entertainment or improper conduct, ex parte conduct, or whatever else it might be. I think that would be a much more sensible and productive way to go about it than a criminal statute.

Senator KENNEDY. Mr. Hale?

A PUBLIC OFFICE IS A PUBLIC TRUST

Mr. HALE. Mr. Chairman, I would like to set forth a few principles based on what I have seen in the executive branch, and at the Senate Banking and Currency Committee, and, up to recently as general counsel and a paid lobbyist for a trade association—the American Bankers Association. I should make it clear, however, that I am speaking only for myself, on the basis of this experience, not for anyone else.

The first principle, of course, is that a public office is a public trust. I am glad to say when I first got into the Government, I was on the staff of Mr. John Lord O'Brian, the general counsel for the War Production Board. Nobody has ever had higher view of the duties and responsibilities and ethics of public officials. He was an outstanding illustration of the fact that the most important element in improving ethical conduct in Government is the individual who has the job.

I am also glad to say that when I was in the Commerce Department and also in the Mutual Security Agency, I wrote codes of ethics for the department and for the agency which started with the general principle that public office is a public trust, and employees must not behave

improperly or make any profits out of their positions. We did not think of making logs at that time, but I think we did try to encourage and impress upon public officials that they have a duty to the public.

I think you, too, Mr. Chairman, as a Senator, have a duty to the public, when you are confirming Cabinet members and agency officials, to make sure that the people who are nominated are aware of these issues and will live up to the kinds of principles you want to write into this bill. In every case the department head, the agency head, and the members of the independent agencies have been confirmed by the Senate. As one who had been on a Senate committee staff for years, I think that the Senate should try to make sure that the officials are confirmed for these positions are aware of these considerations.

My second point is that I wish it might be possible to avoid the use of slogans in this area. "Lobbying" and "influence" are pejorative terms that everybody is afraid of. After reading the Federalist, and the Constitution, I am proud to have been a lobbyist for the Department of Commerce when I was there. I am proud to have been a lobbyist for the American Bankers Association when I was there. And I am proud now to be a lobbyist for another association.

But the fact is that even though I have no objection to lobbyists or to the word "lobbyist." And I think they perform a useful function in the Government, the public generally thinks "lobbying" is a dirty word. The same is true of the word "influence." Anybody who has read the Federalist knows that influencing Senators and Congressmen and influencing the executive branch is the essence of American democracy. But yet, "lobbying" has become a very unfortunate word.

On the other hand, we have favorable slogans. "Truth" is one. If you label a bill "Truth in something or other," it is very difficult to vote against it. A slogan like that is a great help to a bill. "Sunshine" is another word. Everybody believes in sunshine. So if the label "sunshine" is placed on a bill, everyone knows it is a good bill.

But the thousands or millions of Africans who are dying from drought around the Sahara do not think sunshine is an unqualified benefit, nor do those who catch skin cancer from too much exposure to the Sun. Too much sunshine can be as bad as too little sunshine.

All of these slogans should be examined carefully to see what the real facts are. We cannot just go on the theory that because this is a sunshine bill it must be good.

Another thing that I think should be borne in mind is the importance of communications—communications between 200 million Americans and 535 Senators and Congressmen, and the communications between 200 million Americans and the executive branch and the independent agencies. I saw the importance of communications in the Commerce Department and in the War Production Board, where we had industry advisory committees which were carefully screened and scrutinized. I saw the importance of communications in the Senate, and I saw the importance of communications in the American Bankers Association, between the 14,000 banks and their hundreds of thousands of employees and the regulatory agencies and the Congress.

It is very important to make sure that the legislators and the administrators in the executive branch really know what the facts in the industries are, that they really know how a proposed law or regulation is going to affect the industry and to suppliers and cus-

tomers so they can accomplish the right job when they enact a statute or issue a regulation.

In the legislative process and in the regulatory process we are dealing with people. Sometimes communications with people can be carried on better in an informal setting, in an informal discussion, than by requiring everything to be set down in writing and carried out in the form of a written letter or written communication.

I do not think there is any question that requiring every communication to be logged and made public is going to cut down on communications. It is all very well to say that this bill only applies to the executive branch, to the Government official, but the person who is calling up is going to know that his call is going to be logged and published. And he is going to ask himself every time if it is really worth the trouble of being publicized as one who has communicated with an agency.

I think he will think twice before he makes a call under these circumstances. I think that is going to be a loss.

Senator KENNEDY. Do you think if he has something important to say, he is going to think twice.

Mr. HALE. It is true that the pharmaceutical representative who has to get an application approved is going to talk about the application. A banker who has a bank merger application pending or a branch proposal pending, or an application for a charter pending, of course is going to have to call up or write to tell his story. I think that there is a difference between a specific proceeding that is pending and a general policy matter. A specific judicial type of proceeding seems to me may very well follow the same route that you would for a judicial proceeding in court, where nobody would think of an *ex parte* communication.

But the broad regulatory proposals, like the broad statutory proposals are quasilegislative functions. And it would be unthinkable for a Senator or Congressman to say, "I am never going to get a communication, except in writing, except in a formal manner, in connection with a specific bill."

How does one think up the original bill to begin with? Somebody has felt a need for some kind of relief, some kind of remedy, some kind of statute. Somebody has to think that up. Somebody has to go around to the Senator or the staff and say, "We need a bill here." Probably three-quarters of these suggestions do not come to anything. But do not inhibit, do not put restrictions on people discussing the idea that something should be done.

I think that could be a loss to the Government, and I am sure when you come to look at a bill, as a Senator having a bill proposed to you, you think back to all the hundreds and thousands of discussions you have had with constituents over the years, or friends, or any other people, and try to put that particular proposal, that particular bill, into context in the light of what you know about Massachusetts businessmen and teachers and professional people and consumers, and all the other interests that exist in Massachusetts. As a representative of the State, that is your job to do; to think of how this particular proposal is going to affect what you know from every contact you have had, how this bill will affect Massachusetts and the rest of the country too, of course.

Mr. Cutler commented especially on the criminal penalty. I think that imposing a penalty up to 1 year in jail, or up to 1 year in jail and a fine of \$1,000, is very definitely chilling, particularly in a bill which I think one can argue, hardly displays the kind of clarity and precision which the Constitution requires a criminal statute to have. If you have a general statute like the Defense Production Act, where the agency can issue regulations, and it is a crime to violate the regulations, you can be specific in the regulations.

Or if you have a specific crime like committing murder, then it is rational to expect the court to enforce it. But on the very general terms like a major policy question, I wonder if that does qualify under the standard of precision expected of a criminal statute.

KNOWINGLY FALSIFIES, FORGES, OR FAILS TO PREPARE A FILE

Senator KENNEDY. I think we have indicated, some willingness to modify this. But what we are talking about is an agency official who knowingly and willfully falsifies, forges, fails to prepare a file: that is, knowingly and willfully, falsifies or forges or fails. It does seem to me that if we can show that an official knowingly and willfully failed to log, not just someone forgetting to log 1 day, we should take action. We are going to change and adjust this sanction, but we tried to catch those who were purposefully misrepresenting their activities.

Mr. HALE. I recognize those words, Senator. But I am not sure how a jury in Oklahoma or Florida or some other State is going to view my omission, or even worse, my statement that I received a call from somebody or other and we talked about items A, B, C, D, but I forgot E, F, G, and H; or I may have just forgotten one. Now some jury may well believe that if I can remember three things and put those down, I should have put the fourth down. And a jail is a terribly chilling place, I think.

So my conclusion, Senator, it this. We have, as I understand it, three or four of these regulations in force already; one in Justice and several in other agencies, which are working more or less well for the time being. Would it not be possible in the old-fashioned common law approach to try those regulations out for a while, put some pressure on to make sure that Justice does in fact spell out its own regulation, see how it works in these four or five different agencies, and maybe get some more agencies to try it. I can see that in the Justice Department, things are quite different from a consumer protection agency or a consumer product safety agency; or in Justice from the Defense Department, so I suggest that it would be better to do that for a while and see actually how it would work, rather than to try to spell out, in simple terms one statute for varied agencies like State and Defense and Justice, and for the agencies which handle only agency proceedings, like the product safety commission. The differences in the agencies make a single bill very complicated. It might be better to go ahead agency by agency, and see how those different regulations work for some longer period.

Thank you, Mr. Chairman.

Senator KENNEDY. Mr. Cohn?

Mr. COHN. Senator, generally speaking I think this is an admirable proposed piece of legislation and I agree with its thrust and objectives.

I have some comments to make. First, some specific comments and then I will speak generally. On page 9, line 17, the word "press" is used. "This section shall not apply," it says "to requests for information by members of the press." I think for clarification, if it is the intention of the committee, that "press" ought to be expanded to include "broadcasting" or "radio and television," as well.

There is no need to leave in doubt the question as to whether or not "press" does, in fact, include radio and television. And for clarification, if that is the intention of the committee, it ought to be spelled out.

Second, on line 22, of page 9, and again, on line 16 of page 11, the records that the administrator is making are required to be deposited in public file rooms. No provision is made for copies of those particular documents. It would appear to me that either the originals or copies should be left in this public file room, rather than necessarily the originals. Such clarification would avoid any kind of confusion as to what the intention of the committee is.

On page 9, line 24, a reference is made to "public reading room." The agency before which I practice, the Federal Communications Commission, has no public reading room. It has a reference room, it has a library, and it has other kinds of rooms to which the public may go. But I think for clarification, some language ought to be used here, or at least in the committee report, to indicate that it is not necessarily a technically entitled public reading room that you had in mind.

I concur with the comments that were made concerning the severity of the penalties involved for a failure to comply with the act. And I appreciate, Senator, your comment that it has to be knowingly and willfully done in order for the sanctions to be imposed. Nevertheless, as Mr. Hale has pointed out, you might be faced with a jury that does not have the complete thrust of what your interpretation would be of that. Consequently the sanctions could be quite onerous for a basically innocent mistake. I highly recommend that some kind of sanctions be imposed, but not with the severity that have been suggested here.

It has been suggested, Senator, that the White House should be covered. And when I say the White House, I mean the men who work in the White House. And then someone raised the question—I think you raised it—of the separation of powers. One of the overall comments I would like to make is that this particular piece of legislation emphasizes the administrative agencies.

We have, as far as the Congress of the United States is concerned, the Lobbying Act which requires the lobbyist himself to make reports.

But as far as I know, Congressmen are not required to keep records and to make those records available for public inspection. But if we are going to have sunshine in this country, and if we do believe in the Lobbying Act—and we do believe in this particular legislation you have been sponsoring, Senator—I would like to suggest the thought that perhaps some similar type of legislation should be applicable to the Congress of the United States so that if I came to your office, I would be able to see in recorded form, who it was that you talked to about what and when.

After all, I do not have to elaborate on the point that the Congress is where real power lies. Ultimate power is here and not in the administrative agencies over which you have control. More and more the congressional committees have open hearings and more and more infor-

mation is made available to the public because of the openness of those hearings.

Yet, on the other hand—and I don't think that this requires elaborate explanation—there are a great number of things which occur in the Congress of the United States which are not venal, nor Machiavellian and, yet, are never exposed to sunshine. They are an integral part of the democratic process. If we are to have sunshine, I suggest to you the possibility of sunshine also spreading over this particular institution, the Congress of the United States.

Clifford Durr, who was once a Commissioner of the Federal Communications Commission, and a man for whom I worked and admired once commented that the basic problem of the administrative agency is that it does not have men who do not scare easily and who do not rape easily. These, he said, are the the basic qualities of a good administrative agency official.

One of the difficulties that we have in our society today, Senator—and you commented on it in your opening remarks, when you introduced this legislation—is the lack of guts in our administrative agencies. If we had the quality of men that ought to be there, then I do not think there would be a necessity for the kind of legislation that you are proposing here.

I am not suggesting that the legislation is not important, it is and, indeed, should be adopted. But, on the other hand, I simply wanted to make that basic overall comment; that it is a sad commentary that there is this need for the legislation, because it really reflects upon the inadequacy and the quality of our administrators today.

Thank you, Senator.

[An additional comment on the legislation referred to follows:]

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November 13, 1975

Senator Edward M. Kennedy
 Chairman, Subcommittee on
 Administrative Practice and Procedure
 Committee on the Judiciary
 Room 3214 Dirksen Senate Office Building
 Washington, D. C. 20510

Dear Senator

When I testified yesterday before your Committee, I inadvertently failed to make one comment, which I had intended to make, concerning S. 1289.

Paragraph (d) (page 11) provides that the agency official shall maintain prospective and retrospective calendars, and it then goes on to itemize five things that the calendars should contain. Under that Section, as now written, an official would be required to record in his calendars, for example, information concerning meetings which he may have with a relative or a friend who wants to discuss either a personal matter or a matter relating to a neighborhood problem, and is completely unrelated to any possible activity of the agency.

Consequently, may I make the suggestion that there be a provision in Section (d) which provides that the items to be included in his calendars should relate themselves to the kind of subjects which are covered in Section (b)(1).

Sincerely

Marcus Cohn

cc: James Ira Campbell, Jr.

Senator KENNEDY. Mr. Cohn, Henry Geller testified that a great deal of last minute lobbying went on during contested FCC rulemaking proceedings. Do you think any decisions would have been made differently if those communications had been on the public record? Would any lobbying have been inhibited?

Mr. COHN. I cannot speak specifically of any particular rulemaking proceeding at the Commission, but, generally speaking I would have to agree with Henry that this last minute lobbying at the FCC, without recordings of names and days, probably has an impact on the ultimate result of FCC decision.

Mr. Geller, as you know, Senator is a very distinguished lawyer himself and was a very distinguished general counsel at the FCC. He was in the midst of a great number of some of the basic decisions made by the FCC during the past 10 or 15 years.

I was at the FCC in the early 1940's and, consequently, I cannot speak with the same kind of authority that Henry has.

Senator KENNEDY. For the panel, what about the generated mail effort that is made by any number of industries and labor as well? In the lobby bill there is a requirement for the reporting of efforts to generate grass roots mail to Congress. Should we require that that be recorded? Is it useful and important to know if this one particular group is attempting to generate grass roots mail or not?

Mr. MORRISON. Senator Kennedy, I testified about that in connection with the Lobbying Bill and I testified against any such provision, and this is in part for the reason stated by Mr. Cutler that after all, we are dealing with the First Amendment, the right to petition the Government. And I see no logical basis for a distinction between citizen groups on the one hand and industry groups on the other, insofar as this kind of grass roots effort is concerned.

I am very much concerned that any time you require the citizen groups to register, in circumstances like that, be it in connection with labeling requirements at the Food and Drug Administration or some changes in meat requirements for the Agriculture Department, that as soon as you have told the citizen groups that they have to go and fill out a whole bunch of forms, simply because they asked their constituents essentially to write letters to the agency, all of which are on the public record in any event, you are going to have a serious chilling effect on the citizen groups.

I think that in most cases, you would be able to tell pretty quickly whether there are organized efforts. And any administrator who cannot tell that probably is not looking at them very carefully. And I expect in most cases if you ask more than two or three questions, you are going to be able to find out precisely what group is sponsoring a particular letter writing campaign and that can be done without all of the detailed kind of reporting that has been suggested.

If I were wrong on that and if after a few years of trying something like this we got specific complaints about the executive branch lobbying of this kind, I might want to rethink it.

But I personally, and most of the people I have talked to about this, do not see any need to import that whole concept into the myriad of agencies before which citizens have regularly dealings and want to make their views known.

It is hard enough to get citizens to write the executive agencies as it is now, and industry is well enough organized to be able to do it.

But if you are going to impose a burden on the group that is trying to organize citizens to do something like that, you are going to make it even more difficult and you will raise substantial first amendment questions, in my view.

Mr. HALE. My experience would be that if the citizen or industry member does not really agree with you anyway, he probably will not write.

In other words, I think on most of these mass mailings you are only making a person who might himself feel like writing, more of an occasion for writing, but you are not getting him to write. Most organizations do not have the kind of control over their members—which would be required to make them write if they do not agree with you. I know in lots of fields, you can ask people to write until you are blue in the face. And a third of them will write and say the opposite anyway. There is a good measure of independence in the public, at least that is my experience.

But, if they feel that way anyway and they are told that here is an issue on which you feel strongly, then you would get a real response to it. But I do not think that is any real sin on the part of the mass communication.

The person who starts it off is either just triggering or not triggering a feeling that is there already.

DO YOU FAVOR PUBLICATION IN THE FEDERAL REGISTER OF NOTICES OF AGENCIES MEETINGS WITH INDUSTRY REPRESENTATIVES

Senator KENNEDY. What about the practice by some of the Federal agencies to meet informally with industry and labor consumer groups to discuss new regulations. As you know the district court recently upheld the Advisory Committee Act. It requires agencies to publish notices about these meetings in the Federal Register to make them public.

It would be possible to avoid lobbying entirely, if we followed the court's approach in the case and required notice to the public of all meetings, formal and informal, of Federal officials with outsiders.

Do you prefer this approach instead of logging?

Mr. CUTLER. Well I think that of all of the "sunshine" acts that have been passed, that particular one is probably the worst. It seems to me that it sets such conditions on the passage of information between Government and those who are to be regulated or those who have interests, that it is bound to lead to evasion. For example, lawyers, I believe are now advising that the law does not apply if a single adviser goes to state views to the Government rather than a group since it speaks only of committees and groups.

On the other side, a Government agency will go to almost any length to conclude that a particular meeting that it wants to hold for access to information that it wants to have is not an advisory meeting.

It seems to me that statute gets very, very close to depriving both the Government and the citizen of the benefit of the right to petition and also the right to assemble. Going back to your mail argument, we have a right as citizens to urge other people to write. That is part of the right of assembly, as well as the right of petition. And it should not be burdened unnecessarily, especially when the effects of a group effort are self-evident.

If hundreds of letters turn up, clearly, someone was trying to persuade other people to join him in a petition. But, it seems to me that is one of the worst laws that has been passed and the sooner we get rid of it, the better.

Mr. MORRISON. I would not agree entirely with Mr. Cutler's evaluation of the Federal Advisory Committee Act, although I do think there are some complications.

But one of the problems I would point out and which I am in agreement with that should not be extended to this area is that it generally is interpreted only to apply to at least two or more people getting together. And it would not apply to telephone conversations because those are not meetings under the act. And I see no reason to try to extend that particular act to cover the situation. I think it is far better to be done this way and, of course, it would not cover written communications at all. It would only cover meetings. So I would agree with Mr. Cutler to the extent that he recommends against bringing this kind of problem to a solution under the Federal Advisory Committee Act.

Senator KENNEDY. Very briefly; if we pass this logging bill, do you think that it will inhibit your efforts to forcefully represent your client's views before any of the agencies?

Mr. CUTLER. I agree with Mr. Hydeman, not in the slightest. But I think it will inhibit the Government, the Government's ability, to attract decent, self-respecting civil servants; and the Government's ability to conduct its own affairs, enormously.

I wonder, for example, whether anybody has made a count of the number of individuals in the Government who are GS-14 or above. I suspect by the time you check through millions of Government employees, it must be on the order of 100,000 or so. And if that is right, and if everyone of them has to file something every day—let us assume he can get it all on the page—you are generating 100,000 pieces of paper a day.

Senator KENNEDY. It is half that amount, but 50,000 is a lot too.

Mr. HYDEMAN. Senator, it seems to me that as far as—I have already stated my view in terms of our interest in—as people who represent private interests—communication. I do not think there would be any problem because it is important to make those communications. But it does worry me that—the point that Mr. Cutler raises does worry me.

My feeling, as I thought through it, was that at the lower levels of Government, you are getting a fairly high quality person today. The fact that they might have to report communications, I do not think is going to inhibit their going to work for the Government. As far as the top levels, I have difficulty really believing that there is going to be an inhibition.

I think the more serious problem may be that we just generate more paper, and we have a society overloaded with paper. The problem I have with rejecting it on that basis, which does somewhat offend me—the excess paper in the society—is that I think that you get a cathartic effect with this type of bill.

I would agree I did not address myself to it. Mr. Morrison had already done so. But I think the criminal provision, to some extent, may be overstated. I think that you are correct. It did not offend me when

I looked at it, but I think the point made about the impact and the uncertainties in the jury system may suggest that it is a little too harsh.

Mr. CUTLER. Well, it is even being prosecuted, Senator, and you say knowingly and willfully. Remember, it is also knowingly and willfully failing to complete or to file. Now it is very easy to think—let us say you forget to put in a telephone call and on the third day you remember, but you do not get around to sticking it in the file. Have you knowingly and willfully failed and are you going to submit these thousands and thousands of almost entirely highminded people to a criminal charge; the risk that they could even be charged or investigated for failing to file a record?

It is one thing to say that it is a crime to fail to file an income tax return. But to fail to make out an expense account or just to fail to keep some little record in your office certainly should not be criminal. And there are so many other sanctions available.

Mr. MORRISON. I would certainly say, Senator, that in terms of false statements none of the arguments that I have heard today would seem to apply to situations in which knowingly false statements are made. For instance, an official comes to talk about an antitrust investigation and the contact log reflects that they have talked about social policies of HEW. It seems to me there is no reason that I have heard today that would properly be brought to bear in a situation like that; and that there at least ought to be criminal provisions for knowingly filing false returns, or false statements.

Senator KENNEDY. Thank you very much. Your appearance here has been most helpful.

[The prepared statements of Lee Hydeman and Alan Morrison follow:]

PREPARED STATEMENT OF LEE M. HYDEMAN

No one can reasonably quarrel with the objectives of S. 1289. If we have learned anything in the last several years it is that we must have open Government. This means that the general public and public interest groups must be permitted to participate in what has heretofore been the sole preserve of private interests, namely the Federal regulatory process. Essential to effective participation is knowing who is contacting whom outside of public proceedings and knowing what is being presented.

In my view there are only three questions that need to be answered in determining whether the proposed legislation is reasonable.

First, is the bill likely to inhibit desirable contacts between those being regulated and those doing the regulating? Everyone seems to recognize the need for such contacts. This is largely to assure that those performing the regulatory function have a good understanding of the realities of conditions in the industry being regulated, including the impact of specific actions. I might note parenthetically that I believe that the kind and extent of contacts could be altered significantly without insulating the regulators too much from reality. In any event, I can not imagine that this legislation, or even more stringent legislation, would inhibit contacts. Certainly it will not inhibit proper communications. Those being regulated have too much at stake to let the publicizing of communications impede necessary communications. On the other hand, public reporting hopefully will create a greater awareness on the part of those making private communications and those receiving such communications of the propriety of the situation.

The second issue is whether the bill imposes an undue burden on Federal officials. Will too much time be consumed in recordkeeping? It seems to me that the bill is modest in its requirements and has achieved a reasonable balance between burdening officials and providing adequate information to private persons, public interest groups and competitive private interests concerning private communications.

The third issue is whether the bill is broad enough in its coverage of Government employees. It is true as others have noted that many decisions involve or are made by those below the GS-15 level. At the CAB, the line might better be drawn at the GS-14 level. This would include staff members who participate in significant policy decisions. However, as framed, I believe that the bill will result in public reporting of principal contacts on the more significant matters. I might note in this regard that I have generally found that staff people at the lower levels tend to be more circumspect in their contacts with industry representatives, so that the cathartic effect of public reporting, which certainly is a major purpose of the bill, is less significant at those levels.

In sum, I think the bill as drafted is a good step forward. I find no fault with it as written. I believe that the review process provided a year from enactment is the best response to those who are critical or uncertain about the details of the proposal.

With your indulgence, Mr. Chairman, there is another related matter which I would like to discuss briefly. This bill does not specifically address the matter of private communications in a very critical area of decisions in the civil aviation field. This is the area of contacts during the Presidential review of Board decisions involving overseas or foreign air routes. Such decisions may involve new route awards, route exchanges or mergers. These are significant matters both in terms of private interests and in public interest. Under section 801 of the Federal Aviation Act, such decisions are now sent to the President prior to final action and, in fact, prior to publication of the Board's decision. During this process there may be numerous contacts between those representing private interests and those within the executive branch who play a role in advising the President. Often these contacts begin before the case is even set for hearing. Over the past decade, I have witnessed massive pressure, manipulation and improprieties during this review process, which in my view denigrates the integrity of the administrative process, created by Congress. The improprieties stem not only from private contacts but also from the failure of those within the executive branch to limit their review. Generally, there has been a serious disregard for the fact that the Board decision being reviewed is the product of an extensive adjudicative process. In the name of foreign policy and national security—the ostensible reasons for Presidential review—the reviewers undertake what is in effect a *de novo* review, freely substituting their judgment for the Board's. This process has been far more destructive to the integrity of the administrative process than any other area of private communication involving CAB proceedings, of which I am aware.

The American Bar Association, at the urging of our Transportation Committee on Aviation, at its August 1974 meeting, adopted a proposal to eliminate Presidential review, except in cases involving foreign air carriers. The purpose was to restore integrity to the decisional process. That in my judgment is the only solution that will really clean up the process. Short of that, there are some steps that could be taken to improve the situation.

First, the Presidential review could be made a more open process by publicizing the Board's proposed decisions for all to see. Today only those who know their way around town can learn about the contents.

Second, contacts by private parties should be eliminated during this review process. If they are to be permitted, the circumstances should be very compelling and all parties should be given notice that contacts are being permitted and detailed public records should be maintained of such contacts.

Third, the scope of review and those involved in the review process should be limited in keeping with the narrow role of executive review, namely foreign policy and national security.

Let me emphasize that, while these steps may be helpful, I don't believe they will restore integrity to the decisional process or restore public confidence in the final decisions. The only really satisfactory solution is to eliminate the Presidential review. Whatever legitimate foreign policy or defense considerations may be involved can be presented to the Board, either in public or confidential hearings. At present, the State Department and some other executive agencies are unwilling to even appear before the Board. Rather, they wait in the wings until the extensive hearing process is concluded and then step in, often to render the process a nullity. Hopefully the Senate Aviation Subcommittee or this subcommittee will separately consider this critical problem promptly and implement the recommendation of the American Bar Association on this matter.

A BILL

To amend section 801 of the Federal Aviation Act of 1958 to provide that approval of the President for Civil Aeronautics Board decisions involving certificates of U.S. air carriers for overseas or international routes shall not be required.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 801 of the Federal Aviation Act of 1958 (49 U.S.C. 1461) is amended by striking out the following words from the first sentence: "any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or"; and striking out the following words from the second sentence: "certificates and"

Sec. 801. [72 Stat. 782, 49 U.S.C. 1461] The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, [any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or] any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such [certificates and] permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

RESOLUTION

BE IT RESOLVED THAT: The American Bar Association supports the enactment of legislation to amend Section 801 of the Federal Aviation Act (49 U.S.C. §1461) by withdrawing from the President the power of review or approval of Civil Aeronautics Board actions to the extent that such cases involve certificates of public convenience and necessity to U.S. Air Carriers for overseas and foreign air transportation, such withdrawal to be accomplished in a manner which will preserve the President's constitutional rights and obligations in the fields of national defense and foreign relations, while removing economic and domestic political considerations from the decision-making process and assuring availability of judicial review.

~~REPORT WITH LEGISLATIVE RECOMMENDATION~~

AMERICAN BAR ASSOCIATION

REPORT TO THE
HOUSE OF DELEGATES

SECTION OF ADMINISTRATIVE LAW
AND STANDING COMMITTEE ON AERONAUTICAL LAW

RECOMMENDATIONS

The Section of Administrative Law and Standing Committee on Aeronautical Law recommend adoption of the following:

WHEREAS, since 1959 the Association has supported reforms in administrative procedures relating to the President's participation in certification of United States Air Carriers for overseas and foreign routes,

WHEREAS, existing administrative procedures involve the President unnecessarily in disputes among domestic Air Carriers competing for such air routes, and

WHEREAS, the withdrawal of the President from such disputes can be accomplished in a manner which preserves the President's constitutional rights and obligations in the fields of national defense and

foreign relations while removing domestic political considerations, and

WHEREAS, under present procedures there are impediments to judicial review of Civil Aeronautics Board action in such cases;

BE IT RESOLVED THAT: The American Bar Association supports the enactment of legislation to amend Section 801 of the Federal Aviation Act (49 U.S.C. §1461) by withdrawing from the President the power of review or approval of Civil Aeronautics Board actions to the extent that such cases involve certificates of public convenience and necessity to U.S. Air Carriers for overseas and foreign air transportation, such withdrawal to be accomplished in a manner which will preserve the President's constitutional rights and obligations in the fields of national defense and foreign relations, while removing domestic political considerations from the decision-making process and assuring availability of judicial review.

BE IT FURTHER RESOLVED THAT: The President or his designee is authorized to represent the Association in the furtherance of this resolution.

REPORT

1. The general principle of the foregoing recommendation is that the American Bar Association support legislation to withdraw presidential authority over disputes between U.S. Air Carriers competing for lucrative overseas and foreign air routes.

The substance of this resolution was presented to the House of Delegates by the Section of Administrative Law in August, 1973 and February, 1974. Action was deferred in the first instance at the request of the Section of International Law, and in the second instance at the request of the Standing Committee on Aeronautical Law. The Section on Public Utilities Law was consulted and expressed no opposition. The Section on International Law first approved and then decided to reconsider the original resolution in August.

As a result of conferences with representatives of the Standing Committee on Aeronautical Law, the original resolution has been rephrased to enunciate a general principle to be implemented in the legislative process, rather than setting forth the details of the legislation itself. The foregoing revised resolution is being distributed to the above named Sections. It should be noted that the resolution does not propose any change in the President's review of cases involving foreign air carrier permits under Section 402 or of international fares pursuant to Section 801 of the Federal Aviation Act.

2. In the area of foreign and overseas air routes the administrative machinery is significantly different than for domestic routes. Domestic route applications are filed with the Civil Aeronautics Board, which thereupon holds adjudicatory type hearings ultimately culminating in a final administrative order containing the award. (49 U.S.C. §1371 (1970)). Any person who has a substantial interest in the final agency action is entitled to judicial review embracing both procedural and substantive issues, with review of factual questions governed by the "substantial evidence" standard. (49 U.S.C. §1486 (1970)).

While the procedure for foreign air routes is parallel as to the filing of route applications and the Board's conduct of adjudicatory type hearings, the agency's final order is not self-exempting but is instead subject to the "approval of the President":

"(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 1372 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof." Federal Aviation Act of 1958 §801(a), 49 U.S.C. §1461 (1970) as amended, Supp. II (1972).

The Supreme Court found that under this statute the President has the "positive and detailed control over the Board's decisions, unparalleled in the history of American administrative bodies." C & S Air Lines v. Waterman Steamship Corp., 333 U.S. 103, at 109 (1948). The Court went on to hold by a 5-4 vote not only that the President's control is itself immune from judicial review, but also that its mere presence in the certification procedure served to shield the underlying Board action from judicial review as well. *Id.* at 114.

3. This anomaly of administrative practice has long been of concern to the bar, and in 1959 this Association directed a formal resolution to the problem:

"RESOLVED, That the American Bar Association supports the enactment of legislation which will clarify rights to judicial review, in accordance with the provisions of the Administrative Procedure Act, of orders of the Civil Aeronautics Board in proceedings where decisions of the Board are subject to Presidential approval under Section 801 of the Federal Aviation Act of 1958; and

" . . .

"RESOLVED, That the American Bar Association submit to the President of the United States the desirability of establishing or changing administrative procedures within the White House organi-

zation which would result in (1) The earliest possible public publication of Civil Aeronautics Board recommendations to the President, and (2) disclosures, consistent with foreign policy and national defense, of the extent to which consideration has been given to business and economic factors in cases involving foreign and overseas air routes, . . . American Bar Assn. Annual Report-August-1959, pp. 183-84.

4. We believe that the approach set forth in the 1959 resolution has proved to be inadequate. It temporizes with the problem but does not cure it. The anomaly remains. Formal Board hearings, though meticulously pursued, may ultimately prove wholly immaterial; yet hearings which may have in fact provided the entire basis of the ultimate award may not be judicially corrected, even in the face of obvious and prejudicial administrative error. The pressure of domestic air carriers competing for lucrative routes thus inevitably focuses on the White House, and the potentiality of domestic political considerations cannot realistically be disregarded. Both the parties and interested governmental agencies are free to pursue the full spectrum of their competing views within the White House, entirely *ex parte* and thus effectively immune from both challenge and refutation.

Equally unsatisfactory is the situation where presidential review has simply permitted the Board's determination to become effective on its own terms. This is *de facto* no different than a domestic case, yet an aggrieved party has no opportunity to obtain judicial redress even though the President himself may have been critically misled by a Board error of which he was wholly unaware. In the absence of legislative qualification, the *Waterman* doctrine continues to insulate these procedures from judicial review.

The consequences of the present statute were vividly demonstrated in a recent major route proceeding involving two separate administrations, the Transpacific Route Investigation. There, two different sets of awards were made, both superseding the determination of the Board. In each case the superseding award was apparently based not on considerations of foreign policy or national defense, but on substantive determinations of industry economics derived almost entirely from *ex parte* presentation. That assessment replaced the economic assessment made by the Board on the basis of a voluminous public record after hearings.

5. The proposed resolution seeks the correction of these problems by calling for legislation that will remove the President from these disputes, without encroaching upon his constitutional powers and responsibilities in the fields of foreign affairs and national defense. Such legislation should also make clear that Board orders awarding foreign and overseas routes to citizen carriers will be subject to full judicial review in accordance with the familiar principles of the Administrative Procedure Act.

The form of legislation to implement this resolution will necessarily depend upon practical considerations at the time, and we believe it appropriate for the Association to adopt the general principle without limiting itself to precise legislative provisions. Various approaches are possible. For example, the Section of Administrative Law is of the view that the problem can be solved only by removing the President entirely from the certification procedure itself; such foreign policy and national defense considerations as he deems relevant can be amply protected through executive agency participation in Board proceedings and, if necessary, in his negotiation of, or refusal to negotiate, foreign landing rights as to route certifications of which he disapproves. The Standing Committee on Aeronautical Law joins in the desire for full executive participation before the Board, but opposes the interjection of Board veto considerations into bilateral international negotiations for landing rights. It accordingly favors legislation which would retain a limited role for the President in the certification process itself, but would restrict that role to a veto right based exclusively on foreign policy and national defense grounds.

6. While acknowledging these differences as to means of eventual implementation, the Section and Committee are in complete agreement as to the seriousness of the present problem, the necessity for a legislative solution, and the principles necessary to attain that solution. They recognize that alternative approaches to the achievement of those principles can be -- and presumably will be -- fully evaluated by the Congress in the legislative process. They accordingly join in recommending to the Association that it adopt the resolution which they jointly present.

Respectfully submitted,

Frank M. Wozencraft,
Chairman, Section of Administrative Law

J. Paul Cote,
Chairman, Standing Committee on
Aeronautical Law

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October 2, 1974

Robert E. Ginther
Subcommittee on Aviation
Senate Commerce Committee
Room 128 Russell
Washington, D.C. 20510Re: Elimination of presidential approval of
international route awards to U.S. air
carriers

Dear Bob:

In accordance with your conversation with Lee Hydeman, I have enclosed a letter to Chairman Magnuson from Mr. Harrison, the Chairman of the ABA's Administrative Law Section, transmitting a draft of suggested language to effect elimination of the President's review of certificate awards to U.S. air carriers for international routes. Please find enclosed:

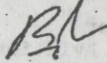
1. Mr. Harrison's letter to Chairman Magnuson.
2. A suggested form of bill.
3. Section 801 with the language to be eliminated shown in brackets.
4. The resolution adopted by the American Bar Association's House of Delegates in Honolulu, Hawaii, August, 1974.
5. The Joint Report of the ABA's Section of Administrative Law and Standing Committee on Aeronautical Law submitted to the House of Delegates at the Summer, 1974 Hawaii meeting on the basis of which the resolution was adopted.

Robert E. Ginther
 October 2, 1974
 Page 2

I hope that the foregoing provides you with what you need. If not, please call me and I will provide anything else that can be useful.

Best personal regards,

Sincerely,



Robert M. Beckman

cc: Lee M. Hydeman
 Marion E. Harrison
 Emory T. Nunneley

Attachments

RMB/mkb

PREPARED STATEMENT OF ALAN B. MORRISON

I am pleased to appear before you today to discuss the Open Communications Act of 1975, which is embodied in S. 1289, in particular the Committee Print of September 19, 1975. In our judgment this is a good bill which fills a clearly defined need and which, subject to the suggestions made below, should be passed by the Congress.

As the subcommittee is fully aware, there are currently pending before the Government Operations Committee a number of bills proposing to amend the lobbying laws, some of which would extend to a greater or lesser degree the coverage of those laws to activities before the executive branch. It is our view that there has been no record made to date that justifies importing those laws, with their full registration and reporting requirements, into the executive branch on a wholesale or even partial basis.

On the other hand, we firmly believe that there is a problem regarding ex parte communications with members of the executive branch in formal proceedings and in other situations. We believe that it is important to make public the extent of such communications and to indicate the general subject matters being discussed so that the public can make an informed judgment about the propriety of such communications.

We believe that S. 1289 is an appropriate means of making such information public for two basic reasons. First, it is an initial step in the direction of disclosure which may or may not lead to further legislation in the future. But regardless of what eventually may be enacted in this area, it is important to take these matters one step at a time, and this appears to us to be an appropriate first step.

Second, S. 1289 places the burden of recording off-the-record communications on public servants who are particularly in a position to control their off-the-record communications and in a position which their off-the-record communications are appropriately a matter for public scrutiny. Because the bill limits its reporting requirements to officials in high positions, they will generally have available to them sufficient secretarial help to ease any burden that otherwise might exist. Moreover, such officials generally make contact with persons outside their agency in person or by telephone in their offices, unlike Members of Congress who often encounter constituents and lobbyists off the floor, and at various official and unofficial functions. While there are some burdens associated with the requirements of S. 1289, we believe that as it is now written, those burdens are minimal and should not take any appreciable amount of time away from other duties.

It has been suggested by some that the logging of all contacts will inhibit the flow of information to Government officials. We would tend to agree with that analysis were the logging requirements placed on private citizens, particularly where the contacts involved lower level employees. But S. 1289 puts no burden on citizens and requires that communications be recorded only if received by those at the GS-15 level and above. Therefore, we see little possibility that there will be any significant inhibitions on the flow of proper communications.

On the other hand, there may well be inhibitions of improper or questionable communications. Consider for example, the communications made by International Telephone and Telegraph Corporation and its various lobbyists in connection with its antitrust difficulties in the early 70's. It would have been highly relevant to know, for example, that contacts were being made to Secretary of the Treasury John Connally and Vice President Spiro Agnew regarding the ITT cases that were then being pressed by the Justice Department, not to mention the secret dealings that top Justice Department officials had with Felix Rohatyn that played such an important role in settling the cases. And of course, the public might well have asked some questions if the public logs had shown that Presidential aide Peter Flanigan was asking securities analyst Richard Ramsden for his view on the possible effects a divestiture by ITT of the Hartford Fire Insurance Company might have on the stock market, building pressure within the administration for the Justice Department to drop the litigation. If S. 1289 had been the law at that time, there might well have been some inhibition of contacts, but I suggest to you that our antitrust policies would have been far better served without such off the record communications to high executive officials.

In a similar vein, the conversations between milk lobbyist Jake Jacobsen and Treasury Secretary Connally about matters then pending before the Agriculture Department should have been made a matter of public record, as should the

various meetings in the White House involving industry lobbyists seeking the reversal of the milk price support decision. Had those meetings been a matter of public record at that time, many of the questions about them might have been raised when there was still an opportunity to do something about reversing those policy determinations.

We recognize that business organizations may feel inhibited if the public disclosure of the subject of their discussions with appropriate government officials would cause them substantial competitive harm. We believe, however, that the provisions of section (c) (2) (D) adequately protect those interests by providing for an exception to the public disclosure rules.¹ On the other hand, we see no basis for concluding that government officials would be inhibited by S. 1289 since they are under an obligation to seek out relevant materials and opinions from all interested segments of the population. Indeed, making their communications with outsiders a matter of public record will permit the public to determine whether they are in fact listening to many or simply a few and whether they are properly discharging their public responsibilities.

With respect to the scope of S. 1289, there seems to be little objection to requiring that in formal proceedings of any kind—adjudications, rulemakings, or licensings—*ex parte* communications ought to be a matter of public record. That analysis would also lead to the conclusion that where Government officials in one agency communicate with the decisionmakers in another in any formal proceedings, all such communications also ought to be made a matter of public record.

That leaves open what to do in other informal proceedings, and S. 1289, wisely in our view, requires all substantive discussions to be covered by it. Why, for instance, should a communication to a high official in the executive branch asking that official to urge the administration to support a bill pending before Congress not be made a matter of public record, particularly if the lobbying laws do not extend fully to the executive branch? Why, for instance shouldn't a communication made by a company official to the Secretary of Commerce asking him to use his influence to quash a Justice Department antitrust investigation, not be made a matter of public record simply because there is no formal proceeding yet started? And since the decision whether to start or stop an investigation may be one of the most crucial, high level communications relating to that decision ought not to be kept eternally secret.

There is a further practical reason why the bill's coverage should not stop at formal proceedings. When Harold Geneen, chief executive officer of ITT, discussed "general antitrust policy" with then-Attorney General John Mitchell, that was a matter in which the public had a great interest, both because of ITT's then-pending litigation with the Justice Department, and because John Mitchell had disqualified himself from acting in those cases. Whether "general antitrust policies" were indeed the subject discussed is something that we may never know, but it surely would have been important to have the existence of that conversation and the alleged subject matter made public at that time.

It is doubtless true that any definition utilizing such phrases as "other important agency actions" or "policy issues" can never answer all of the questions that may be raised. However, give the context in which S. 1289 is written, the moral ought to be, when in doubt, write it down, since doing so in any particular case represents a miniscule additional burden. And as subsection (e) makes clear, the failure to record a conversation results in criminal liability only if done knowingly and willfully. It seems hard to believe that honest errors will not be seen as simply that.

Our support of the bill is qualified in one important respect: it relates to an issue which falls somewhere between the lobbying laws and S. 1289—the subject of gifts, loans, entertaining, vacations, and free plane rides to members of the executive branch. Over the last few months, the media has been filled with stories of lavish entertaining of Pentagon officials by Northrup and other defense contractors. We urge this subcommittee to ensure that in some legislation dealing with this topic—be it S. 1289 or one of the lobbying bills—provisions be included requiring that expenditures of funds by those with business before the Government be fully reported for the public.

In drafting such provisions, we urge that the following principles be followed: when the donor is an organization, there must be disclosure of every gift, loan, entertainment, free transportation, honoraria, any other similar benefits, given to any employee at the level of GS-12 and above, including all Members of Con-

¹ In certain limited respects, we believe that this provision goes too far. See p. 8.

gress and their staffs, as well as those in the executive branch. We believe that there ought to be no de minimus rule when an organization is paying for such expenditures, and it is only the public that should decide when generosity has exceeded proper bounds and hence is suspect. Where the gift is from an individual with business before the Government (either personally or on behalf of his/her employer), disclosure should be required regardless of the amount if there is reimbursement by an employer, or the individual deducts the expenditure. Where there is no reimbursement or business deduction, such individuals should be required to make disclosures if the amount of the gift exceeds a figure such as \$100 (the amount used in the election law). While any such dividing law is of necessity somewhat arbitrary, there comes a time when individual contributions are simply too generous to go unreported. It is far too easy for a corporation simply to increase the salary of its high officials so that after paying their added taxes, they still have sufficient funds remaining to make "personal" gifts.²

With respect to the specifics of S. 1289, we are concerned that the definition of "agency official" in subsection (a)(1), which is limited to the "executive branch" may not be broad enough to reach officials of independent regulatory agencies, not to mention organizations such as the Postal Service and the Federal Reserve Board, all of whom should be subject to this law. See 5 U.S.C. section 552(e). Next, the legislative history, if not the statute itself, should make it clear that it is fully applicable to members of the White House staff, and to the President and Vice President, at least with regard to publication of their calendars. On the other hand, with respect to the President and the Vice President, there may be constitutional impediments and national security questions involved in requiring full disclosure, not to mention the practical questions in enforcing such provisions. And what of the mail that the President "receives" only after it has been screened by his staff? Would that be reported? Whatever resolution the subcommittee makes with respect to issues such as that, it ought to do so directly and openly rather than leaving the matter subject to litigation. Finally, with respect to this definition, it should be made fully applicable to paid consultants to the government who, while on duty, are compensated at GS-15 levels. While they may not be decisionmakers in a formal sense, they often can have highly significant roles in policy formulation and hence ought to be brought under the coverage of S. 1289.

We are somewhat concerned about the requirement of subsection (b)(1) which, read broadly, suggests that communications which take place after business hours in purely social settings may also be covered by this bill. If that is the intent of it, the language should be clearly drafted to reflect that intent, but before adopting that position, careful consideration ought to be given to whether the additional burden, which would surely result from such an extension, is worth the benefits to be derived, particularly in light of the extraordinary difficulties of enforcing any such far-reaching legislation. While we believe the question to be a close one, it is our view that the simple report which is now required would not place any great burden on executive officials if the rules were applicable beyond normal business hours and outside the office setting.

With respect to the provisions of subsection (c) regarding the public filing of these reports, we would urge that specific language be included either in the statute or in the legislative history requiring that the indexing be done by subject matter, by docket number, and by the name and position of the relevant official, so that with any of these items of information, an interested member of the public or the press can gain ready access to the relevant material.

With respect to the exception contained in subsection (c)(2), we agree with the exclusion in subclause (A) regarding confidential sources for investigations and enforcement proceedings. We also believe that communications on behalf of subjects of civil or criminal enforcement investigations need not be disclosed, at least until a formal proceeding has been commenced, after which we would see no reason in keeping the file secret. We are, however, somewhat troubled by the exemption in subsection (C) which appears to import in large part the part of the fifth exemption to the Freedom of Information Act for interagency communications. One difficulty with this provision arises because under the applicable law, portions of a record which contain facts must be disclosed and it is not clear how proposed exemption (C) would apply in that instance. But

² We would, of course, support an exception for gifts to close relatives.

more fundamentally, it is precisely the kind of material that would not be available under the Freedom of Information Act—recommendations—that most need to be disclosed. If the Secretary of Commerce recommends to the head of the Antitrust Division that an investigation or a pending proceeding be stopped, that is exactly the kind of information that ought to be on the public record. Such disclosure would be limited to communications from other agencies, and hence communications with subordinates would not be made public. We acknowledge that it might be appropriate to permit nondisclosure of interagency communications if they relate to a subject that would otherwise be exempt under one of the other subparts of subsection (c) (2), such as that relating to an interagency recommendation on a criminal tax fraud investigation that was underway.

Our only other suggestion relates to enforcement. Criminal penalties are appropriate in one some cases, and they can never be used if there is a difference of opinion as to the meaning of a provision or if the offending official occupies a high place in the Administration. Therefore, we urge the inclusion of a provision allowing citizens to maintain actions in the federal courts to enforce the provisions of S. 1289. Without such a provision, S. 1289 could become little more than a dead letter in a matter of just a few years. It deserves a far better fate than that.

Senator KENNEDY [continuing]. Our final witness is Jon Mills, executive director, Center for Governmental Responsibility in Gainesville, Fla. Mr. Mills is the founder of the center. Last year, he did an outstanding analysis of the proposed freedom of information amendments for the committee and now we are glad to have the benefit of his work on S. 1289.

STATEMENT OF JON L. MILLS, EXECUTIVE DIRECTOR, CENTER FOR GOVERNMENTAL RESPONSIBILITY

Mr. MILLS. Thank you, Senator. If I may, I would like to submit my statement for the record.

Senator KENNEDY. All the statements will be printed in their entirety. It is a very excellent statement.

Mr. MILLS. As you stated this morning, and as others have mentioned, all Federal agencies are supposed to be acting in the public interest. It is somewhat sad to note that a recent study done by the Senate Intergovernmental Relations Committee, through a Harris survey, revealed that 74 percent of the public believes that the special interests get more from the Government than the people do.

It seems to me that the essential thrust of this bill is to try to remedy that situation. Overall, S. 1289 seems to be a sensible effort to regain the public's faith, to curb abuses, and to avoid some of the very tricky first amendment questions, which arise in dealing with public contacts. Also it is worth noting that the mood at the moment seems to be right. The Senate has recently passed the Sunshine bill (S. 5) without a dissenting vote.

S. 1289 offers another chance to further increase openness and avoid abuses.

In analyzing S. 1289, our center specifically looked in detail at four agencies which are currently operating their own logging provisions: the Consumer Product Safety Commission, the Food and Drug Administration, the Federal Trade Commission, and the Federal Energy Administration. It is our conclusion, after analyzing the bill in light of the operational success of these agencies, that the practice of logging is workable.

PROBLEMS MAY ARISE FROM THE CRIMINAL PROVISIONS

We do, however, have four particular suggestions which I would briefly like to mention. First, with regard to the remedies available for violations of S. 1289. Problems may arise from the criminal provisions. Some of these problems have been discussed by those who testified this morning, but there is another which I have not heard raised.

There are criminal provisions which exist in other open meetings and open Government types of legislation, including the Florida Sunshine Act. What has occurred in Florida is not numerous persons have been prosecuted as feared; but in fact, over a course of almost 10 years, not one person has actually been punished for violating the Sunshine Act.

Apparently this is the result of the fear of overpenalizing persons, as has been suggested this morning. It is not because the Sunshine Act has not been violated. We have done a survey of the effectiveness of that act and the level of familiarity of members of the Government bodies to which the bill applies; the result was that only one in 10 Government officials could answer all of the questions and correctly identify situations dealing with open meetings.

Our study therefore reveals that there have probably been thousands of violations, but not one single person has been punished for violating that bill.

An alternative which might respond to this problem would be to add to the bill a civil remedy. In response to this problem, S. 5 has provisions for civil remedies. We would suggest that this sort of alternative provision would increase accountability by allowing more effective enforcement in cases where criminal penalties were inappropriate. The provision in the Sunshine law allows Federal district courts to enforce by declaratory judgment, injunctive relief or otherwise. We think this would be wise on several counts.

LOGS WHICH HAVE BEEN CREATED BY THE AGENCY SHOULD BE EFFECTIVELY INDEXED

Our second suggestion is that the logs that have been created by the agency should be effectively indexed. It is vital to have a bill which is enforceable, but also to have one that is usable to the public. Just because contacts are logged does not mean that that information is useful to the public, which we discovered by people directly attempting to sift through the existing logs in the agencies which currently log.

The prior draft of S. 1289 mentioned that indexing should be required. I would suggest that it would be more effective to include a direct provision requiring the promulgation of rules for indexing; perhaps by official, by subject, and by date. This is an important aspect of the bill which the administrative conference should also examine.

GENERAL EXCEPTIONS: LOGGING CONTRACTS AND LOGGING INFORMATION

A third suggestion relates to the general exceptions to logging in the bill. Earlier this morning, the gentleman who was testifying for the National Association of Manufacturers reflected a confusion which a

number of people have with this bill—that is, the distinction between logging contacts and logging information. At the moment, the bill has four exceptions to logging publicly the existence of a contact. I would suggest that it is not necessary to include exceptions to logging the existence of a contact, while it might be necessary to exclude certain information which might be sensitive.

Therefore, the change in the act would allow all important meetings to be recorded publicly to note their existence, and all information not of a sensitive nature would also be recorded. Whereas, if certain provisions dealt with national security matters or trade secrets, they in particular could be excluded, and their exclusion could be noted as being for that reason.

Senator KENNEDY. We do not do that in the current draft?

Mr. MILLS. No, you do not.

Senator KENNEDY. So you agree, we ought to do that?

Mr. MILLS. Yes. I think the result would be more than just adding paperwork because at some time individuals could note a pattern of confidentiality—that is, if a particular official had a long log of contacts all of which were noted to be confidential, at least he can be checked upon, and the more confidential subject matter can be sought more directly.

CORRESPONDENCE PROVISION SHOULD BE MODIFIED

The fourth suggestion we have is that the provision concerning correspondence be modified. S. 1289 currently exempts written communications routinely available for public inspection. This may possibly create a flood of correspondence rather than contact by telephone or by direct meeting. In fact, there was an indication of this in some of our interviews. An individual of the FEA who said that he began logging contacts in person and by telephone had an increase in his written correspondence from people who had formerly called him.

The danger of the breadth of the exemption which relates to communications routinely available for public inspection is that a great number of letters presumably available for public inspection under the Freedom of Information Act would not be recorded. To have a provision which allows this many contacts to be exempted may well provide a loophole.

To conclude I would like to respond to one or two of the principal complaints that I have heard about S. 1289 back this morning and previously. One of the major complaints seems to be that there is a burden on the agency and that it is not worth the benefit derived from logging. It is worth noting that although we encountered individuals in these various agencies who said that the logging provisions had some problematic effect on their operations. They generally added their belief that logging tended to improve their image and may have helped their overall operation.

To quote directly a CPSC official, "It's amazing how easy it is once you get used to it. It's not an awful barrier, and it does give you a certain degree of freedom."

Also the cost in terms of actual expenditures are not prohibitive. The costs for administering these CPSC logging procedures were less than those for administering the Freedom of Information Act. The

other side of the balance is that there seems to be a substantial benefit. People sometimes question whether open reforms have any impact; whether opening up a meeting or logging contacts actually has an impact on the decisionmaking process.

In Florida, a survey we conducted showed that about 64 percent of the public officials surveyed felt that the impact of citizens opinions had increased specifically because of the sunshine bill.

There is reason to believe that this sort of logging provision might have a similar effect. There are already examples of public interest. For example, the calendar which has been created by the CPSC had a mailing list last year of 1,000 for their logs. This year, there are 3,500 people on that mailing list. Apparently, there is an increased interest in the public and individuals who are using them.

A second major criticism of the bill is that logging may impair the communications of private individuals with Government. It is interesting to note that this morning several persons speaking to this issue, in particular the gentleman from the drug industry, said that they felt it would not impair their right or their ability to contact and deal with executive agencies.

There is also no indication of reduced contracts in the agencies which are currently using the logging provisions. Those persons did not say they had fewer contacts with members of the private sector or the public sector or lobbyists. Also, there is no direct burden on the private individual as there may be in other types of lobby disclosure bills.

On balance, it seems to me that the provisions of 1289 are a workable means of disclosing what may be offensive contacts which could be dangerous to the public interest. The experience of the agencies we examined reveal no unreasonable burden, and we believe that S. 1289 is a step in the right direction toward increased accountability and openness.

Senator KENNEDY. Would you extend this legislation to contacts with Congress as well?

Mr. MILLS. I think it could be extended to contacts with Congress, but there is a new difficulty involved here because of such things as constituent mail and persons petitioning on a particular legislative bill. There is probably a much greater volume of mail involved. As to certain types of contacts and meetings, I think it would be a good idea.

Senator KENNEDY. Do you have any ideas how to accomplish this? There may be forces who want to kill this whole program, by adding to it to the point where it just will not be workable. If you could give some thought to the issue of congressional coverage that would be very helpful, and we could see what we could do on that. We would also like your ideas on the White House contacts. You think they should be included as well?

Mr. MILLS. Yes, I do.

Senator KENNEDY. All of them, or above a level, or below what level? Could you give that issue some thought? Could you submit a note to us on that?

Mr. MILLS. We will submit something on that. We initial reaction is that although there are obvious separation-of-power dangers, that

what would result from this is a bill that could apply to the executive branch at the White House level.

Senator KENNEDY. Tell me finally : do you think there is going to be too much paperwork?

Mr. MILLS. There are examples of the paperwork in some of the agencies which we went through. It depends on the degree of sincerity with which some agencies may approach it.

At the moment, the FTC only has 75 contacts over 11½ years, which would indicate that either they are saving a lot of paperwork, or they may not be recording all of their contacts. The overall conclusion is that the trade-off between the additional paperwork and the benefit to the public would seem to be resolved in favor of the benefit to the public.

Senator KENNEDY. Well, that is a good point to conclude the hearing on. We will look for your comments on these other matters, and we thank you very much for your appearance here.

We will recess.

[Whereupon, at 12:10 p.m., the subcommittee adjourned.]

[The prepared statement of Jon L. Mills follows:]

PREPARED STATEMENT OF JON L. MILLS

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Appendix

TESTIMONY ON
OPEN COMMUNICATIONS ACT OF 1975

Perspective

Improper influence on government officials has been recognized as a danger since the beginning of the Republic. James Madison, writing in The Federalist, realized that special interest groups were a potentially destructive force. There were two methods by which these forces could be arrested: either by removing the cause or controlling the effect. Removing the cause, i.e., the special interest groups, would not only be impossible, he concluded, but also undesirable. Thus Madison determined: "The regulation of these various interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government." (The Federalist, No. 10 at 54, Lodge ed. 1888).*

Despite the recognition of the existence of special interests and despite the fact that lobbying has been the specific topic of legislative concern since almost the beginning of the 20th century, no legislation has dealt with it until 1946. The achievements of that legislation have been dubious. Although the 1946 Act survived a Constitutional challenge, it has been judged to have failed in many other respects in the prevention of lobbying abuses.

* J. F. Kennedy, Congressional Lobbies: A Chronic Problem Re-Examined, 45 Georgetown Law Journal 539 (1957).

Control of lobbying abuses is more than an abstract "good government" issue. The results of lobbying can affect every citizen. For example, in the summer of 1971 the Justice Department announced that it would not press an anti-trust action against I.T.T. - a suit that, reportedly, the Department was certain to win. The announcement which signaled the shift in government anti-trust policy came in the wake of a massive lobbying effort by I.T.T. It was revealed that their success was based in part on a pledge to help finance the Republican Convention to the tune of \$400,000. Thus the larger public interest which would have been served by abolition of anti-competitive practices was subservient to the private interests of avoiding a lawsuit.

The public has been well aware of abuses at the highest levels stemming from lobbying, from the "Five Percentors" of the Truman era, through the I.T.T. and Vesco cases during the Nixon administration. These abuses have taken their toll. The overall effect is part of what a Harris Poll, commissioned by the United States Senate Subcommittee on Inter-Governmental Relations, found was a "full blown crisis of confidence." Significantly, that survey found that 74 per cent of the people believed that "special interests get more from government than the people do."

With Watergate almost two years behind us, the country has still not instituted a significant change to avoid the same abuses. The renewed consideration of lobbying reform does, however, offer an opportunity to reduce the potential of future Watergates. Apparently the mood is right for this type of reform. The Senate has recently recognized that openness is a fundamental element of accountable government by passing the "Government in the Sunshine" Law without a dissenting vote. Opening lobbying

procedures to public view deserves the same attention and support.

The task of lobbying reform, however, is not an easy one. What makes lobby disclosure difficult is achieving the balance between encouraging citizen participation and input in government and discouraging improper influence. The most basic principles of the U.S. Constitution protect public communications with members of government: the freedom of expression and the right to petition. The best reform would be that which least inhibits expression, while providing the most pragmatic disclosure to discourage abuse.

Much lobbying serves a useful purpose, i.e., informational and positive input that are necessary for informed decision making. The positive aspects of lobbying, however, should not obscure the social costs, i.e., the abuses of lobbying. Groups with economic interests tend to dominate the lobbying process. Such overrepresentation has conferred a lack of legitimacy on government decisions. In order to combat such domination, various attempts have been made to control lobbying abuses via registration and disclosure.

The first attempt to enact a federal law to regulate lobbying came in 1907^{*}; however, no federal law was enacted until 1946, when the Federal Regulation of Lobbying Act was passed. The federal law covers only attempts to influence Congress, even though some of the most effective and pervasive lobbying today is directed at executive and regulatory agencies. In addition, the 1946 act is riddled with loopholes and contains inadequate enforcement provisions. The various interpretive difficulties in the act

* In 1907 three bills were introduced, H.R. 25369, 25617, 25767 (59th Congress).

give rise to problems with respect to who must file and report; there are no guidelines for reporting and disseminating information made public under the reporting provisions. In 1954 a closely divided Supreme Court in U.S. v. Harriss upheld the constitutionality of the Act, but, in the process substantially rewrote the Act and considerably limited its application. The Supreme Court's interpretation under Harriss eliminated entirely those portions of the Act involving indirect efforts to influence legislation, and limited the Act's coverage to only direct communication with Federal officers. The narrow reading of the 1946 Act resulted in the Act's applicability only to those persons who actually solicited or received money to influence legislation.

The need for lobbying disclosure legislation has also been recognized by the states. Forty-eight states have some kind of lobbying disclosure statute and over half of these contain stricter standards than the 1946 Federal Regulation of Lobbying Act. Sixteen have tightened lobbying disclosure laws or enacted comprehensive new statutes since November of 1972. Eight state laws cover attempts to influence executive branch decision making.* In Massachusetts executive branch officials must log contacts with and report gifts from agency licensees. The most stringent of the state lobby laws is that of California, known as Proposition Nine (or the Political Reform Act of 1974).

It is apparent, not only from the ineffectiveness of the 1946 Act, but from the recurrent lobbying abuses, that some federal reforms

* Arizona (Chapter 198 of 1974); California (Political Reform Act of 1974, Proposition 9); Colorado (Initiative #3 of 1972); Kansas (Chapters 353 and 354 of 1974); Louisiana (Title 24, 51-55 of 1972); Massachusetts (Chapter 981 of 1973); Minnesota (Chapter 470 of 1974); and Washington (Initiative 276 of 1972).

are needed. Currently, proposals include lobbying registration and disclosure as well as logging. There are proposals for lobby reforms relating to both the executive and legislative branches. Various lobbying bills from the Congress include H.R. 15, the Public Disclosure of Lobbying Act of 1975 (Railsback-Kastenmeier); S. 815, The Open Government Act of 1975 (Kennedy-Stafford); and in particular, S. 1289, the Open Communications Act of 1975 (Kennedy-Clark-Percy-Ribicoff-Stafford).

Logging, not unlike lobbying registration and reporting, is another avenue for acquiring more openness and conferring greater legitimacy to the decision making process, while at the same time avoiding some of the First Amendment problems which are inherent in the lobbying bills. Logging avoids some of the "chilling effect" arguments which have been made by those opposed to more stringent lobbying disclosure laws.

Specifically logging avoids the chilling effect which might be caused by those who are afraid to contact government officials because of the lobbying regulations. For instance, it has been argued that California businessmen, since the passage of Proposition Nine, are afraid to contact their legislators in Sacramento, not for fear of being exposed, but rather from fear of inadvertently violating one of the many provisions of Proposition Nine.

Without passing judgment on the complexity of Proposition Nine or the reasoning capacity of California businessmen, logging would eliminate this aspect of the problem. Logging is done entirely by the executive branch official. The contacting individual is not required to do anything. Thus the lobbyist or private individual does not have to

decide whether a particular contact with a legislator or government official should be reported or whether criminal penalties might be imposed for failure to register as a lobbyist. Thus the threshold question of defining "who is a lobbyist" is avoided. The executive official has the burden of preparing a log of the contact.

Logging may prove to be a rather simple means by which improper conduct may be discouraged. Logging does not restrict contact; it merely records it, without making any value judgments concerning the communication logged. The agency employee simply logs all of his contacts, resulting in a visible pattern of the influences directed toward the executive branch.

Our research began with an extensive examination of the legal and constitutional issues raised by the logging bill and the broader lobbying proposals. Also, in order to better evaluate the pragmatic impact of S.1289, we investigated the logging procedures of four selected agencies: the Federal Energy Administration, the Federal Trade Commission, the Food and Drug Administration, and the Consumer Products Safety Commission. The agencies show great variation in their use of regulations and practices, resulting in a broad range of effectiveness in lobbying disclosure.

The Consumer Products Safety Commission, for example, requires all employees to log all contacts on "substantial interest matters" and to provide advance notice of such contacts by means of a prospective calendar [see Appendices E(1) and (2)]. All oral communications, including telephone calls, are logged after the fact [see Appendix E(3)]. The CPSC Office of

the Secretary also maintains a log of incoming correspondence [see Appendix E(4)]. This "goldfish bowl" quality has not seemed to hinder the efficiency of the agency, nor been costly to operate. As one CPSC official put it, "it's amazing how easy it does work once you get into it. . . . It's not an awful barrier and it gives you a certain freedom."

At the other end of the spectrum was the FTC. Although the FTC publishes a prospective calendar, a recording of which is available by telephone, it is limited to the activities of the Chairman. All FTC personnel are subject to a requirement that oral contacts with non-involved persons outside the Commission be recorded in memorandum form [see Appendix C(1)], but only about 75 such contacts have been reported by the entire agency over the past year and a half. (The CPSC averages between 40 and 60 a week.)

Between these two extremes lie the FEA and the FDA. The FEA maintains no prospective calendar but does utilize a retrospective calendar to record contacts of senior officials and requires personnel of ratings higher than GS11 to prepare "Report of Contact" forms reflecting ex parte contacts [see Appendix B(1)]. The FDA makes extensive use of both a prospective calendar and a retrospective calendar to disclose contacts of a number of senior officials and extends requirements for reports of ex parte communications to all agency personnel [see Appendices D(1) and (2)].

Appendix A provides a more detailed explanation of each agency's procedures. Subsequent appendices are samples of actual forms used by agency personnel in carrying out required procedures.

Methodology of Logging: S.1289

In order to understand S.1289 and logging in general it is necessary to consider six aspects of the situation:

1. What officials should record their contacts--Who?
2. What types of contacts, substantively and procedurally, should be logged--What?
3. Contacts with whom, or what communicants should be included--With Whom?
4. How should contact information be logged--How?
5. How should records be compiled and analyzed--Compilation and Analysis of logs?
6. How should logs be made available--Publication and Access?

To answer these questions we have considered the provisions of S.1289 and the regulations and current practices of the four agencies mentioned earlier. In evaluating the proposed answers to these questions we have tried to keep in mind that the purpose of logging is to provide the most complete record of policy-relevant contacts with agencies, with the minimum of effort and disruption of the administrative operations. Thus the logging system should be complete, simple to use, and effective.

1. Who should record contacts?

Requirements to log could include all agency employees, all above a certain grade level, some specified set of officials, or some combination of these. S.1289 calls for agency officials, appointed officers or employees compensated at above the GS-14 level [Section 560(a)(1)], as well as those other officials designated by the agency as participating in policy-making [Section 560(b)(2)(A)]; existing agency practices vary. The FEA utilizes GS-11 as the cutoff. In contrast, the FDA requires only 7 senior officials,

associate and assistant commissioners, and their respective deputies to log. The FTC's regulations would appear to require logging by all employees, as does the CPSC, when the contact is a "substantial interest matter."

The actual practices in the agencies are not what is in the regulation books. In the FDA, although the regulation would indicate that all officials should log, only Bureau Directors and management levels are recording. In the FTC where logging procedures have been in existence for one and a half years, only 75 contacts have been reported.

At the moment it appears that the determination of who should log is variously defined even within the same regulations. The consequence is a reduced usefulness of the logs for lack of knowing how broad a given agency's interpretations might be. The guidelines in S.1289 requiring those above GS-14 and others defined by agencies provide some uniform basis for interpretation. Under a similar standard the FEA reported that they were not overburdened. In fact, they increased the number of individuals required to log by reducing the cutoff level from GS-14 to GS-11 in September of this year.

2. What types of contacts should be logged?

Types of contacts may be distinguished in terms of their substantive or trivial nature, and in terms of the means or forms of conveyance of the communication--in person, by telephone, or by mail. Our basic premise in this situation is that when in doubt, contacts should be logged through the most efficient system possible. Logging of contacts is required where the matter is the subject of agency proceedings such as rulemaking, orders, adjudications, and other important agency actions and policy issues with the exception of written communications routinely available to the public.

Agencies have taken varied approaches as to what must be logged. The FDA requires recording of all significant events including meetings, conferences,

seminars, social events sponsored by the regulated industries, and speeches. Telephone conversations are not required to be logged although some officials do. It was reported that after taking the option to log phone calls such FDA officials were "now receiving less phone calls and more letters." Written communications, needless to say, are not published as records on the FDA retrospective calendar.

The FEA and FTC have somewhat similar standards. They are not required to record routine matters or inquiries such as requests concerning the status of a matter, when actions may be taken, or the availability and location of public information concerning a matter. Both require logging of oral contacts in person, by telephone, or otherwise when there is a communication from a "non-involved person." The FEA definition of a non-involved person is very similar to the FTC's:

A non-involved person is one with whom contact would normally not be made in the routine handling of the investigation or case and includes, but is not limited to, a Member of Congress or his staff, an official of another government agency or of the Executive Branch and any other person in public or private life not directly involved in the matter. It does not include an official or employee of the Commission or a person outside of the Commission with whom an employee would be expected routinely to communicate in the normal course of handling a matter. Examples of those who would not be considered a non-involved person include a person under investigation, an informant in an investigation, a party or witness to a proceeding or the attorney for such a person.

An interesting interpretation of what is logged which cuts through the verbage was given by a FTC employee. "Only if the communication is posed in a manner such as 'buttonholing' would the employee be required to log." This is probably a subjective matter with each employee and demonstrates that any definition will be subject to interpretation by those who use it.

The CPSC requires not only logging, but detailed summaries of all meetings and telephone conversations involving "matters of substantial interest" before the Commission. Contacts, according to Chairman Richard Simpson, are recorded when "... pertaining in whole or in part to any issue that as a minimum is

likely to be the subject of a regulatory or policy decision of the Commission." (Statement of CPSC Chairman Richard O. Simpson to the Senate Administrative Practice and Procedure Subcommittee, April 14, 1975).

Chairman Simpson's statement reflects the goal of attempting to identify contacts relating to the policy process. While each agency ultimately will do some self definition of what should be logged, the bill should make clear the basic requirements of what subject matter contact triggers the logging mechanism. The language of S.1289 specifies matters which are the subject of agency proceedings, other important agency actions or policy issues, as criteria for the subject matter. The breadth of this provision is sufficient to avoid a narrow interpretation which might avoid sufficient logging. S.1289 exempts "written communications routinely available for public inspection." If an agency retains a letter it becomes part of their agency records, and is therefore subject to inspection under the Freedom of Information Act. A problem with gaining access to letters through the FOIA is the fact that a person cannot request all agency correspondence, but must request with reference to a specific matter or document. Where correspondence is not indexed it becomes very difficult to make a specific request unless the requesting person has knowledge, prior to his request, of the existence of the document. Since this is usually not the case, an index in the form of a log such as the CPSC's would facilitate access.

Our research on the FDA showed that letters were used more frequently when an official began logging phone calls as well as in-person contacts. The FDA does not require that written correspondence be logged, and a loophole is therefore provided. To prevent the subversion of the purpose of the logging provision, namely full disclosure of policy communications with agencies, written communications should be included.

3. Communicants--contacts by whom?

The coverage on S.1289 is appropriately broader than agency requirements and combats the possibility of missing some of the most dangerous areas for potential abuse. S.1289 covers all "persons outside the agency" while three of the agencies examined record contacts with "non-involved persons" only. They do not log contacts with one "with whom an employee would be expected routinely to communicate in the normal course of handling such a matter, such as a person under investigation, an informant in an investigation, a party or witness to a proceeding or the attorney for such person, informant, party or witness." The limited definition of who is a communicant may explain why the FTC has had only 75 contacts in a year and a half of logging.

We feel that it is often precisely the contacts of those involved in an agency action which should be logged. The charge that many regulatory agencies are "captured by those they regulate" is exactly the type of problem which the involved person distinction would perpetrate.

Take for example the actions cited by Henry Geller, former Counsel for the FTC. He notes that after the formal hearing stage an informal hearing is continued as representatives of the various trades or industries involved make their supporting facts or counter arguments known to the FCC Commissioners. Under the involved person exception these contacts would not be logged. Yet Geller notes the one-sided nature of these contacts. Given the time and cost involved in maintaining contacts, public interest groups and citizen groups, who can often testify at rulemaking hearings, cannot continually monitor intra-agency activities. Industries can and often do perform such monitoring, as Mr. Geller points out in the case of a rule on pay cable TV. When the industry learned of the impending FCC decision, some time after the hearing stage, their representatives made a last minute lobbying effort

to reverse the FCC's tentative, but not formally announced decision. Thus only some of those originally involved in the hearing process took part in these "informal hearings." It is exactly this type of lobbying which logging should disclose. Therefore the non-involved exemptions should not be allowed.

It also appears that part of the confusion on this issue stems from the extension of the notion of ex parte communications from a non-involved person in a judicial proceeding to a broader policy making context. Judicial decisions, while they may ultimately affect large numbers of people, are directed at specific parties. Legislative or policy decisions are intended to affect general categories of persons or organizations. It is a mistake therefore to transfer the notion of a non-involved party in a judicial proceeding to a context where it is the actions of the involved persons which should be the predominant focus of logging.

S.1289 exempts from logging contacts from communicants who provide incriminating information under an assurance of confidentiality either explicit or implied, persons subject to criminal enforcement or their counsel, a government official providing an intra- or inter-agency memorandum, and communicants who might suffer immediate and substantial competitive injury or whose disclosure of contact might lead to serious financial speculation.

Total exemption from logging of even the existence of these meetings provides a potential loophole. Agencies may interpret an inordinate number of meetings to be among those excepted. Although the exemption is based on the communicant, the characteristics are similar to certain exceptions to the Freedom of Information Act. There is however a basic difference. Logging only speaks to the occurrence of a meeting while the FOIA protects the substance of a document in government possession. There is little detriment in compelling the logging of the existence of the contact and allowing the

official recording it to enumerate one of the FOIA exemptions as a reason for not listing the subject or providing a summary of the meeting. This would serve to identify individuals who may hold an unreasonably large number of secret types of meetings and would avoid circumvention of recording by broadly construing the exemptions. Further, the subject matter of the contact could be recorded and placed in a non-public file under a claim of the FOIA. This procedure could protect any necessary confidentiality and allow the courts to determine if there is an abuse.

The recording of this type of meeting is similar in nature to the logging of closed meetings which has been carried out by the CPSC and the FDA. Presumably some of those closed meetings regarded matters which if put on paper would be subject to the FOIA and which may have involved persons who would cause the operation of the exemption in S.1289.

It is therefore suggested that S.1289 should not exempt any meeting from logging because of the communicant and the subject matter he discusses. A summary of the meeting can be withheld from public view but allowing the official not to record at all may encourage failures to record in legitimate circumstances.

Even though logging of who communicates with the agency may not stop improper contacts it can have some positive effects on the functioning of the agency. For example, the FEA has been criticized for an excessive dependence on contacts with industry. This type of criticism could not have been made, nor would the agency have been forced to re-arrange its priorities if some type of log was not available to inform the public of the identity of those with whom the agency was meeting.

4. What should the logs contain--What information logged?

In considering the agency approach to what information should be logged, it appears that the entries are rather uniform, and essentially the same type

of information is required. S.1289 provides that the following information be recorded for each written and oral communication:

(b)(1)

(i) name and position of the official who received the communication; (ii) the date upon which the communication was received; (iii) an identification, so far as possible, of the person from whom the communication was received and of the person on whose behalf such person was acting in making the communication; and (iv) a brief summary of the subject matter or matters of the communication, including relevant docket numbers if known.

The CPSC requires a "meeting summary" for face to face meetings and telephone conversations, which set forth in writing details of all substantive matters relevant to the Agency and also any decisions made or conclusions reached regarding substantial interest matters. An example of this meeting summary is in Appendix E(3).

The FEA Report of Outside Contact Form includes the identity of the application, petition for redress, appeal, interpretation request, investigation or enforcement proceeding involved; the name of the person from whom the communication was received; the place or method of communication; a brief summary of the communication; and the name and office of the person completing the report of contact.

The FDA maintains both a retrospective calendar and post-contact memoranda in the form of "meeting summaries" [See Appendix D(1)]. The retrospective calendars are maintained by the same senior officials who maintain the prospective calendars [See Appendix D(20)]. These retrospective calendars include all meetings (open and closed) with persons outside the federal government, except telephone conversations, which are, however, increasingly included at their own option by individual FDA officials. Also included are other "significant events" (meetings, conferences, seminars, social events sponsored by the regulated industry, and speeches). Entries on the retrospective calendars include the date, the person involved, and the subject matter involved.

The FTC employs a very brief Record of Outside Contact form. This log merely requires the identification of the proceeding involved (including any file or docket number), identification by name and title of the outside person and agency employee involved in the contact, the date and time of the contact, and a brief description of the subject discussed. [See Appendix C(1)]. All of the agencies have relatively brief forms, which take approximately two to five minutes to complete.

In calling for a "brief summary of the subject matter" S.1289 raises some confusion. The summary of a meeting, as discussed above, has specific meaning in certain agencies. We assume that S.1289 is calling for a "brief statement of the subject matter."

In considering the content of logs, the basic function of logging is the central consideration. That goal should be to make available useful information to the public. The logs of the agencies examined are very brief--usually two sentences summarize the subject matter. The principal question related to content is the length of the summary of subject matter. Some summary is necessary to allow citizens to know what the meeting was about. Just knowing that a meeting occurred is not adequate. Also, indexing by topic would be difficult without a statement about the subject matter of the meeting.

In examining the logs of the four agencies we found wide variation in the depth of the statement of the subject. The statement should be as specific as possible. S.1289 calls for the docket number. We presume this would include the bill number when an Executive Branch employee is contacted regarding legislation under consideration in Congress. The statement of the subject of the meeting is crucial to an effective indexing of agency contacts in terms of issues or agency actions.

Since the bill states that the log will contain a "brief" summary it is unlikely that officials will be too verbose. With regard to content it is important to relate the suggestion that no exceptions be made to the requirement to log the occurrence of a meeting. The exceptions in S.1289 take effect according to the identity of the communicant, as indicated earlier. In these cases, there is no record of the meeting under the Act. We suggest that a record be kept of the occurrence of the meeting and the exceptions be applied merely to the summary of the subject of the meeting. Rather than having no record at all there will be a record of a meeting in which the person logging claims an exemption as a reason for not including the brief summary of the subject matter or matters of the communication. This technique would allow protection of sensitive conversations yet provide a record to protect against possible abuses by giving no excuse whatsoever for not recording at least the occurrence of a meeting.

5. How should the records be compiled?

Compilation is a question distinct from indexing, which is treated in the next section. Compilation is a question of where and when logs are to be stored and recorded. Under S.1289, compilation procedures require: "(c)(1), the records of communications required to be prepared under subsection (b) of this section shall be prepared and, unless excluded under clause (2) of this subsection, furnished for inclusion in a public file within five working days of the receipt of the communication." The basic agency procedures are as follows:

The FTC provides that the record be placed in the file for that matter and then made part of the Commission's public record when the public record of the matter is established.

The CPSC provides that a meeting summary or notice of cancellation of the meeting must be submitted to the Office of the Secretary within 20 days

after the meeting for which the summary is required.

The FDA has two places where their logs are kept: They have administrative files, in which the meeting summaries are kept; the retrospective calendar, which includes activities of senior officials and their deputies, is maintained and published together with the prospective calendar. The retrospective calendar is published weekly, showing for the previous week all meetings not previously listed on a prospective calendar.

The FEA rules provide that the records shall be placed in appropriate subject matter or case files, depending on the nature of the proceeding to which they relate. Such records are, however, maintained separately from the material upon which the Review Committee may rely in reaching a final decision.

The compilation procedures provided by the bill are sufficient, but there is one suggestion which we think is useful. Presently Section 560(d) provides that "Such materials shall be submitted, and updated, the first working day of each week..." Where agencies use public calendars as their logging device there should be some provision that if an item on the prospective calendar was not included on the calendar for that week, it should be included retrospectively on the next calendar. An example of this procedure is that now followed by the FDA in publishing its prospective and retrospective calendars.

6. How should logs be made available--indexing and access?

Perhaps the most crucial aspect of logging is usability and availability to the public. It is one thing to say that certain oral and written communications must be logged, yet another to make the information publicly available in a useful form.

The agency reading rooms are the location of the existing logs. Generally our researchers encountered helpful people to direct them to the files. However, the files were not always readily usable. Even if the information

is there one has to know precisely what one is looking for. If a person does not know how the material is indexed then they cannot find the information even if it is public--an informational Catch-22. Effective indexing is crucial to logging and even the agencies with effective logging regulations do not have adequate indexing.

Briefly, the publication and indexing procedures in the agencies is as follows:

The FEA merely provides that the records are made part of the public record, if and when a public record of that particular matter is established. A central index for the meeting list is routinely published twice a month and is located in the Office of Public Affairs Freedom of Information Act Office. The FEA, not unlike the FDA and CPSC, log their calendars in chronological order.

None of these agencies has had this logging procedure in effect for a sufficient length of time to render the present system unworkable; however, after a period of years this information will remain buried and out of reach unless one knows the exact date of a particular contact that he was interested in.

In the FDA, prospective and retrospective calendars are available to the public and are located at: the Office of the Hearing Clerk; the Office of the Assistant Commissioner for Public Affairs; a central location in each bureau, field office and at the National Center for Toxicological Research.

For the CPSC the files are maintained in the Office of the Secretary for public inspection. There are 50 to 60 meetings listed every week. Meeting summaries of meetings are also available for public inspection, subject to the Freedom of Information Act. Again, the information is listed chronologically, and, generally, one has to know what contact he is looking for and when it occurred in order to find it. It should also be noted, however, that the CPSC has a mailing list of over 3,500 persons who receive their calendar. In

addition, at least some offices within the CPSC, including that of the Office of the Secretary, maintain for public inspection logs of all correspondence received. The actual correspondence is then subject to requests under the Freedom of Information Act procedures.

The FTC's records are kept in the Office of the Secretary. They employ an index card filing system. The FTC has their logs indexed by the contact's name. Since they have had only approximately 75 contacts recorded in the past one and a half years, it is relatively easy to flip through all the index cards. However, if numerous contacts were logged, it would be virtually impossible to find anything.

We suggest that S.1289 include a provision to require the promulgation of rules for indexing logging records. Contacts should be indexed by official, by subject, and by date. If a central analysis unit is developed, contacts should also be indexed by communicants. After the system has been in operation a coherent listing of subjects should be developed. We feel this is an important aspect of the bill which the Administrative Conference should evaluate.

Enforcement

One of the most crucial elements of any lobbying reform is enforceability. Lack of enforceability has been the cause of much concern after the failures of the 1946 Act. In the words of Deputy Attorney General Harold R. Tyler, Jr., in testimony given before the Senate Committee on Government Operations on May 15, 1975, enforcement of the 1946 Act by the Justice Department was reduced to "promoting voluntary compliance." The result of such voluntary enforcement requests was, in Mr. Tyler's words, an "unimpressive record."

None of the four agencies analyzed have any formal enforcement mechanisms and report no known serious violations of their regulations. The FDA and CPSC have, however, utilized a comparison of prospective calendars with post-contact reports to police conformity with the requirements for post-contact reports. Other than this, enforcement within the agencies has apparently been left largely to informal emphasis given to contact disclosure by the various heads of agencies.

The fact that this type of informal enforcement has not been uniformly successful is best illustrated by the FTC file of outside contact reports. For a period of about a year and a half, the file indicates only approximately 75 contacts. This would seem to indicate that some sort of formal enforcement measures and sanctions are needed.

S. 1289 provides for criminal sanctions of fines up to \$1,000 and imprisonment of up to one year, enforceable by the Justice Department. To depend only on such criminal sanctions for effective enforcement is unrealistic because of the difficulty in proving the scienter necessary

for a criminal conviction, and because of the historical inability of the Justice Department to enforce criminal sanctions in an area involving concepts as vague as "important agency actions" and "policy issues."

This difficulty in enforcement might be eliminated by providing for civil enforcement similar to that available under the proposed Government in the Sunshine Act, S. 5. Such provisions would give Federal District Courts jurisdiction to enforce requirements of S. 1289 by "declaratory judgement, injunctive relief, or otherwise," by any person, including an individual, partnership, corporation, association, or public or private organization other than an agency. By providing both criminal and civil enforcement procedures, S.1289 would meet both the need to deter willful and deliberate lawbreakers with criminal penalties, and the need to effectively police agency personnel who might commit unintentional violations which do not deserve harsh criminal punishment.

The public, and particularly the press is a source of enforcement to insure the implementation of logging provisions. Our examination of Florida's "Government in the Sunshine Law" showed that enforcement problems were encountered with the criminal sanctions.

Another aspect considered was the extent to which public attention and the threat of public scrutiny insured compliance. The local press played a crucial role in publicizing government actions, particularly when they were decided at closed meetings.

With respect to S. 1289 it is likely that the general press as well as the more specialized trade and public interest publications will make use of the logged information. While pressure from the public and press

does not eliminate the need for civil and criminal penalties, it should play an important role in the implementation of any logging regulations.

Objections to S.1289

Several objections are continually raised to S.1289 by opponents.

1. Is the burden of imposing the duty to log worth it? Who will look at it?

The answer to this question is by nature subjective. The relative costs and benefits of openness and administrative efficiency will be weighed differently by different persons.

The burden imposed on executive officials does not on first glance appear onerous. The time taken to prepare a log in the agencies that we examined was usually less than 5 minutes. There are paper work burdens on administrative officials currently which are unreasonable, but some of the burdens are inflicted for much less important reasons than revealing to the public the nature of the influence on the decision-making process.

As one FTC official told our researchers, the requirements for the FTC logging procedures are "not so onerous as to cripple my ability to work." An official at the Consumer Product Safety Commission, the agency which works the hardest at logging, noted that "it's amazing how easy it does work once you get into it. . . . It's not an awful barrier and it gives you a certain freedom."

In terms of cost estimates, the Consumer Product Safety Commission spent \$29,820 in fiscal 1975 to implement its open meetings policy. They have a thorough system of logging for a prospective and retrospective calendar. The major expense, approximately \$20,000, was for printing and distributing calendars to the 3,200 people on their open meetings list. The Commission attributes minimal indirect costs to the agency officials to maintain their entries for the calendar system. The agency also spent \$36,000 during fiscal 1975 to

implement the Freedom of Information Act. Again, the Commission attributes minimal indirect costs to this function as well.

Since all agencies have FOIA implementation units, access to logs will already be provided. In fact, the availability of logs, including logs of written communication, should aid both the public in specifying the objects of its requests and aid the agency in locating them.

As to whether anyone will use it, I have little doubt that logs will be used. Already public interest groups, as well as business and industry groups, are using them for agencies such as FEA, FDA, and CPSC.

We have an analogous situation in Florida. Similar objections were raised prior to the passage of Florida's Government in the Sunshine Law. During the past year, we have conducted an extensive study of the impact of that law. We found the public, particularly the press, making use of the open meetings law. As important in evaluating the logging provisions is the impact of the potential for use. In our analysis of the Florida Sunshine law, we found that the possibility that a citizen or someone from the press would attend had an effect in itself. Officials began to anticipate what they thought citizen interest would be. They became more responsive to the public because their actions or positions at meetings might become known. While harder to document, city officials did agree that the openness mandated by the Sunshine law had "disinfectant" impact on potential corrupt practices, including the abuses of influence. We feel that the openness generated by logging, as by open meetings, does make corrupt or improper activities more difficult.

There is even more direct evidence that agency logs will be used. Although no comprehensive record is kept of how many persons look at logs, there is an increasing interest in who agencies are meeting with. For example, the CPSC calendar mailing list has increased from about 1,000 to over 3,500 in a year and a half.

2. Logging will not prevent abuses because it depends on the honesty of the individual to do it.

It is possible that if an individual wishes to circumvent a lobbying law, he can avoid recording. Agency regulations which grant discretion now account for a wide variation among agencies. For example, in the FTC, only 75 contacts were logged in a year and a half, while the CPSC had 50-60 per week.

Any law restricting conduct is, however, subject to circumvention. One can extend the argument to say that laws against robbery really do not prevent robberies. The effect of the logging law is to compel agency personnel to record contacts in peril of imprisonment or fine. The purpose is to protect the integrity of the bureaucratic decision-making process, not to indict agency personnel nor restrict the content of discussions. While it is possible for individuals to circumvent the law, by failing to log properly, they violate a criminal statute, placing themselves in peril of prosecution, a strong incentive to reveal contacts. And the existence of this incentive will, of itself, likely increase awareness of potential abuses. Our recommendation that civil enforcement be available provides another mechanism to promote compliance in instances where criminal prosecution is not appropriate.

Moreover, it is the purpose of the bill not only to prevent unlawful conduct, but perhaps also to make executive officials aware of the type of input they are subjected to, and broaden their scope of inquiry. It is interesting to note that the FEA, after a review of its initial logging, which showed a preponderance of industry contacts, corrected their calendars by adding previously omitted contacts with non-agency personnel. This demonstrates an incentive to have a balanced calendar which may affect future contacts also.

3. The existence of logging provisions will inhibit communications and impair the constitutional right to petition and the right of privacy.

Of the types of lobbying bills being considered, logging is the one that least inhibits communications. There is no burden placed on the person communicating with agencies, nor is a person's ability to communicate with the official impaired. While there is a constitutional guarantee of free speech, there is no constitutional right to communicate with the government in secret, except in certain narrowly defined areas. S.1289 considers this in its exceptions and would inhibit only those unprotected contacts made in secret.

4. S.1289 does nothing about influence through social contacts.

S.1289 calls for each agency official to prepare a record of "each oral or written communication received by such official." We feel that this includes all significant communications, whether produced at a social function or a chance meeting where a person affected by the act raises a matter that is the subject of agency proceedings, other important agency actions or policy issues. The burden is on the official to log contacts, irrespective of the location or context, as required by the bill.

Currently the FDA includes in their regulations that senior FDA officials must log contacts, including social events sponsored by the regulated industries. No real problems were cited with this policy. When asked his advice to FDA officials concerning logging of social contacts, an official said it would be to "use common sense."

CPSC also logs social or casual types of contacts. For example, a Commissioner of the CPSC happened to take the same cab from the airport with Ralph Nader and later logged the contact.

Logging is not intended to interfere with the social activities of public officials or lobbyists, or other citizens. But if public business is discussed at a social gathering, and it is logical to expect that this would often be the case, then the contact should be logged.

5. Logging would divulge secret material.

Presently S.1289 provides that a contact should not be recorded at all if a person provides incriminating information under an assurance of confidentiality, or under circumstances from which such an assurance can reasonably be implied; if the subject relates to a civil or criminal enforcement investigation, or the counsel for someone under investigation; if the contact is with an employee of another agency where the record of the communication would not be available under section 552(b)(5) of this title; or if the discussion proposes "financial or commercial transaction(s) where disclosure" of such request would result in immediate and substantial competitive injury.

Our position is that there is no need to totally exempt recordation of the contact in these circumstances. Therefore, the current bill does not disclose too much but in fact should disclose more.

Necessary confidentiality can be protected by the procedure of logging the existence of a meeting but not revealing facts publicly which relate to matters listed above, but placing summaries of the meeting or other purportedly exempt data in a confidential file. Such exempt data would usually be the subject of the meeting but conceivably even the communicants' name might be protected.

The distinction is important. It is possible a log would contain only a date, name of the agency official, and place. The ultimate result might be to enable other officials and citizens to identify an official who might be using exemptions as a shield to avoid thorough logging and request confidential summaries under the FOIA. Without such a provision, no record of the secret meetings would exist as a basis for evaluation. Also, the public

record of a meeting whose subject or communicant is not recorded may provide the basis for obtaining substantial matter improperly labeled confidential. For example, if a citizen were aware of a meeting about which he wished to receive information, he could identify the confidential files through the log; the materials could then be requested under the FOIA to determine the propriety of confidentiality.

6. S.1289 is too vague.

The criticism that S.1289 is vague has also been raised. This is a problem inherent in defining what is important and in the degree to which one is committed to the policy of openness inherent in S.1289. There will always be disagreement over what is important in agency decision-making. S.1289 states that matters dealing with agency proceedings, other important agency actions, and policy issues are subject to logging. This is a sufficiently inclusive standard. We feel that when in doubt agencies should log. The trade-off in logging too much, i.e., some things that may not be important, is increased administrative cost. As noted earlier, this appears to be minimal. There may be a cost to some communicants, as noted in the FDA situation where an official received more letters after he began logging meetings and phone calls. Yet we feel that there is no harm done in exposing the fact that a person exercised his constitutional right to express his interests to the government. The cost in logging too little, in limiting the officials responsible for logging, the communicants or the subject matter they must log, could subvert the purpose of disclosing important contacts.

Yet it is ultimately each official who will determine what contacts meet the requirements for logging. His or her determination will be affected by the commitment shown within the agency toward openness. This suggests

some reflection on the part of members of Congress as well as high agency officials on the need for increased citizen confidence in government. The sponsors of S.1289 and the other lobbying bills, as well as the heads of the CSPC and the FDA, have expressed their own commitment to increasing citizen confidence by providing more openness in government. Logging contacts is one important aspect of achieving that goal.

While vagueness is a problem, particularly in the context of potential civil or criminal prosecutions, it will remain as long as there is no judicial standard of what is important. However, a strong commitment on the part of agency officials would do much to ensure that persons within their agency do in fact log all their contacts which cross the importance threshold as set out in S.1289.

Conclusion

Logging is a workable means of disclosing lobbying contacts without burdening private individuals. S. 1289 is a logical response to many of the problems and abuses of lobbying; however, we suggest several changes. First, civil penalties should be added to enforcement provisions to reduce difficulties of criminal enforcement and increase options for insuring compliance. Second, there should be no major exceptions to recording contacts. Content relating to sensitive data may be exempted and minor matters need not be logged. Third, all communications in writing should be logged in order to prevent the intent of the act being circumvented by letters. Fourth, the act should mandate a systematic method of indexing to make logs accessible and usable to citizens. Logging without indexing would be an empty promise.

On balance S.1289 is a good bill. While it does not go as far as it might in disclosing activities of lobbyists, it is a sensible method of opening the lobbying process to public view. Logging will provide a basis for evaluating the quality and nature of the decision making process. It should also encourage officials to seek diverse contacts to present a better record for future inquiries. At the same time the logging requirement places no burden on the private person contacting the government.

The experience of agencies using logging indicates that the expense is not prohibitive and inconveniences not unreasonable. The potential benefits in terms of public confidence and an improved decision making process far outweigh the burden. This bill, with the suggestions offered, is an excellent beginning toward solution of the problems of lobbying.

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APPENDIX A

OVERVIEW

Initially, our investigation on the logging issue focused on legal research with respect to the constitutional ramifications of the various lobbying proposals in Congress. Turning towards a more pragmatic approach, we decided to evaluate the practical implications of S. 1289 by investigating the operation of logging procedures in four selected agencies who already had regulations in effect. The four agencies selected were the Federal Energy Administration (Appendix B), Federal Trade Commission (Appendix C), Food and Drug Administration (Appendix D) and the Consumer Product Safety Commission (Appendix E). In evaluating the agency procedures we found widely divergent practices and varying levels of effectiveness.

APPENDIX B
FEA PROCEDURES

The FEA currently utilizes both retrospective calendars and post-contact memoranda. However, the retrospective calendars which detailed daily meetings are maintained only for the administrator, deputy administrator, each assistant administrator and the general counsel. The calendars list all meetings with persons from outside the FEA and "contain the date of each meeting, the names of all participants and agencies represented, and the general subject discussed." Retrospective calendars are prepared on a bi-monthly basis with entries to be submitted to the Office of Public Affairs within one week after the 15th and the end of the month. These calendars are available on request from the FEA's public reference room or from the Office of Public Affairs which distributes them on a regular basis to interested persons.

Post-contact memoranda are prepared by all FEA employees from grades GS-11 and above. (The grade was recently reduced from GS-15). They utilize the "Record of Outside Contact Form." This form is used for all communications, including telephone conversations, which includes "non-involved persons" expressing an opinion or viewpoint on a specific application, interpretation, request, appeal, petition for redress, investigation or enforcement proceeding pending before the FEA."

However, memoranda are not prepared for some communications. Communications are exempt if they are "routine requests for information concerning the status of a matter, including but not limited to inquiries

regarding when FEA actions were or may be taken, the identity of parties or staff personnel responsible for a matter, or availability and location of public information concerning a matter." Communications can also be exempted on the basis of the source of the contact when the agency employee would be expected to routinely communicate with the person from outside the agency in the processing of a particular matter. This includes, but is not limited to, persons such as an applicant, a person requesting an interpretation, an appellant, a petitioner for special redress, a person under investigation, a person charged with a violation, a party or witness to a proceeding, or the attorney for any such person.

For those contacts which are recorded, the reported outside contact includes: the identity of the application, petition for redress, appeal, interpretation request, investigation, or enforcement proceeding involved; the name of the person from whom the communication was received; the place or method of communication; a brief summary of the communication; and the name and office of the person completing the report or contact. The reports are filed in the "appropriate subject matter or case file" or in the "appropriate application and proceeding file" as the case may be. After being filed, these reports are available through the usual Freedom of Information Act procedures.

In order to initiate a request under the Freedom of Information Act, it is of course necessary to have some indication of what to ask for. Because of this practical limitation, memoranda which have been filed without logging may be effectively hidden from the public.

APPENDIX C
FTC PROCEDURES

The FTC, although it facilitates access to the Chairman's personal calendar by having a recording of it available by telephone, limits such advance notice to the activities of the Chairman. The FTC maintains no retrospective calendar. However, provisions have been made by directive which require that "each Commission employee shall record...oral communications...concerning investigations or cases pending with the Commission." This requirement applies to communications with non-involved persons outside the Commission but exceptions are provided for any "official or employee of the Commission or person outside the Commission with whom an employee would be expected routinely to communicate in the normal course of handling such a matter." This is similar to the provision in the FEA. Such contact reports are to be "placed in the file for that matter" and "made part of the Commission's public record when the public record of the matter is established." The records may be available earlier under the usual Freedom of Information Act procedures.

(1) Form used to record outside contacts

RECORD OF OUTSIDE CONTACT

Identity of Pending Commission Investigation or Case:

File No. or Docket No.:

Name, Title of Outside Person Who Made Contact:

Name, Position of Commission Employee Contacted:

Date/Time of Contact:

Brief description of subject(s) discussed:

APPENDIX D

FDA PROCEDURES

The FDA centrally compiles a comprehensive prospective calendar which includes "all public meetings, public conferences, public hearings, public advisory committee hearings, public seminars, and other public proceedings of the FDA and other significant public events [speeches, relevant non-agency activities, etc.] involving the FDA." The prospective calendar includes the activities of senior FDA officials and their deputies with listed information generally including designation of the event, its time and place and the parties expected to be present. The prospective calendar is compiled by the FDA Office of Public Affairs covering the time period four weeks in the future. FDA personnel estimate that the preparation of each entry requires approximately five minutes executive time and ten minutes secretarial time, with each senior official listing about a half dozen entries per week. The prospective calendar is published both by mailing it to any person who requests and by posting at the Office of the Hearing Clerk, the Office of the Assistant Commissioner for Public Affairs, and at a central location in each bureau, field office, and the National Center for Toxicological Research.

The FDA also maintains both a retrospective calendar and post-contact memoranda in the form of "meeting summaries." The retrospective calendars are maintained by the same senior officials who maintain the prospective calendars. The retrospective calendars are to include all meetings (open and closed) with persons outside the federal government,

except telephone conversations. Telephone conversations are increasingly included at the option of individual FDA officials. Also included are other "significant events" (meetings, conferences, social events sponsored by the regulated industry, and speeches). Entries on the retrospective calendar include the date, the person involved, and the subject matter involved. The calendars are published in the same manner as the prospective calendars.

The FDA also provides that a meeting summary shall be prepared for any communication between an FDA representative and any person outside the agency, if it "relates to a pending court case, administrative hearing, further regulatory action or decision, or ... involves any other important matter, decision on an issue or statements or advice or conclusions to which future reference may be required as part of the administrative record." These communications include correspondence, meetings and telephone conversations. These summaries are placed in the appropriate administrative file and are available through Freedom of Information Act procedures.

D(1) Sample of FDA Memorandum of Meeting

A-10



DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
PUBLIC HEALTH SERVICE
FOOD AND DRUG ADMINISTRATION
ROCKVILLE, MARYLAND 20852

MEMORANDUM OF
MEETING

JPW
John T. Walden, Assistant Commissioner for Public Affairs

and

Roger Coleman, Director, Public Relations
Dr. Richard Dougherty, Assistant to the Executive Vice President
National Canners Association, Washington, DC

October 2, 1975
Rockville, Maryland

NCA officials asked for a meeting to discuss possible alternatives to use of the term "filth" in referring to unavoidable, natural contaminants in foods.

I agreed that the term was unfortunate, but suggested it was unlikely the FDA or anybody else could direct the press away from the term when reporting on what were, in fact, "unavoidable natural contaminants."

I agreed to consider language suggested by NCA for use in public statements. The proposed language is attached.

Attachment

The term "filth" as used in this release is a technical term taken from the law. It is not intended to conform to the general public understanding of the word. It refers to certain natural substances which may be included in canned foods despite every precaution possible under modern technology. In foods packed according to standards established by the Food and Drug Administration these fragments present no health hazard and are present in such small quantity that they usually cannot be seen and have no effect on color, flavor, or any other important quality characteristic of the food in question. It has been found almost impossible to eliminate them entirely whether food is packed in a commercial factory or in the home. Normally, they are in no way offensive and need cause no concern to the consumer.

FOOD AND DRUG ADMINISTRATION
5600 Fishers Lane
Rockville, Md. 20852

Date Issued October 3, 1975

PUBLIC CALENDAR

WEEK OF September 26 - October 2

This public calendar is issued weekly by the Food and Drug Administration. It lists meetings held by key FDA policy makers with persons outside the Federal Government.

D(2) Sample of FDA calendar

FDA OFFICIAL AND TITLE	DATE AND SITE	OTHER FDA PARTICIPANTS	NON-FDA PARTICIPANTS	SUBJECT
Alexander M. Schmidt, M.D., Commissioner of Food and Drugs	October 1 FDA- Rockville		Dr. Henry Simmons of J. Walter Thompson	Discussion of current deficiencies in medical education.
	October 2 FDA- Rockville	Richard Merrill, William Randolph, Paul Hile, Dr. Carl Leventhal and other members from the Bureau of Drugs	G.A. Godinez of Marshall Pharmaceutical Corp., Gerry Dorfman, Attorney	Discussion of over- regulation of Marshall Pharmaceutical.
John Jennings, M.D. Associate Commissioner for Medical Affairs	Sept. 26 Surrey, England		Government and industry representatives of sev- eral different countries	Participated as panel member in an international Symposium on Chemical Toxicity in Man, sponsored by the University of Surrey.
	October 1 FDA- Rockville		Umberto Rossi, M.D. and Dennis J. Bucceri of Hoechst-Roussel Pharma- ceuticals, Inc., Australia	Courtesy call and general discussion of mutual interests and problems.
Mark Novitch, M.D. Deputy Associate Commissioner for Medical Affairs	Sept. 26 FDA- Rockville	Richard Anderson	John Goddard, Dept. of Health & Social Security, Supply Division, London, England and David Peterson, Commercial Officer, British Embassy, Washington	Medical device regulations.

(more)

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APPENDIX E
CPSC PROCEDURES

The most comprehensive logging regulations of the four agencies examined are those of the Consumer Product Safety Commission. The CPSC requires prospective calendars on meetings held between any party outside the CPSC and any employee of the Commission, including the commissioners, which involve "substantial interest matters" (anything on which the Commission may have to make a regulatory or policy decision). In addition, "meetings with outside parties where the public interest would be served by listing on the calendar" are also included. The prospective calendar includes both open and closed meetings with each entry including "the probable participants, the subject matter of the meeting, who requested the meeting, whether the meeting involves matters of substantial interest, notice if the meeting is open or reasons why the meeting...is closed, the date of the meeting, and the place of the meeting." The Office of the Secretary publishes a prospective calendar every Friday for the following week. Weekly entries are submitted to the Office of the Secretary on the Wednesday preceding the Friday publication date. In exceptional cases, where advance notice is not possible, a two-track procedure for obtaining a waiver of notice is available: personal staff of the Commissioners may obtain waivers from their respective Commissioners, and other agency staff may obtain waivers from the Chairman. In any case where a waiver is given, the meeting is subsequently listed in the next retrospective calendar. The prospective calendar is published by posting

or mailing to persons who request it. The mailing list of the calendar has increased from less than 1,000 a year and a half ago to a current circulation of over 3,500.

The CPSC requires all employees, including the Commissioner, to prepare a "meeting summary" for any meeting between agency personnel and outside parties at which "substantial interest matters are discussed." Substantial interest matter is defined as "any matter other than that of a trivial nature that pertains in whole or in part to any issue that as a minimum is likely to be the subject of a regulatory or policy decision by the Commission, including any matter in which the agency is legally obligated to make a decision." Both telephone calls and personal meetings are included. The meeting summaries set forth "in writing details of the essence of all substantive matters relevant to the Agency, especially any matter discussed which was not listed on the public calendar...any decisions made or conclusions reached regarding substantial interest matters." Within 20 days these meeting summaries are submitted to the Office of the Secretary where they are maintained in chronological order, available for public inspection. In addition, at least some offices within the CPSC, including the Office of the Secretary, maintain for public inspection a log of all correspondence received. The actual correspondence is available upon request, subject to the Freedom of Information Act.

Despite the extensive and complete logging activities of the CPSC, the cost of its procedures is not excessive. In response to questioning at Senate Oversight Hearings, the Commission provided figures indicating that the total cost of their prospective and retrospective calendar system

(the major part of their logging activities) was less than \$30,000 for fiscal 1975. Approximately \$25,000 of that was spent for the actual weekly printing of the calendars.

E(1) Form used to record information for prospective calendar

Please list information for the Public Calendar in the order suggested below, and send it by mail, messenger envelope or Telecopy to the Office of the Secretary, Room 1025, 1750 K St., (202) 634-7700. Notices must be in OS by noon Wednesday; the Calendar is published on Friday, and the seven day notice period starts upon publication. Please answer all the questions.

(date of meeting)

(name of CPSC participant(s), office/bureau)

Meeting with

(name, affiliation of outside party)

to discuss

(topic--please be clear and sufficiently detailed)

The meeting is being held:

(location and time of meeting)

It was requested by:

Further information available from:

(name, phone number of CPSC host/contact person)

"Substantial interest matters" will / will not be discussed.

(If yes, seven days advance notice is necessary; emergency approval for short notice is available only from the Chairman's office)

The meeting is open / closed. (If closed, please explain below; except under certain conditions, clearance may be required by majority vote of the Commissioners)

Additional Information?

(space restrictions, Federal Register notice required?, etc.)

CPSC PUBLIC CALENDAR

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MEETINGS. . . (Cont.)

September 17

General Counsel Michael Brown, Robert McAfee and Victor Petralia, Denver Area Office, Bessie Draper and Ken Rashid, Bureau of Information and Education meeting with the Governor of Utah and heads of departments and state agencies to discuss the state's role in protecting consumers from hazardous products. Mr. McAfee arranged the meeting; it is in the Governor's Office in Salt Lake City, at 9:00 a.m. For additional information, call (303) 837-2904.(N)

- * Marilyn C. Bracken, Bureau of Biomedical Sciences, attending a seminar on animal resources for large scale extramural programs of the National Cancer Institute (NCI) sponsored by NCI; Conference Room 9, Building 31, National Institutes of Health, at 10:00 a.m. For additional information, contact Dr. Bierbower, (202) 245-1445.(N)

September 17-17

- * Georg S. Maisel and Michael Gidding, Bureau of Biomedical Science, and Robert Poth, Bureau of Compliance, attending a seminar on child-resistant packaging sponsored by the American Society for Testing and Materials, at ASTM, Philadelphia. For additional information, contact Mr. Gidding, (301) 496-7906.(N)

September 17-18-19

Alex A. Labonski, director, William R. Berbaum and Anthony Merolis, New York City Area Office, meeting with the Commonwealth of Puerto Rico Department of Consumer Affairs, and Economic Development Administration, and with manufacturers, importers, distributors and retailers to discuss an overview of CPSC with major emphasis on violations uncovered by DACO, and corrective actions to be taken. The meetings are in San Juan, (9/17), Mayaguez, (9/18), and Ponce, (9/19), and were requested by the Commonwealth of Puerto Rico. For additional information, call (212) 264-1125.(S)

September 18

- * Alan M. Ehrlich, Office of Standards Coordination and Appraisal, meeting with Dennis Dix and Ed Mentz, Outdoor Power Equipment Institute, to discuss the mower industry position on Consumers Union's recommended power mower standard. OPEI requested the meeting; it is in the Sixth Floor Hearing room, 1750 K Street, at 10:00 a.m. For additional information, contact Mr. Ehrlich, (301) 496-7606. A similar meeting is scheduled for mid-October.(S)

Commission Chairman Richard O. Simpson speaking at a dinner meeting of the San Francisco Chapter of the Financial Executive Institute on "CPSC - An Overview"; St. Francis Hotel, San Francisco. (N)

MEETINGS. . . (Cont.)

Carl W. Blechschmidt, director, Office of Product Defect Identification, speaking at a luncheon meeting of the Systems Safety Society on "Section 15 Procedures of CPSA," at Hogates, Washington. For additional information, call (301) 496-7631.(N)

September 19

Lacy B. Ward, director, Philadelphia Area Office, meeting with George A. Fioto, Noxell Corporation and Philip Reiss, legal counsel for Noxell, to discuss FHSA labeling requirements for denture cleaner. The meeting was requested by Mr. Keiss; it is held at the Philadelphia Area Office at 1:30 p.m. For additional information, call (215) 597-9105.(S)

Commissioner R. David Pittle meeting with Norman Pugh, Sears, Roebuck & Company, to discuss investigation of consumer attitudes toward cost-benefit for safety standards. Mr. Pugh requested the meeting; it is in Commissioner Pittle's office, 1750 K St. at 10:00. For additional information, call (202) 634-7726.(N)

September 20

Sidney F. Ascher, New York Area Office, participating in a panel discussion on "Toy Safety - Update of Rules and Regulations" sponsored by the American Society for Quality Control, Metropolitan Section. The meeting is at Middlesex County College, Edison, New Jersey, at 11:00 a.m. For additional information, call Mr. Ascher (212) 264-1370.(N)

Week of September 21-27, 1975

September 22

Dr. Robert M. Hehir, director, Bureau of Biomedical Science, meeting with Ralph Engels, Chemical Specialties Manufacturing Association, to discuss the Commission's product ingredient survey. Mr. Engels requested the meeting; it is in Room 456, Westwood Towers Building at 10:00 a.m. For additional information, contact Ann Hamann, (301) 496-7937.(S)

Donald R. Mackay, Office of Standards Coordination, attending the annual meeting, American Ladder Institute, to review and discuss CPSA and CPSC. The meeting is in Boston. For additional information, contact Mr. Mckay, (301) 496-7511.(S)

September 22-23

Commission Chairman Richard O. Simpson and other CPSC staff meeting with six members of the Canadian Parliament to discuss CPSC. For additional information, contact George Smith, (301) 496-7621.(N)

E(3) Sample of Meeting Log

LOG OF MEETING

SUBJECT: Procedures for Economic Impact Studies

DATE OF MEETING: August 5, 1975 PLACE: WTB - Rm 533

LOG ENTRY SOURCE: Walter R. Hobby, Director, BEA

COMMISSION REPRESENTATIVE:

Walter R. Hobby, Director, BEA

NON-COMMISSION REPRESENTATIVES:

Thomas Hopkins, Council on Wage and Price Stability
John Morrall, Council on Wage and Price Stability
Bob Coleman, GAO

SUMMARY OF MEETING:

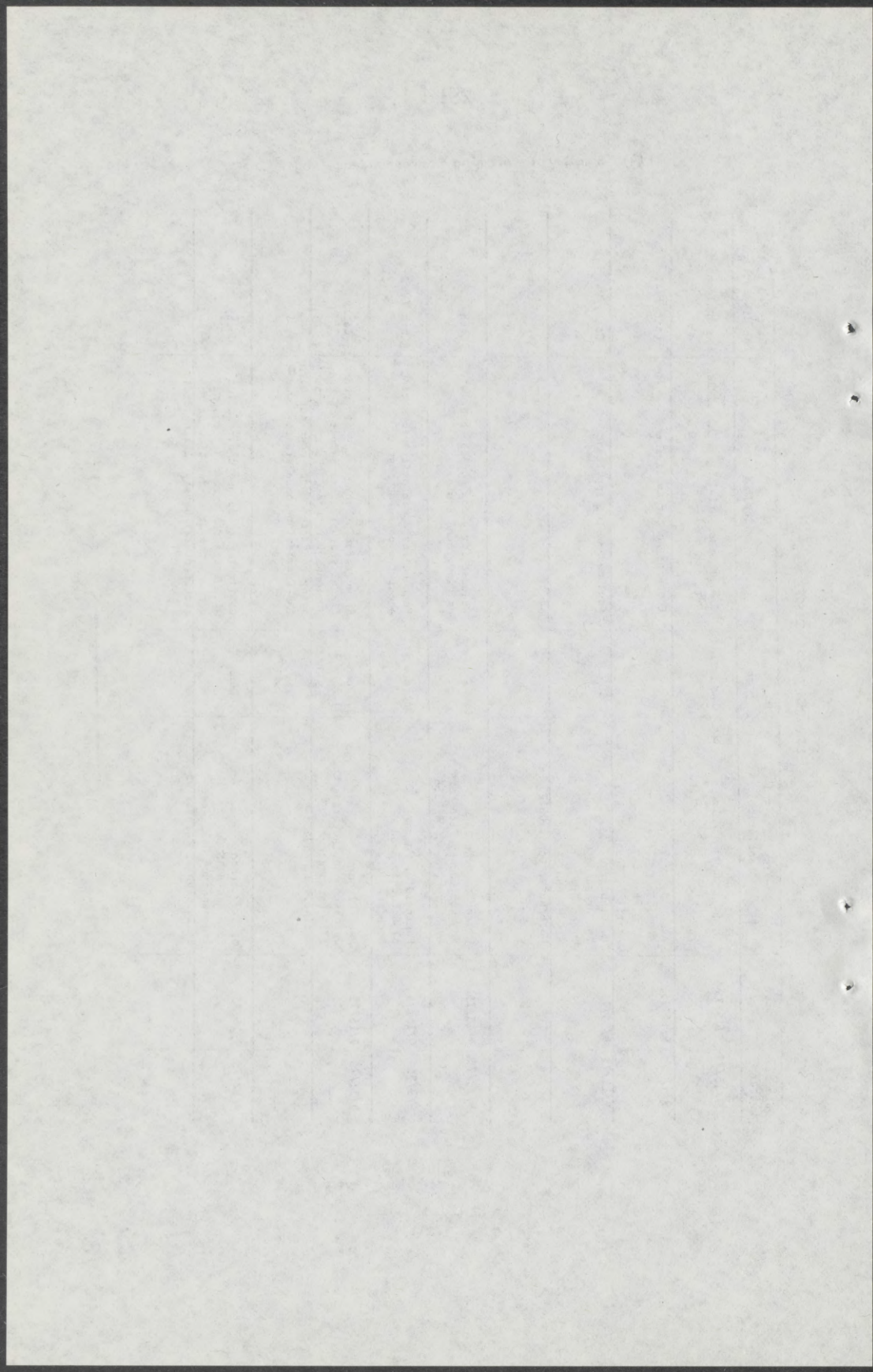
Thomas Hopkins and John Morrall, Council on Wage and Price Stability were provided an orientation to the processes by which BEA conducts economic studies and there was a general discussion of the situations under which we will furnish copies of our studies to the Council. It was agreed that in general, impact studies of major regulatory actions would be furnished to the Council at the time they are sufficiently complete to be released.

E(4) Sample of Incoming Correspondence Log

A-19

INCOMING CORRESPONDENCE

Date of Letter	Date Rec'd	From (Name and Association)	Addressed to	SUBJECT	Referred to & Disposition
9/15/75	9/15/75	D. S. Lemberk, OGC	Commission	Hester Grass Briefing Package, Petition III-75-18	Sheldon
9/9/75	9/15/75	Allan J. Monroe Amarillo College P. O. Box 447 Amarillo, Texas 79105	OS	Consumer Roster applicant	Cathy/Va.
9/11/75	9/15/75	R. G. Gerrad The Amcondia Co. Brass Div 414 Mendow Street Waterbury, Conn. 06720	CPSC	Consumer Roster applicant	Cathy/Va.
9/10/75	9/15/75	Wilson J. McNeill Robeson County Fire Marshal Lumberton, N. C. 28358	OS	Request for a copy of the booklet on Playground Equip.	Cathy
9/9/75	9/15/75	Reginald J. Folmar 6780 Latham Road Rockford, IL 61130	Secretary	Request for additional information about the consumer roster	Cathy/Va.
9/11/75	9/15/75	Paul Clymer Jacobsen Manufacturing Co. 1721 Packard Ave. Racine, WI. 53403	S. Dunn J	Request for a copy of the 4th quarter fiscal year progress report of the National Bureau of Stds on the project being conducted under contract with the Commission in regard to power lawn mowers.	Cathy
9/12/75	9/15/75	O. L. Pierson Rohm and HAAS Co. Independence Mall West Philadelphia, Pa. 19105	S. Dunn	Confirming telephone conversation with Sadye re: agreement to send company the draft revision of the Architectural Safety Glazing Std.	Cathy



APPENDIX

EXHIBITS

LOGGING COMMUNICATIONS ON MATTERS
UNDER INVESTIGATION

[Exerpt from "Removing Political Influence
from Federal Law Enforcement Agencies,"
American Bar Association, 1975, pp. 41-43]

Logging Communications on Matters Under Investigation

A former special counsel to a President recommended that all divisions of the Department of Justice be required to keep records and disclose all requests and contacts they receive from non-involved third parties, including the White House, Congress and others. This recommendation was based on his experience in the early 1960's. He described his functions as special counsel as being wholly unlike those performed by John Dean and Charles Colson, both of whom were heavily involved in law enforcement and intelligence activities.⁵⁴

The panel of the National Academy of Public Administration found numerous abuses of government power in a host of activities engaged in by White House personnel. To the panel this was a violation of equal treatment under the laws as to individuals against whom or for whom certain activities were directed. The panel felt that legislation alone cannot guarantee against such occurrences. It concluded:

"The essential ingredients lie in the integrity and the sense of public interest of the President and his appointee; these can hardly be assured through legislation. But it is possible that more effective disincentives and safeguards against the abuse of government powers could be built into the system.

"The panel recommends that generally the President, his staff, the Executive Office, and the heads of government agencies refrain from par-

icipating in cases involving individuals or specific institutions, but rather concentrate on the policies and criteria governing such cases and rely upon the operating agencies to apply them."⁵⁵

One former Department of Justice official felt that ex parte calls involving a matter or case under investigation represent one of the most dangerous threats to the integrity of the administration of criminal justice.

"I think that the agencies and the proper people in the Department need this protection, that when they are contacted by people on an ex parte basis (in the government or out of it) they need this kind of protection against any subsequent attacks. I'd go one step further, if you're going to go that far. It should be exposed to the Freedom of Information Act, that's how strong I feel about the thing."

He felt that the head of the Department should be required to issue detailed rules and standards spelling out how logs should be kept, under what circumstances, and how they would be stored. He said the knowledge that the log was being kept would probably reduce the number of ex parte contacts.⁵⁶

A former U.S. Attorney was emphatically in favor of the desirability, and indeed, the necessity of such a log. While he was U.S. Attorney no discussion was had concerning a case with anyone except the attorney of record. His practice had been to move the case up to the number one priority on the docket if intervention was attempted through calls or communication.⁵⁷

There is clear evidence that the attempted cover-up of Watergate involved contacts from White House personnel to key figures in its investigation and prosecution. The Acting Director of the FBI was given materials by highly placed White House personnel and told that they were "political dynamite." Although he received no specific instructions he thought he was being told to destroy the materials, an act he performed in his home.⁵⁸

During the investigation of the Watergate break-in personnel of the White House were present during FBI interrogation of employees of the Committee to Re-elect the President.⁵⁹

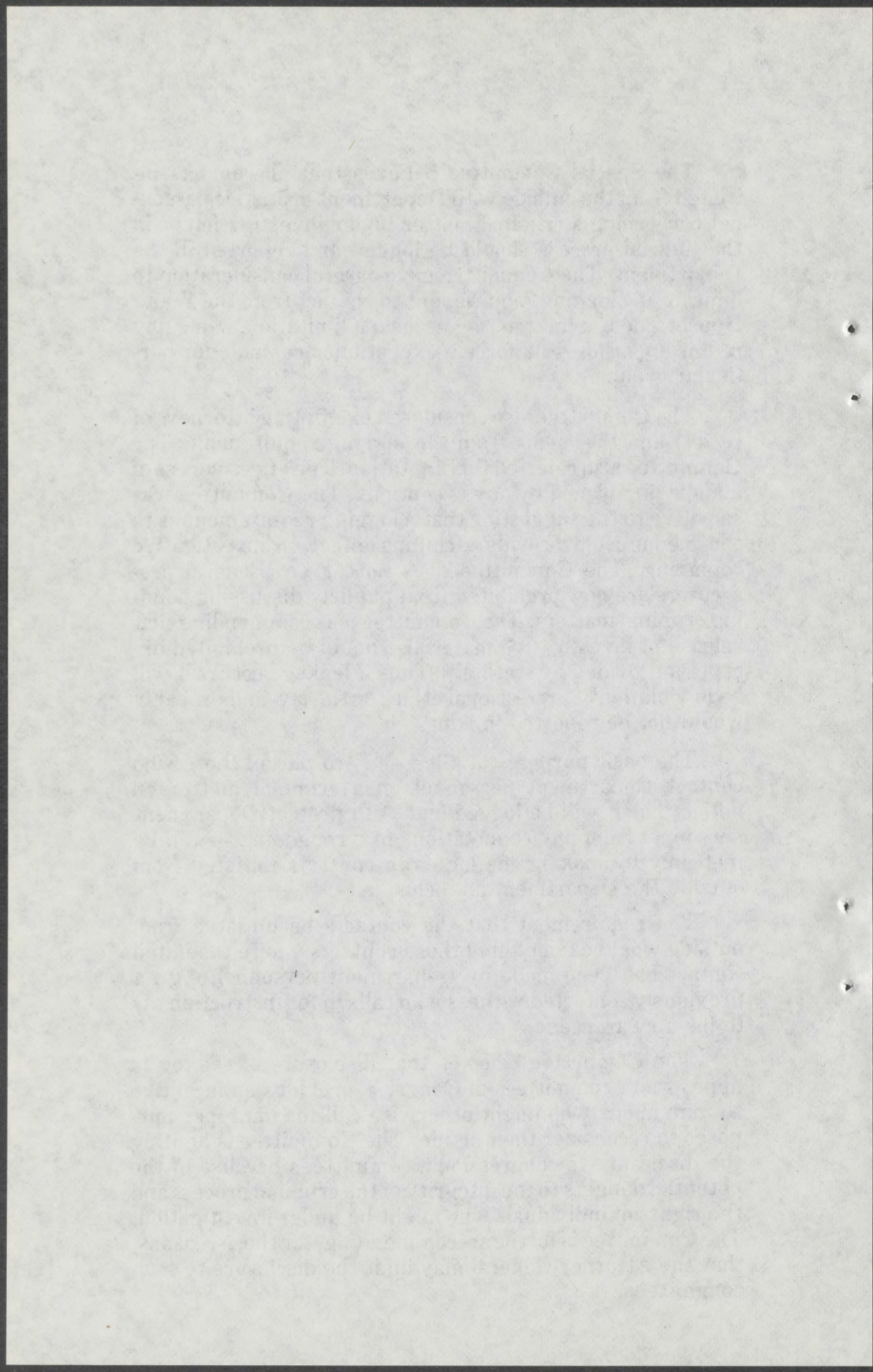
The Special Committee believes that all contacts initiated from the outside with Department of Justice personnel concerning a criminal matter under investigation or in the judicial process should be logged and reported in the Department. The Committee gave careful consideration to limiting the logging requirement to contact from the White House. The Committee rejects such a limitation. A logging requirement loses its force if exceptions are made for particular groups.

The Committee also considered exempting attorneys of record and the media from the logging requirement. The Committee also rejected this limitation. The effectiveness of a log is diminished by any exceptions. The Committee was sensitive to the suggestion that a logging requirement as to the media could provide a chilling effect on investigative reporting. The Committee does not agree. Federal prosecutors are now prohibited from publicly discussing pending criminal matters. The Committee is recommending that release of investigative materials should be prohibited except as provided by statute.⁶⁰ Thus if leakage occurs it will be in violation of professional ethics or the law and probably would not be reported in a log.

The basic purposes of a log — 1) to put all those who contact Department personnel on a criminal matter on notice that it will be logged and 2) to protect Department personnel from any connotations of wrongdoing — can be met only by making the log as to contacts initiated from outside the Department all-inclusive.

The requirement that the contacts be initiated from outside would exempt only those contacts where the initial contact had been made by Department personnel, e.g., a previously contacted witness who calls in for instructions as to his appearance.

The Committee believes that disclosure of the log to appropriate committees of Congress provides an incentive to individuals who might otherwise call for improper purposes to reconsider their action. The Committee is limiting the disclosure to congressional committees because of the potential dangers to the integrity of the criminal process and the rights of individuals who might be under investigation. The Committee is further recommending, for these reasons, that the Attorney General may limit the disclosure to such committees.





UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

November 10, 1975

YOUR REFERENCE

Honorable Edward M. Kennedy
Chairman, Subcommittee on
Administrative Practice and Procedure
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Senator Kennedy:

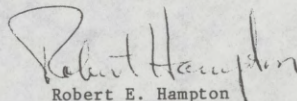
Your letter of November 4, 1975, asks for the number of Federal employees covered under the definition of agency official in S.1289 and for information on whether this definition would include all Federal employees in policy-making and decision-making positions.

We assume the definition is intended to cover all employees in grades 15 and above in the General Schedule, those compensated at equivalent rates under other pay systems, and Executive Schedule employees. Approximately 42,400 full-time executive-branch employees fall into these categories. Although these categories would cover most Federal employees who make policy and important decisions, they would also cover a great many who do not.

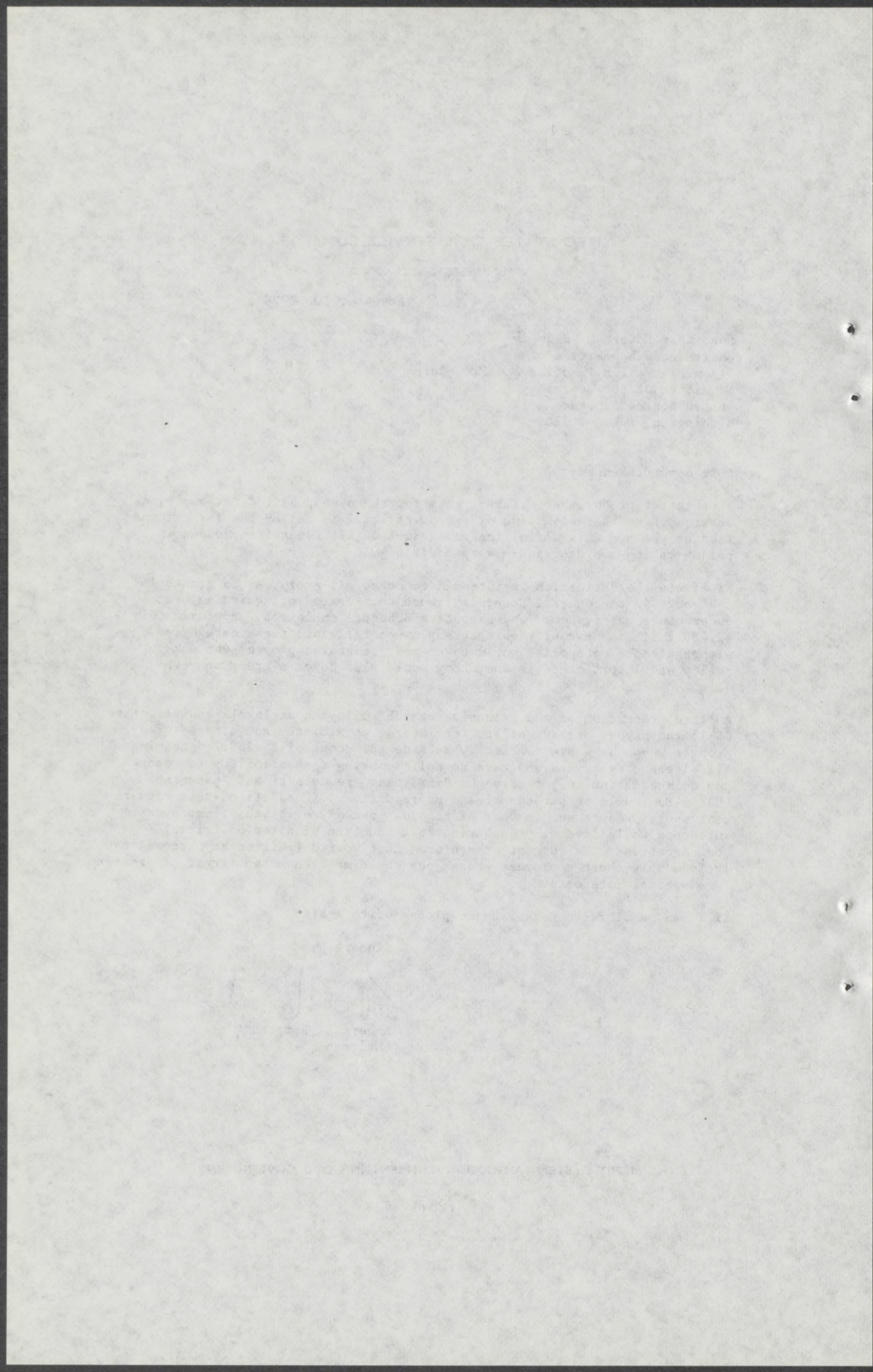
A large proportion of the executive-branch employees at levels equivalent to GS-15 and higher are scientists, engineers, physicians, and other professionals whose jobs are completely outside the scope of S.1289. Requiring all of these employees who have no policy-making responsibility to report any communication they receive on "important agency actions" /paragraph (b)(1)(B) 7 would be burdensome and unproductive. In addition, this requirement would produce such a mass of records that any evidence of improper influence would literally be buried in a mountain of notes on trivial communications. We suggest, therefore, that your definition be narrowed to include only those employees whose jobs could make them the target of pressure from special interests.

If I can be of further assistance please write again.

Sincerely,


Robert E. Hampton
Chairman

THE MERIT SYSTEM—A GOOD INVESTMENT IN GOOD GOVERNMENT





U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

JUN 16 1975

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter is in response to your request for comments of the Consumer Product Safety Commission on S. 1289, a bill

"To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

The bill would prescribe requirements for the maintenance and disclosure of records of communications between federal agency officials (compensated at the Executive levels and GS-15 and above) and outside parties. Records of communications would be categorized according to the prescribed form of disclosure, i.e., full, summary, or internal. Full disclosure would be required for records of communications involving formal agency proceedings. The nature of communications involving policy matters or internal agency proceedings would be disclosed to the public in summary form. Records of communications involving activities during preadjudicative stages of enforcement proceedings would be maintained only within the agency to protect the privacy of parties who are subjects of such actions.

The Commission strongly supports enactment of S. 1289 which it views as a long overdue effort to restore public confidence in the federal regulatory process. The Commission would, however, suggest consideration toward expanding the provisions of the bill in certain respects.

The bill would provide that the requirement for maintenance of records of communications with outside parties be applicable only to federal agency officials compensated at GS-15 and above and those compensated under the Executive Schedule. The Commission's proposed and interim meetings

- 2 -

policy (39 FR 37780), which generally parallels the provisions of S. 1289, does not specify, by grade or otherwise, which officers or employees are required to maintain records of communications. Instead, the policy's requirement for records of communications between Commission personnel and outside parties is dependent on the nature of the meeting. Preparation of detailed summaries is required for all meetings and telephone conversations involving "matters of substantial interest" before the Commission, i.e., those pertaining in whole or in part to any issue that at a minimum is likely to be the subject of a regulatory or policy decision by the Commission. Further, under the Commission's proposed and interim procedures for disclosure or production of information under the Freedom of Information Act (39 FR 30298), such summaries and all incoming as well as outgoing correspondence are on file and available for copying or inspection. If a distinction is to be made in the bill as to which officers or employees are to maintain records of significant communications, the Commission suggests that such be based not on grade level, but rather, on the officer or employee's role in making or recommending decisions on matters before an agency. Anyone with more than a minimal role in the decision making process should be subject to the recording provisions.

The Commission's meetings policy further provides that virtually all meetings between Commission personnel and outside parties be open to the public, with the exception of those involving trade secrets or proprietary information. Meetings involving "matters of substantial interest" before the Commission must be publicized in the Commission's "Public Calendar" in advance of the scheduled meeting date. While the bill requires the maintenance for public inspection of a prospective and retrospective calendar by officials compensated under the Executive Schedule, no provision is made for publicizing other meetings or for opening any significant meetings to the public. The Commission believes that its "open meetings" policy encourages public confidence since it enables interested persons to observe, participate in, and even criticize the decision making process. Although the bill would require detailed summaries of most meetings between agency officials and outside interests, the general public, if denied the opportunity to observe meetings, may not place full faith in the accuracy and completeness of any such summaries. Accordingly, the Commission believes that consideration should be given to providing for "open" meetings where significant matters are discussed with necessary limitations such as for the protection of proprietary information.

- 3 -

In summary, the Commission supports government-wide implementation of "openness" policies with respect to meetings with outside parties and information disclosure. Although such "openness" policies may entail some difficulties, the Commission believes that such burden becomes trivial when compared to the benefits of increased public confidence.

Sincerely,

ORIGINAL SIGNED BY
RICHARD O. SIMPSON

Richard O. Simpson
Chairman

cc: Office of Management
and Budget



SECURITIES AND EXCHANGE COMMISSION

WASHINGTON, D.C. 20549

March 12, 1976

Calendared

MAR 17 1976

The Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: S. 1289, 94th Congress

Dear Mr. Chairman:

This is in response to your request for our views on S. 1289, the "Open Communications Act of 1975."

This bill would amend the Administrative Procedure Act, 5 U.S.C. §551, et seq., to require agency officials compensated at a level of GS-15 or above to record and publicly disclose communications by persons outside the agency. The bill would impose different disclosure requirements on the various kinds of communications typically received by agencies. Communications concerning pending rulemaking, adjudicative or licensing proceedings would be fully disclosed to the public. Communications regarding "substantive policy matters" other than the foregoing, as prescribed by regulations of this Commission, would be disclosed in summary form, however. Finally, a third category of requirements would apply to communications received prior to the commencement of an administrative or judicial enforcement proceeding. Communications initiated by the subjects of such actions would be recorded and maintained within the agency but not publicly disclosed. However, all communications from non-parties attempting to influence agency officials during this critical period would be fully recorded and publicly disclosed.

The question whether public disclosure of the activities of persons seeking to influence significant legislative or executive policy-making decisions would serve the public interest is a policy judgment best resolved by Congress. Having examined S. 1289 and other bills that seek to promote this goal by imposing certain

The Honorable James O. Eastland
Page Two

reporting requirements on agency personnel ^{1/}, the Commission has determined that S. 1289 represents the most balanced approach for supplementing the safeguards that presently exist. We have suggested certain modifications to S. 1289 that we consider to be appropriate in view of the duplication between the protections that would be afforded by this bill and presently existing safeguards, and we recommend that Congress pursue this bill, as modified, rather than the other bills on which we have commented.

The Commission's position regarding S. 1289 depends in part on the relationship of this bill and the protections presently afforded by existing legislation and regulations. It thus would seem appropriate to begin our discussion with a general description of the outside communications we receive and the protections and restrictions now applicable to them.

The Commission, through its members and staff, is in almost constant contact with the public. For example, the Commission last year processed 800 securities registration statements and 1500 proxy statements under the Securities Act of 1933 and the Securities Exchange Act of 1934, respectively, as well as many more applications and registrations provided for by statute. As a part of that process, the staff often must communicate extensively with registrants and applicants to assure their fullest possible compliance with the securities laws. Likewise, the Commission's exercise of its responsibility to oversee the self-regulatory scheme created by the Securities Exchange Act of 1934, under which the national stock exchanges and the National Association of Securities Dealers and the Municipal Securities Rulemaking Board regulate the conduct of their members, requires that our staff constantly be in communication with these organizations.

^{1/} The Commission has submitted comments to the Senate Committee on Government Operations on S. 774, S. 815, S. 2068, S. 2167, and S. 2477. Additionally, we reviewed H.R. 15 and H.R. 1734 and offered our comments to the House of Representatives Committee on the Judiciary. Copies of these comments are attached.

The Honorable James O. Eastland
Page Three

In these and many other ways, the Commission must maintain regular daily contacts with outside parties that commonly would not be considered lobbying. The bulk of these communications are an essential aspect of our regulatory function.

In order to protect the administrative process from improper influence, the Commission in 1963 adopted a Code of Behavior Governing Ex Parte Communications Between Persons Outside the Commission and Decisional Employees, 17 C.F.R. 200.110-114. 2/ This Code of Behavior applies to most Commission adjudicatory proceedings, and to all licensing functions within the meaning of 5 U.S.C. §§551(8) and (9). It requires that any Commission member or decisional employee receiving any ex parte oral communication in such a proceeding that he knows to be unauthorized prepare a memorandum reflecting the content of the communication and the circumstances under which it was made. 3/ This memorandum must be sent to the Commission's Secretary, who will place it in the public file, send copies to all participants in the proceeding, and inform the communicator of the Commission's rules prohibiting unauthorized ex parte communications. 4/

-
- 2/ The Canons of Ethics for Commission members, 17 C.F.R. 200.62, specifically provide that member shall at all times comply with this Code of Behavior. Copies of each of the Commission regulations referred to herein are attached.
 - 3/ The procedures relating to unauthorized written ex parte communications, which are substantially the same as those applicable to oral communications, are set forth in paragraph (a) of Section 200.112 of the Code.
 - 4/ If the individual receiving the communication determines that it would be too burdensome to send written copies to the participants in the proceeding, however, the Secretary will notify the participants that the communication has been made and that a memorandum setting forth its substance has been placed in the Commission's public files and is available for inspection.

The Honorable James O. Eastland
Page Four

All participants in the proceeding may then request an opportunity to answer any contentions or allegations contained in an unauthorized ex parte communication, and the Commission will grant such requests whenever it determines that the dictates of fairness require. ^{5/} Finally, the Commission also has promulgated rules of general applicability forbidding actual or apparent improprieties on the part of its members and staff. See, for example, 17 C.F.R. 200.61 and 200.735-3(b)(2).

The protections afforded by Commission regulations are supplemented by certain provisions of existing law. Section 23(a)(3) of the Securities Exchange Act of 1934 requires the Commission to make available for public inspection all written statements filed with it, and all other written communications relating to any rule-making proceeding under that Act, to the consideration of any application for registration or to a self-regulatory organization's proposed rule change. To a large extent, the requirements of the Freedom of Information Act, 5 U.S.C. 552, also provide general public access to written communications received by the Commission members and staff.

In summary, although the Commission and its staff have substantial contacts with the public, we believe that they primarily involve communications that are essential to the responsible execution of our duties rather than those that should be regulated as "lobbying." We also believe that existing statutory safeguards and Commission regulations generally have been effective in preventing undue influence of the decision-making process, and will remain so in the future.

^{5/} Pursuant to 17 C.F.R. 200.114, the Commission may, to the extent not prohibited by law, censure, suspend or revoke the privilege to practice before it of any person who makes or solicits an unauthorized ex parte communication.

The Honorable James O. Eastland
Page Five

The reporting requirements of S. 1289, although limited to certain high-level government officials and federal employees and to certain significant outside contacts, would impose a substantial burden on our staff, requiring the preparation of memoranda regarding those contacts. 6/ Many of the most important types of communications from the public to this agency, such as formal requests for interpretative advice and no-action letters, already are made public by the Commission. Many other written communications are made available by the Freedom of Information Act, 5 U.S.C. §552 et seq. In view of the duplication of the matters to be disclosed by the reporting requirements of this bill and information already available to the public, the Commission questions whether this burden can be justified. 7/

Assuming that Congress determines generally that the existing protections should be supplemented by additional agency reporting requirements, however, the Commission considers the selective approach of S. 1289 to be preferable to the approaches of other, similar bills. It seems appropriate that some attempt be made, as does this bill, to limit the burden imposed without compromising the basic attempt to monitor private effort to influence significant governmental policy determinations. Moreover, in distinguishing between records of contacts that should publicly be disclosed and those that should be maintained only within an agency, S. 1289 minimizes the potential for disruption of efficient agency operations and important communication channels.

6/ We estimate that compliance would cost some \$240,000 annually for compensation of the staff members directly responsible for preparing the memoranda. There would, of course, be additional costs for secretarial support and other administrative expenses.

7/ This duplication would further be increased if Congress were to enact any of the bills presently under consideration that would impose reporting requirements on lobbyists. See, S. 774, S. 815, S. 2068, H.R. 15, and H.R. 1734.

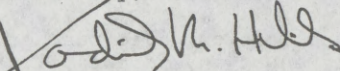
The Honorable James O. Eastland
Page Six

The following modifications of S. 1289 would seem appropriate in view of the anticipated impact of the bill on the operations of the agency and the duplication of a the protections to be offered by this bill and those presently existing. First, in order to prevent subjects of a Commission enforcement proceeding from asserting that noncompliance with the reporting requirements of S. 1289 would void the proceeding or the validity of the substantive rules on which it is based, we suggest that Congress clearly indicate that the sanctions of the bills are exclusive. We also suggest that Congress insure that requiring public access to reports of all communications "containing information with respect to any adjudication" not be construed to expand the existing requirements of the Freedom of Information Act, 5 U.S.C. 552, regarding disclosure of investigatory records and communications from other law enforcement authorities. In many instances, such disclosure would compromise Commission investigations and inhibit discussions initiated by persons or entities subject to potential or impending enforcement proceedings. Both results would impair this agency's law enforcement operations. We, therefore, suggest that Congress specifically indicate that disclosure of contacts with the agency would not be required if a record is exempt under the Freedom of Information Act.

The opinions here expressed are those of the Commission, and do not necessarily reflect the view of the President. Our comments are being submitted simultaneously to the Office of Management and Budget, and we will inform you of any advice received from OMB concerning the relationship of our views to the program of the Administration.

Thank you for the opportunity to comment on this subject.

Sincerely,



Roderick M. Hills
Chairman

Attachments

Interstate Commerce Commission

Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

May 20, 1975 ✓

MAY 21 1975

Calendared

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Chairman Eastland:

The following is in response to your request for our report on S. 1289, the "Open Communications Act of 1975." We note at the outset that this bill would apply only to agencies within the Executive branch and not to independent regulatory agencies such as the Interstate Commerce Commission.

We believe, at least as far as this agency is concerned, that the limitation of the coverage of the Act to executive branch agencies is appropriate since the legislation is largely unnecessary in view of our own regulations and procedures for dealing with ex parte communications. For your information, I have enclosed a copy of Appendix C to our General Rules of Practice (49 C.F.R. Following 1100.25) which contains the rules prohibiting ex parte communications in agency deliberations. These rules are also incorporated into the Canons of Conduct applicable to all Commission employees. (49 C.F.R. 1000.735-18).

Moreover, we think it is important to note that even though the apparent purpose of the bill--to preclude off-the-record influences in governmental decision-making--is commendable, the procedures required to accomplish this purpose are unduly cumbersome and time-consuming. S. 1289 would require that each employee of the Executive branch, grade 15 or above, maintain records of all communications pertaining to any pending agency proceeding or substantive policy matter before the agency. The bill requires an extensive report to be made on each such contact and mandates that all such records will be kept on public file for a period of five years.

(299)

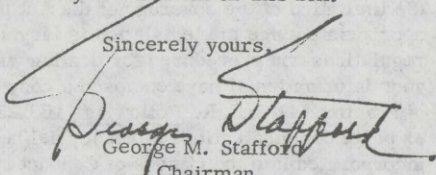
The bill's requirement for detailed recordation of every contact relating to pending proceedings or policy matters, no matter how perfunctory or routine, would clog the agency with paperwork and thwart its efforts to function efficiently. If there is to be a requirement for recording such contacts, we suggest that the type of communication involved be more narrowly defined and the extent of the record to be kept be substantially reduced.

We also note that this bill would require that records of communications from parties to a proceeding in its preadjudicative stages be permanently maintained in an internal file. While such a requirement may be useful in proceedings before the Justice Department, it would prove totally impractical for this Commission to implement as most of our adjudicative proceedings are initiated by parties other than the Commission. It would therefore be impossible for us to determine when a proceeding is in its preadjudicative stages.

In sum, we recognize the importance of insuring that agency decisions be made on the basis of the public record alone, free from the influence of ex parte communications. We support any measure reasonably necessary to accomplish that goal, and indeed have promulgated rules which, we believe, provide the requisite insurance against improper communications. As far as this agency is concerned, however, we do not believe that the pervasive requirements of S. 1289 are either necessary or appropriate.

Thank you for the opportunity to comment on this bill.

Sincerely yours,



George M. Stafford
Chairman

Enclosure

App. B

Title 49—Transportation

Notice is hereby given that the below-named applicant has filed with

(Name of State commission)

an application for a certificate to conduct motor common carrier operations in intrastate commerce; that, in connection with such operations, applicant also is seeking authority to engage in transportation in interstate and foreign commerce within limits which do not exceed the scope of the intrastate operations which may be authorized to be conducted; and that the intrastate and interstate operations proposed to be conducted are as set forth below.

1. -----
(Name and business address of applicant)

(Street) (City) (State)

2. -----
(Name and address of applicant's representative, if any)

(Street) (City) (State)

3. Describe below in full the operations proposed to be conducted in intrastate commerce, together with the extent to which applicant is seeking authority in connection with such intrastate operations to engage in transportation in interstate and foreign commerce. (If additional space is necessary, use reverse side.)

(Signature)

(Title)

Date ----- 19--

PART II

(To be completed by State commission)

Date of filing application -----

Docket number assigned -----

Date and time and place application has been assigned for hearing, if known -----

(Signature)

(Title)

(Name of State commission)

Date this notice forwarded to Interstate Commerce Commission, Washington, D.C. 20423, ----- 19--

INSTRUCTIONS

This form is for use in giving notice to interested persons regarding the filing of intrastate motor carrier applications in connection with which the applicant also desires authority to engage in interstate and foreign commerce pursuant to section 206(a) (8) of the Interstate Commerce Act, as amended

October 15, 1962, by Public Law 87-805. It should be filed in duplicate (along with the intrastate application) with the State commission, which will forward it to the Interstate Commerce Commission, Washington, D.C. 20423.

The description in Part I, item 3 should include the commodities (or passengers) sought to be transported, the points to be served, and the routes over which, or territories within which, such transportation is to be performed. Care should be taken to insure that the description, which will be published in the FEDERAL REGISTER, fully informs interested persons of the type and scope of the proposed intrastate operations, and the extent to which applicant desires authority to engage in transportation in interstate and foreign commerce in connection with such intrastate operations.

APPENDIX C—EX PARTE COMMUNICATIONS

1. *Ex parte communications.* (a) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, member of a joint board, or to any employee of the Commission participating in the decision in such proceeding.

(b) No member of the Commission, hearing officer, member of a joint board, or employee of the Commission participating in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

2. The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure or from such earlier time as the Commission may fix by rule or order in the particular case.

3. For the purposes hereof:

(a) "On-the-record proceeding" means a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(b) "Person who intercedes in any proceeding" means any individual outside the Commission (whether in public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular

Chapter X—Interstate Commerce Commission

§ 1101.1

party to the proceeding, whether or not he acts with the knowledge or consent of any party or any party's agent.

(c) "Ex parte communication concerning the merits" includes both oral and written communications, but the following classes of ex parte communications shall not be prohibited:

(1) Any oral or written communication which all the parties to the proceeding agree, or which the Commission, the hearing officer, or joint board formally rules, may be made on an ex parte basis.

(2) Any oral or written communication of facts or contentions which have general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which he is interested.

(3) Any communication by means of any news medium which in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(d) "Any employee of the Commission participating in the decision" includes personal assistants to members of the Commission, members of an employee review board appointed pursuant to Public Law 87-247 (1961) to whom the proceeding may be referred for decision, employees of the Commission Bureau (e.g., Operating Rights, Finance, Rates and Practices) whose responsibilities correspond to the nature of the proceeding, and the staff of the General Counsel's Office.

4. Any member of the Commission, hearing officer, employee of the Commission, or member of a joint board, participating in the decision who personally receives a written or oral communication which he believes is prohibited at the time received, shall transmit the written communication or a written summary of the substance of an oral communication promptly to the Chairman of the Commission together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself. If the Chairman concludes that the communication is prohibited, or that the dictates of fairness require that it be made public, he shall instruct the Secretary to place the written communication or summary of the oral communication in the correspondence part of the public docket of the proceeding or take such other or further action as may be appropriate under all of the circumstances.

5. The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

6. To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully makes or solicits the making of a prohibited communication.

7. The Commission may censure, suspend, or dismiss, or institute proceedings for the suspension or dismissal of, any Commission employee who knowingly and willfully violates the foregoing prohibitions or requirements.

APPENDIX D

I. -----
(Name)

(Address) (Telephone No.)
hereby declare that I am an attorney at law qualified as a member in good standing of the bar of the highest court of the -----

(Signature)

[32 F.R. 20779, Dec. 23, 1967]

PART 1101—TEMPORARY OPERATING AUTHORITIES AND APPROVALS

Sec.

1101.1 Extension of temporary operating authority or approval.

1101.2 Definitions and interpretations.

1101.3 Additional grant for new need.

1101.4 Termination of temporary authority or approval.

AUTHORITY: The provisions of this Part 1101 issued under sec. 17, 24 Stat. 546, as amended 49 Stat. 546, as amended, sec. 10, 52 Stat. 1238, as amended, secs. 304, 311, 54 Stat. 933; 49 U.S.C. 17, 304, 310a, 804, 911.

SOURCE: The provisions of this Part 1101 appear at 32 F.R. 20090, Dec. 20, 1967, unless otherwise noted.

§ 1101.1 Extension of temporary operating authority or approval.

The Commission will determine upon written request by any interested party, or it may determine upon its own initiative, whether under section 558 of the Administrative Procedure Act (5 U.S.C. 558):

(a) Any temporary operating authority granted under 210a(a) or 311

¹ Specify State, possession, Commonwealth or territory.



GENERAL COUNSEL

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

NOV 20 1975

Calendared

NOV 24, 1975

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

Your Committee has requested the views of the Department of Transportation (DOT) on S. 1289, a bill

To amend chapter 5, subchapter II of title 5,
United States Code, to provide for improved
administrative procedures.

The bill would require records to be maintained, in public reading rooms, of certain classes of communications to agency officials. Additionally, all officials compensated under the Executive Schedule would be required to maintain prospective and retrospective calendars for public inspection.

Although the DOT believes the basic purpose of public disclosure is commendable, it does not favor enactment of this bill. The DOT now requires memorialization of all ex parte communications concerning the merits of a proceeding for placement in the public docket. We believe this method is sufficient both to discourage attempts at improper ex parte communications and to inform the public when such communications, nonetheless, occur. This relatively simple procedure assures that all matters pertaining to the conduct of a proceeding are included in the public docket of that proceeding. In the event the proceeding involves submitted information not subject to mandatory disclosure under the Freedom of Information Act (5 U.S.C. 552), and a determination is made that information which is not mandatorily disclosable should be withheld from release, a notation to that effect is included in the public docket.

S. 1289, on the other hand, would require:

(1) To be maintained for full disclosure records of communications, except those initiated by a party (which would be maintained for internal disclosure only), received during pre-adjudicative stages of an administrative or judicial enforcement proceeding held to determine punishment for or to prevent the violation of Federal law or agency regulation; and

(2) To be maintained for summary disclosure records of communications pertaining to a substantive policy matter before the agency. A "substantive policy matter" is defined as "any important agency action or policy issue as prescribed in regulations promulgated by the agency, except that no such regulation shall apply to agency proceedings (involving rulemaking, adjudication or licensing)."

The "pre-adjudicative" record requirement appears to apply only to actions prior to formal initiation of proceedings, and is addressed only to potential proceedings to determine punishment for or to prevent violation of laws or regulations. The requirement does not extend to pre-adjudicative stages of proceedings to determine whether a violation of a law or regulation has occurred.

Adjudicative actions normally are not severed into two distinct proceedings (violation determination and punishment determination). Once a violation is determined to have occurred, the penalty assessment, if any, is made. There is not a separate "pre-adjudicative stage" of the penalty assessment portion of the proceeding.

The "substantive policy matter" record requirement is not clear. Each agency, presumably, must promulgate regulations defining those matters within its purview which involve "substantive policy", and rule-making, adjudicatory and licensing proceedings may not be included. The DOT does not understand the intent or purpose of this provision. Initially, it may not be possible to define by regulation substantive policy matters (other than those addressed in rule making or adjudication) before the agency. "Before the agency" is an ambiguous term. In the context of the bill, it seems to mean a subject being considered by the agency in a context other than rule making or adjudication. Thus, inquiry must focus not only upon what a substantive policy matter may be, but also upon when it comes "before the agency".

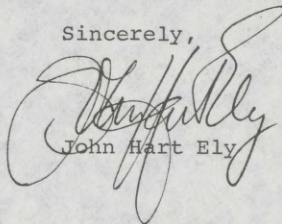
There exists no provision in the bill requiring disclosure of ex parte communications in rule making, adjudicatory or licensing proceedings, or areas in which such disclosure would appear more important.

With respect to the form of disclosure, the DOT believes the provisions of the bill to be cumbersome and overly time-consuming. Moreover, the public file of disclosure records, which would include only the records and summary sheets, would not be useful to the public without access to the file of the proceeding to which the disclosure relates. The DOT considers the system it utilizes (placement of ex parte communications in the pertinent public docket) to be preferable. Those communications which do not address the merits of an in-process proceeding are not ex parte communications. Rather, they are treated as routine communications, and, if in written form, are maintained in the Department's file system. Records in that system are available for public inspection and copying under the Freedom of Information Act.

The requirement for maintaining the prospective and retrospective calendars of all officials compensated under the Executive Schedule would not serve any valid purpose. Within the DOT, all key officials maintain for Departmental use (available to the public) weekly schedules listing major appointments and activities. It does not appear necessary to open to public scrutiny all personal activities of government executives. More importantly, however, this requirement could prevent necessary activities of key officials, especially in areas involving foreign affairs or national defense which, because of their nature, must be kept secret.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report for the consideration of the Committee.

Sincerely,



John Hart Ely

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UNITED STATES
ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION
WASHINGTON, D.C. 20545

NOV 18 1975
Calendar

NOV 12 1975

Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate

Dear Mr. Chairman:

Thank you for the opportunity to comment on S. 1289, a bill "[t]o amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

The intent of S. 1289 is worthwhile. However, the Energy Research and Development Administration is opposed to the enactment of S. 1289 for the reasons enumerated below.

S. 1289 would add to Subchapter II, "Administrative Procedure," of Title 5, United States Code, a new section 560, "Maintenance of records of ex parte communications." Officials, grade 15 and higher, in executive agencies would be required to record and make public each oral and written communication received from any "person" (broadly defined in section 560(a)(2)) outside the agency concerning any of the following matters:

- (1) a substantive policy matter before the agency, unless the communication is received from an informant or a member of the working press. A substantive policy matter would be defined by agency regulation, but could not pertain to an "agency proceeding" (generally, rulemaking, adjudication, or licensing);
- (2) a proceeding, during its pre-adjudicative stages, or a pending agency proceeding, with exceptions as to communications from informants and members of the working press, and to communications initiated by a party to an enforcement proceeding during the pre-adjudicative stage.

The nature of the matter would determine whether records would be maintained for full or summary public disclosure or, in some instances, for disclosure within the agency only.



Honorable James O. Eastland

-2-

Other parts of the bill provide definitions of the terminology and requirements as to records involved. Those records required to be publicly disclosed would have to be prepared and included in a properly indexed public file, in the public reading room of the agency, within five working days of the receipt of the communication. Records for internal disclosure would have to be included in the appropriate file permanently, with a copy to be placed in a centrally located agency file within five working days from receipt of the communication.

A related requirement on each Executive level agency official would place his prospective and retrospective calendars on public inspection in the agency's public reading room.

Finally, criminal penalties would be imposed on any agency official who "knowingly and wilfully falsifies, forges, or fails to file any record required" by the legislation.

The intent of S. 1289 is worthwhile, but the administrative burdens which it would create are incalculable. The first problem is the absence of a definition of a "substantive policy matter," together with the provision for definition by each agency's regulations. The lack of uniformity which would thereby result in the various agencies' public files of "substantive policy matters" could create much uncertainty and dissatisfaction on the part of the public. We believe that any such legislation should precisely define the matters desired to be covered.

Even with such a change, however, the disruption of agency processes caused by the filing and indexing requirements could be severe. With the criminal sanctions which would be imposed, the tendency of officials would be to devote their principal energies to maintenance of the pertinent records, with a noticeable detrimental effect on the agency's mission.

It should also be noted that 5 U.S.C. 554(d) already addresses the question of ex parte communications in the case of agency adjudications.

We would also like to call attention to the fact that this agency's regulations, 10 CFR Part 2, deal comprehensively with ex parte communications in connection with all proceedings under the Atomic Energy Act of 1954. Since the dissolution of the former Atomic Energy Commission pursuant to the Energy Reorganization Act of 1974 (P.L. 93-438), the proceedings which might be conducted by ERDA under 10 CFR Part 2

Honorable James O. Eastland

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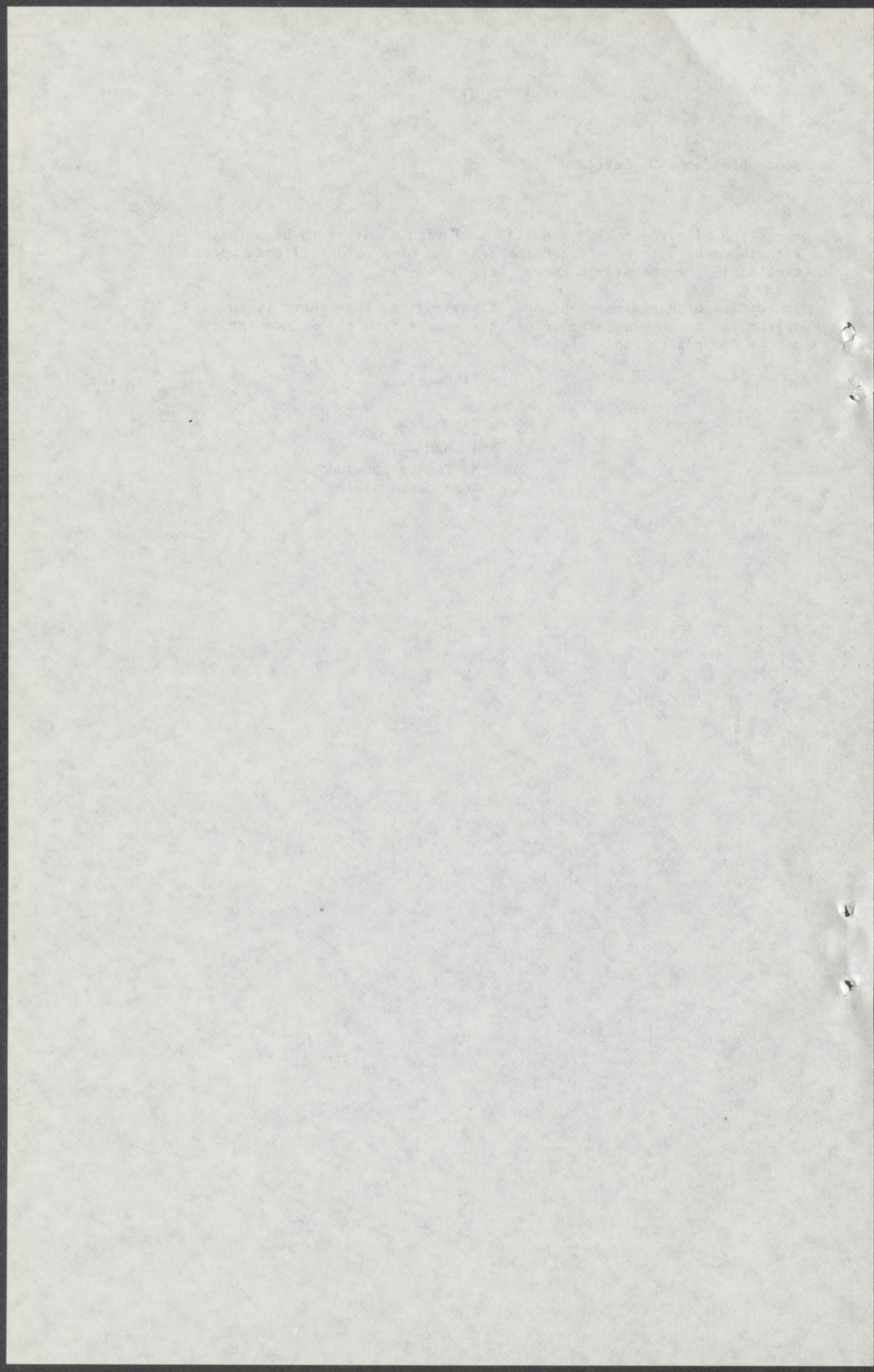
are (i) public rulemaking and (ii) declaring a patent to be affected with the public interest, and the granting of a patent license under section 153 of the Atomic Energy Act.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

Original signed by
R. Tenney Johnson

R. Tenney Johnson
General Counsel





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DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20250

November 10, 1975

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in reply to your request of April 28, 1975, for a report on S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

The Department recommends that the bill not be enacted.

The bill is characterized as the "Open Communications Act of 1975." It would require agency officials who are compensated at grade 15 and above or under the Executive Schedule to prepare, with certain specified exceptions, a record of each oral or written communication initiated by persons outside the agency (1) pertaining to a substantive policy matter before the agency, or (2) during the pre-adjudicative stages of a proceeding or pertaining to a pending agency proceeding. The record would include the name and position of the official who received the communication, the date the communication was received, the identification of the person from whom the communication was received and the person on whose behalf he was acting, a brief summary or characterization of the subject matter, copies of any written material, and, in the case of a communication made during an agency proceeding, a brief description of the action taken by the official in response to the communication. The agency would be required to include such record in a public file located in the reading room of the agency and index such record within five working days of the receipt of the communication. The agency would also be required

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to make and have on file records of communications from outside the agency not falling within the categories specified above. The bill would provide criminal penalties for knowing and willful violations of these requirements.

It is our view that any benefit to the public from such requirements would be heavily outweighed by the additional cost involved and the administrative burden imposed on an agency and its officials.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's Program.

Sincerely,
J. Phil Campbell
Under Secretary

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

NOV 12 1975

11 November 1975

~~Calendar~~

Honorable James O. Eastland, Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request for our views on S. 1289, a bill further amending the Administrative Procedures Act of 1946 to require certain employees of executive agencies to maintain, for varying degrees of public disclosure, records of certain oral or written communications initiated outside the agency, and to require agency officials compensated under the Executive Schedule of Title 5 to maintain their "prospective and retrospective calendars" for public inspection.

It seems apparent that S. 1289 is intended to insure open proceedings in those administrative agencies which affect private rights or public interests through adjudicatory, rule making, or related actions. The Central Intelligence Agency is not such an administrative authority. It was established by the National Security Act of 1947 to coordinate the intelligence activities of the United States; to correlate, evaluate and disseminate foreign intelligence; and to perform other functions and duties related to intelligence and affecting the national security. Therefore, the Agency's interest in this legislation is limited to the concern that certain sections could impinge upon these statutory responsibilities.

Subsection (d) of the new section "5 U.S.C. 560" proposed in S. 1289 would require officials compensated under the Executive Schedule to maintain "prospective and retrospective calendars for public inspection in the public reading room of the agency." The Director and Deputy Director of Central Intelligence are compensated under this schedule and, therefore, apparently would be subject to this requirement.

Whatever merits this disclosure requirement would have with respect to the regulatory functions of administrative agencies, if applied to the calendars of the Director and Deputy Director of Central Intelligence, it would impair the nation's foreign intelligence efforts and raise serious statutory conflicts.



Disclosure of the identities of individuals with whom the Director or Deputy Director are in contact and the frequency and pattern of these contacts would be of significant intelligence value to rival powers and could betray, and therefore nullify, intelligence sources and methods, which the Director is obligated to protect pursuant to Section 102(d)(3) of the National Security Act of 1947. Moreover, where the names and functions of Agency personnel are recorded therein, publication of these calendars would contravene Section 6 of the Central Intelligence Agency Act of 1949 which exempts the Agency "from the provisions of any other law which requires the publication or disclosure of the organization, functions, names, or . . . numbers of personnel employed by the Agency." Further, this publication requirement could discourage private individuals from contacting the Director or Deputy Director on matters in which they would otherwise be willing to assist the Government's foreign intelligence program. In sum, proposed subsection (d), while in no way furthering the public interests which S. 1289 seeks to promote, would be harmful to the nation's foreign intelligence interests. For this reason, I am opposed to S. 1289, as drafted.

The other provisions of S. 1289 are more clearly directed at the regulatory functions of Federal administrative agencies. However, the language of subsection (b)(1) is ambiguous and elastic enough to warrant some clarification.

Under subsection (b)(1) each "agency official" is required to maintain for summary disclosure records of oral or written communications initiated by persons outside the Agency pertaining to "a substantive policy matter before the Agency."

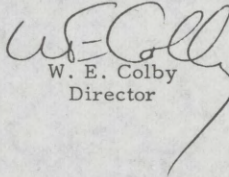
The first point to be noted with respect to this subsection is that in general officials of this Agency would not be subject to its provisions. "Agency Official" is defined in S. 1289 as "those employees of the Executive branch who are compensated in grade 15 and above under the General Schedule under section 5332 of title 5 (emphasis added)." Section 5332 establishes the basic pay schedule for positions to which Subchapter III, Chapter 53 of Title 5 applies. Section 5331 provides that "agency" and "employee," for purposes of Subchapter III, have the meanings given them by Section 5102. Section 5102 specifically provides that "agency," for purposes of Chapter 53, does not include the Central Intelligence Agency. However, "agency

official" is further defined in S. 1289 to include those compensated under the Executive Schedule. This would encompass the Director and Deputy Director of Central Intelligence. Thus, the only officials of the Central Intelligence Agency who could be deemed subject to the provisions of subsection (b)(1) are the Director and Deputy Director.

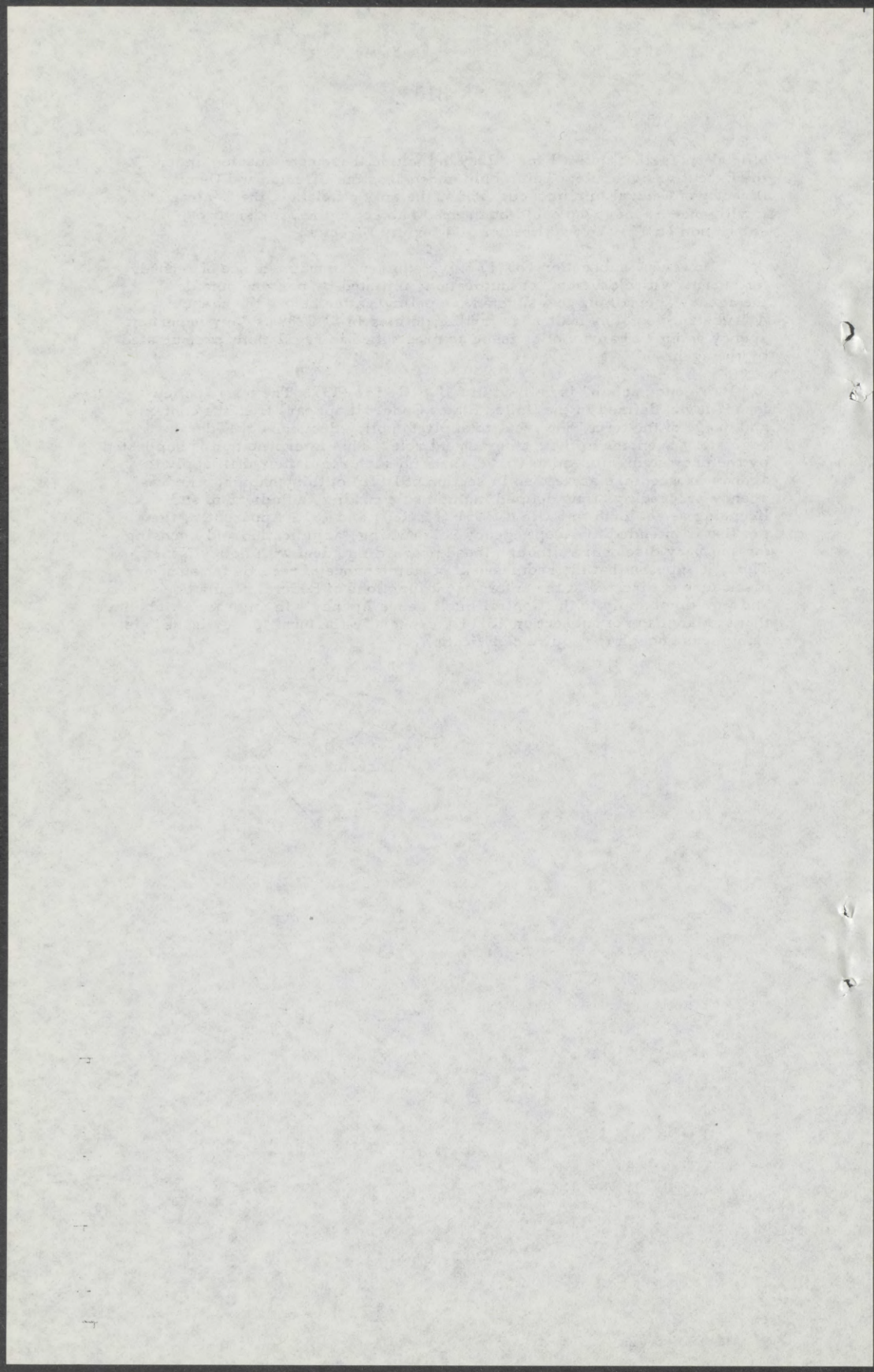
However, subsection (b)(1) only requires the maintenance of records for summary disclosure of communications initiated by persons outside the agency "pertaining to a substantive policy matter before the agency." A "substantive policy matter" is further defined in S. 1289 as "any important agency action" or any "policy issue as prescribed in regulations promulgated by the agency."

"Agency action" is defined in 5 U.S.C. 551 (13). The term "policy issue" is not defined in the United States Code. It appears from the context and usage of the term, however, to apply to policy decisions of Federal regulatory agencies in their enforcement role. This interpretation is supported by the proviso in subsection (b)(1) that "no such regulation shall apply to agency proceedings as defined in section 551 (12) of this chapter." Federal agency proceedings thus defined include rule making, adjudication and licensing as set forth in 5 U.S.C. 551 (5), (7), and (9). Apparently, the proviso is intended to except agency rule making, adjudication and licensing for summary disclosure although those proceedings deal with policy issues. Thus, it appears that the requirement of maintenance of records for summary disclosure is directed at the enforcement functions of Federal regulatory agencies and would not apply to the Central Intelligence Agency. In any case, we believe that the language of subsection (b)(1), especially the term "policy issue," is ambiguous enough to require clarification.

Sincerely,



W. E. Colby
Director





DEPARTMENT OF STATE

Washington, D.C. 20520

NOV 12 1975

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NOV 7 - 1975

Honorable James O. Eastland
Chairman, Committee on the
Judiciary
United States Senate

Dear Mr. Chairman:

Your letter of April 28 requested the report of the Department of State on S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures.

The bill would require that, with respect to proceedings before Government agencies, senior employees would be required to prepare various types of records of communications from persons, whether in or out of Government, concerning such proceedings. One kind of record, described as record of communications maintained for summary disclosure, is for communications (other than from the press and informants) pertaining to a substantive policy matter before the agency. Another kind described as record of communications maintained for full disclosure is for communications (with certain exceptions) during the pre-adjudicative stages of an enforcement proceeding held to determine punishment for or prevent violation of Federal law or agency regulation, or pertaining to a pending proceeding.

Department regulations presently require memoranda of conversation to be prepared of significant oral communications, and written communications of significance to the operations, activities and organization of the Department are required to be preserved. These records are subject to the Freedom of Information Act (5 U.S.C. 552). An objectionable feature of this bill is that it provides no discretion to refrain from recording and preserving communications which are not significant, thus burdening officers and records systems with unnecessary record making and keeping.

Another objectionable feature of the bill is the excessive detail it provides on the content and maintenance of the required records. This will require senior officers to spend

-2-

considerable time categorizing communications and a different records system for records of communications for full disclosure. Considerable administrative burden and records services costs would result.

This excessive detail and the penalties provided for falsification, forgery or failure to file any required record may have the effect of discouraging officers from oral communication and making records of oral communications which would be recorded under existing regulations.

The Department, for the reasons indicated, objects to enactment of S. 1289.

The Office of Management and Budget advises that from the standpoint of the administration's program there is no objection to this report.

Sincerely,

Robert J. McCloskey
Assistant Secretary
for Congressional Relations



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

NOV 18 1975

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NOV 18 1975

Honorable James D. Eastland
Chairman, Committee on the
Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter of April 28, 1975, requesting the views of the Small Business Administration with respect to S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

S. 1289, entitled the "Open Communications Act of 1975," would require that the heads of all Government agencies and all officials in positions of GS-15 and above keep calendars of their meetings with those outside the Agency and copies of correspondence which contain "substantive policy matters" that may affect "important agency actions" or "policy issues." In addition, copies of these required submissions are to be furnished within five working days to a public reading room. Any agency official who knowingly and willfully falsifies, forges or fails to file any record required under the bill would be subject to a fine of not more than \$1,000 or imprisoned for not more than one year or both.

All communications concerning formal agency rulemaking proceedings would be logged and fully disclosed to the public. Communications regarding matters other than agency rulemaking proceedings, policy matters or internal agency proceedings not governed by the APA, would be disclosed to the public in summary form if they are among those deemed "important" by the agency. Also, communications relating to discretionary agency activities during the pre-adjudicative stages of enforcement proceedings would have to be logged. However, in this latter case, to protect the privacy of

parties who are the subject of such actions, the communications they initiate would be recorded and maintained only within the agency. Such an exception would not apply to nonparties attempting to influence agency officials and therefore such disclosures would be fully logged and publicly disclosed.

S. 1289 is aimed at countering the behind-the-scenes influence of industries being regulated by the Federal Government. The bill would attempt to throw open to the public all communications running between the public and Federal agency executives GS-15 and above.

While we do not question the intent of the bill, which is to make the public's business (operations of the executive branch) easily available to the public and the "working press," we believe its provisions could create an administrative nightmare. Beyond this, there are some difficulties with particular sections.

For example, under 560(b)(2) the difficult job of delineating "substantive policy matter" has been left to the agencies to define in terms of "important agency actions" or "policy issues." When faced with a possible criminal penalty, what real choice would an official have but to record, log and fully report every contact or communication that he has with the public?

In 560(b)(2), which requires maintenance of a record for full disclosure, it is not clear whether it applies only to adjudicative proceedings of an enforcement type. If it applies to proceedings generally, it could apply to the thousands upon thousands of loan applications SBA receives each year and make public what we have long regarded as confidential information, namely, the existence of a pending loan application. SBA considers approved loans within the public domain, but not those pending or declined, because disclosure of the latter could unnecessarily adversely affect the credit of businesses.

A public reading room is apparently required by 560(b)(2). SBA had one at one time and found the expense of maintenance unjustified. There is the further complication of our extensive decentralization. Where will records processed in the field be available? The section speaks of the public reading room of the agency, an indication of a

centrally located place. And, if mailing from field offices all over the country is contemplated, is it realistic to require public filing within five working days of receipt?

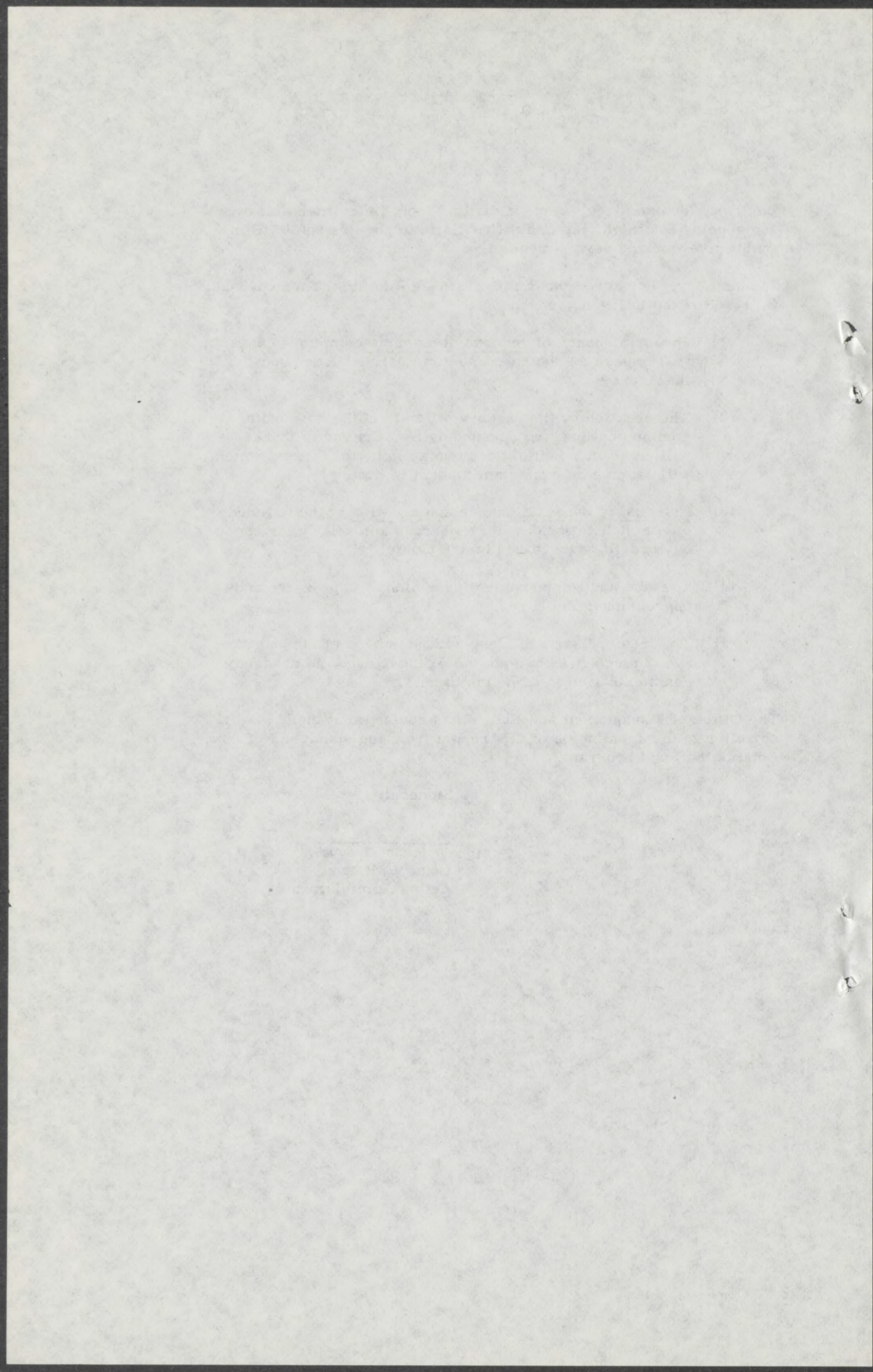
In summary, therefore, the Small Business Administration opposes S. 1289 for the following reasons:

- (1) The maintenance of records of ex parte communications will impose a substantial administrative burden upon the Agency;
- (2) The creation by the "agency official" of the "record of communications" will be unduly burdensome in that it will entail substantial documentation by the official which will assume an exorbitant amount of time;
- (3) The cost of the maintenance and creation of the "record of communications" will be onerous and will by far exceed any benefit to be gained by the public;
- (4) The fine and imprisonment provision is oppressive and opprobrious; and
- (5) The free exchange of ideas with members of the public and other parties outside the Agency, e.g., interagency communication, will be inhibited.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

(Signed) Louis F. Laun
Louis F. Laun
Acting Administrator



NATIONAL SCIENCE FOUNDATION
WASHINGTON, D. C. 20550

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OFFICE OF THE
DIRECTOR

November 7, 1975

Honorable James O. Eastland
Chairman, Committee on the Judiciary
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

This is in response to your letter of April 28, 1975, requesting the comments of the National Science Foundation on S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

While the Foundation fully supports what we understand to be the objectives of this bill -- openness in the Governmental, decision-making process and the discouragement of improper influences on such processes -- we believe that the Freedom of Information Act, which was recently amended, assures the public access to most information necessary to properly judge the performance of the Government agencies. In addition, other legislation of fairly recent origin such as the Federal Advisory Committee Act and the Privacy Act have also opened new sources of information concerning the Governmental, decision-making processes. In addition, of course, a variety of traditional means of public scrutiny exists, including Congressional oversight and the press.

Until the above alternatives are found wanting, in our opinion it would be premature to establish procedures that would require the preparation and maintenance for five years of massive record systems, access to most of which may never be requested. Moreover, much more than the mere recording and collecting of communications will be involved. Agencies will be under a burden to review and edit each communication so as to delete information that they feel should rightly be maintained on a confidential basis pursuant to recognized exemptions under 5 USC 552(b). It has been our experience that such review even on individual requests under the Freedom of Information Act can entail considerable staff time of persons

Honorable James O. Eastland

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at fairly senior levels. If every communication received by the Foundation had to be reviewed in this manner, the costs and time involved could well become inordinate.

Finally, while it is our understanding that the intent of this bill is to make open to the public the contacts between Government officials and private lobbyists, the bill actually goes much further. It appears, for instance, that internal staff memoranda would be required to be included within the "record of communications."

For these reasons we do not favor the enactment of the approach proposed in S. 1289. We believe current safeguards, including many of recent origin, have not yet had a chance to prove their effectiveness in ensuring an open Governmental, decision-making process.

The Office of Management and Budget has advised us that there is no objection to the submission of this report from the viewpoint of the Administration's program.

Sincerely yours,

H. Guyford Stever
Director

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425



STAFF DIRECTOR

JUN 17 1976

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JUN 12 1975

Honorable James O. Eastland, Chairman
Committee on the Judiciary
2226 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is in reply to your request of April 28, 1975 for the views of this Commission with respect to S. 1289, a bill to improve administrative procedures and practices by requiring senior Federal Officials to maintain a log of external communications. We have made a technical review of the Open Communications Act since we do not view it as having particular implications for civil and women's rights.

It is our over-all impression that the bill is not well drafted, although it addresses a problem which needs resolution. The Administrative Procedure Act governs the communications of agency officials with private interests or who deal regularly with persons in the private sector. The Open Communications Act of 1975 follows the lead of the Department of Transportation and the Department of Justice in tightening the limited restrictions in the Administrative Procedure Act.

With respect to the actual drafting problems we see, I will enumerate the following:

I question whether it is proper in addition to the identification of the person initiating the communication with the government official, to also note "on whose behalf such person is acting in making the communication". This seems perilously close to infringing on the rights of the third party because it could be easily abused. For example, in a telephone communication it is hard to verify the authenticity and authority of who is speaking for whom. Misrepresentation by an individual could place an unfair burden on the third party by having the call a part of a public record. This is somewhat like the hearsay rule in criminal law. This is not to say the caller could not identify who he or she was or where he/she works, but on whose behalf he/she speaks appears disturbingly unstructured.

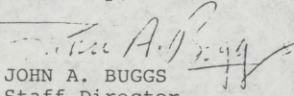
Honorable James O. Eastland
Page Two

S.1289 calls for agencies to disclose in summary form "important" policy matters within the agency. We believe use of the word "important" would establish a poor and subjective standard, and could be a loophole for inadequate disclosure. Certainly different individuals will have different ideas of what constitutes "important".

This bill requires each agency to monitor its own files. S.1289 leaves open the question of exactly who will monitor this system. It presents a conceivable conflict to expect high ranking individuals within an agency to put communications on record which they believe may be detrimental to their agency or to themselves.

If you have any questions, please have a member of your staff call Bud Blakey (254-6626).

Sincerely,


JOHN A. BUGGS
Staff Director

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC 20405



NOV 18 1975

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Honorable James O. Eastland
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Your letter of April 28, 1975, requested the views of the General Services Administration on S. 1289, a bill "To amend chapter 5, subchapter II of title 5, United States Code, to provide for improved administrative procedures."

The bill as it is currently written is vague and confusing. It appears that the intent of this legislation is to permit the public to be aware of all views expressed to agency officials concerning policy matters. However, the actual result may be to severely limit, or stop altogether, communications on policy matters as the burden on agency officials will be such that they will prefer not to continue such communications or will conduct them informally. Effective implementation of the bill's requirements would be virtually impossible. There is, for instance, no acceptable way to monitor contacts officials make after work or outside of Government offices. Many violations would not become apparent until an inquiry or legal action made them obvious.

GSA believes that extending coverage of the bill to all employees of the executive branch at Grade 15 and above (Section 560 (a)(1)) is unrealistic since not all Grade 15's are concerned with "substantive policy matters." There are probably many technical positions at that level which have no policy responsibilities at all. The bill should limit coverage to officials in Grade 15 and above who have policy decision-making responsibilities, or should permit heads of agencies to exempt certain Grade 15's from the provisions of the bill.

The term "record" is incorporated in each of three definitions in the bill: "record of communications maintained for internal disclosure" (5 U.S.C. 560(a)(5)), "record of communications maintained for summary disclosure" (5 U.S.C. 560(a)(6)), and "record of communications maintained for full disclosure." Two definitions of the term "record" currently

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are a part of the law of Federal documents. Section 3301 of title 44, United States Code, defines "record" for purposes of disposal of Federal documents as

" . . . all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under 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 in them"

The Privacy Act of 1974, P.L. 93-579, which went into full effect in September 1975, defines "record" as

" . . . any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history, and that contains his name or the identifying number, symbol, or other identifying particular assigned to the individual such as a finger or voice print or a photograph. (5 U.S.C. 552a(a)(4))."

We suggest that use of the term "record" in S. 1289 in three contexts which differ significantly from the two existing definitions of "records" in titles 5 and 44, United States Code, may result in confusion in GSA's records management program. This problem could easily be avoided by using a term such as "notation" or "report" for the term "record" wherever the latter appears in S. 1289.

Section 560(c)(2) calls for records of communications for internal disclosure to be "permanently" included in certain files. As currently used in Federal agencies, the word "permanent" connotes permanently valuable Federal records to be accessioned into the National Archives of the United States. As used here, "permanent" could restrict the normal disposition of records under the records schedules provided for in 44 U.S.C. 3303 and 3303a. Moreover, the inclusion of these records of communications for internal disclosure in both case files and centrally located files is unnecessary duplication, and creates the possibility that material in one file could be misinterpreted without related material kept in the other file. There is no retention period specified for material in the central file.

Section 560(c) contains no statement of the elements of information to be included in an official's prospective and retrospective calendars, and there is no retention period specified for the calendar copies provided to the agency public reading room.

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As stated earlier, GSA does not believe that effective implementation of S. 1289 would be possible. We feel that the proposal will do little to hinder the activities of Government officials who are susceptible to pressures exerted from outside their agencies. The measure will, however, impose a tremendous burden on other officials who will be less able to perform their functions quickly and efficiently. For these reasons, GSA opposes enactment of S. 1289.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to your Committee.

Sincerely,

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