

Statement Of Senator Patrick Leahy
On The Introduction Of Section 8 Of The Open Government Act
June 7, 2005

MR. LEAHY. For the third time this year, Senator Cornyn and I have joined to introduce common sense proposals to strengthen open government and the Freedom of Information Act, or FOIA. The Senator from Texas has a long record of promoting open government, most significantly during his tenure as Attorney General of Texas. He and I have forged a valuable partnership in this Congress to support and strengthen FOIA. We introduced two bills earlier this year, and held a hearing on our bill, the Open Government Act, issues during Sunshine Week in March.

The bill we introduce today is simple and straightforward. It simply requires that when Congress sees fit to provide a statutory exemption to FOIA, it must state its intention to do so explicitly. The language of this bill was previously introduced as section eight of S.394, the Open Government Act.

No one argues with the notion that some government information is appropriately kept from public view. FOIA contains a number of exemptions for national security, law enforcement, confidential business information, personal privacy, and other matters. One provision of FOIA, commonly known as the (b)(3) exemption, states that records that are specifically exempted by statute may be withheld from disclosure. Many bills that are introduced contain statutory exemptions, or contain language that is ambiguous and might be interpreted as such by the courts. In recent years, we have seen more and more such exemptions offered in legislation. A 2003 Justice Department report stated that Congress has been "increasingly active in enacting such statutory provisions." A June 3, 2005, article by the Cox News Service titled, "Congress Cloaks More Information in Secrecy," pointed to 140 instances "where congressional lawmakers have inserted such exemptions" into proposed legislation. I commend this article to my colleagues and understand that Senator Cornyn has placed a copy in the Record.

Our shared principles of open government lead us to believe that individual statutory exemptions should be vigorously debated before lawmakers vote in favor of them. Sometimes such proposed exemptions are clearly delineated in proposed legislation, but other times they amount to a few lines within a highly complex and lengthy bill. These are difficult to locate and analyze in a timely manner, even for those of us who stand watch. As a result, such exemptions are often enacted with little scrutiny, and as soon as one is granted, others are requested.

The private sector has sought many exemptions in exchange for agreeing to share information with the government. One example of great concern to me is the statutory exemption for critical infrastructure information that was enacted as part of the Homeland Security Act of 2002, the law that created the Department of Homeland Security. In this case, a reasonable compromise, approved by the White House, to balance the protection

of sensitive information with the public's right to know was pulled out of the bill in conference. It was then replaced with text providing an overly broad statutory exemption that undermines Federal and State sunshine laws. I have introduced legislation, called the Restoration of Freedom of Information Act, to revert to that reasonable compromise language.

Not every statutory exemption is inappropriate, but every proposal deserves scrutiny. Congress must be diligent in reviewing new exemptions to prevent possible abuses. Focusing more sunshine on this process is an antidote to exemption creep.

When we introduced the Open Government Act in February, we addressed this matter with a provision that would require Congress to identify proposed statutory exemptions in newly introduced legislation in a uniform manner. Today, we introduce that single section as a new bill that we hope can be enacted quickly.