

Department of Justice
Washington, D.C. 20530

APPENDIX A

November 18, 1975

Honorable Olin E. Teague
Chairman, Committee on Science
and Technology
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on a proposed provision of H.R. 3474, a bill "To authorize appropriations to the Energy Research and Development Administration in accordance with Section 261 of the Atomic Energy Act of 1954, as amended, Section 305 of the Energy Reorganization Act of 1974, and Section 16 of the Federal Nonnuclear Energy Research and Development Act of 1974."

Specifically, you desire our comments on the November 17, 1975 draft provision on protection of proprietary information. In this connection this Department has worked informally with members of the staff of the House Science and Technology's Subcommittee on Energy Research, Development, and Demonstration.

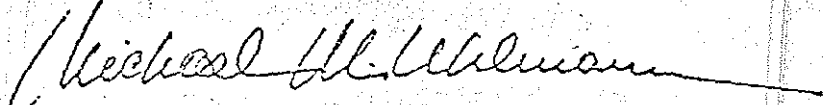
The draft provision under consideration is an attempt to avoid the legal uncertainties involved in protecting from public disclosure proprietary information by creating a statutory exemption which would be within the scope of Exemption 3 of the Freedom of Information Act (5 U.S.C. § 552(b)(3)). This exemption was recently considered by the Supreme Court in F.A.A. v. Robertson, _____ U.S. _____, 95 S. Ct. 2140 (1975). In our view, the draft provision

would be helpful in obviating these uncertainties. It clearly states that the Administrator of ERDA and any other agencies involved may not release such proprietary information after a showing satisfactory to the Administrator that the information is indeed proprietary in character. Although there may be occasional questions as to what constitutes "proprietary information" in specific instances, this term reflects a concept familiar in federal law.

Therefore, although the draft provision may not avoid all uncertainties regarding the availability of the information involved, it nonetheless represents a significant progress. The creation of a statutory exemption that meshes with Exemption 3 of the Freedom of Information Act (5 U.S.C. § 552(b)(3)) avoids the need for ERDA to determine the often difficult questions as to whether the proprietary information sought to be protected falls within either Exemption 4 (5 U.S.C. § 552(b)(4)) or 18 U.S.C. § 1905. As long as the information to be withheld qualifies under the terms of the proposed statutory exemption, it would be covered by Exemption 3 of the Freedom of Information Act and thus would not be subject to mandatory disclosure.

The Department of Justice defers to the Energy Research and Development Administration, the agency primarily concerned with the subject matter, as to whether as a matter of policy this provision should be enacted.

Sincerely,



Michael M. Uhlmann
Assistant Attorney General
Office of Legislative Affairs