

By Mr. LEAHY (for himself and Mr. Cornyn):

S. 2427. A bill to promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes; to the Committee on the Judiciary.

Mr. LEAHY. Mr. President, today, I have joined with Senator Cornyn to reintroduce the ``Openness Promotes Effectiveness in our National Government Act--or the OPEN Government Act--the first major reform to the Freedom of Information Act, FOIA, in more than a decade. The Senate passed this historic FOIA reform legislation, S. 849, before adjourning for the August recess. But, sadly, this measure has been stalled in the House Oversight and Government Reform Committee for several months, preventing these long-overdue FOIA reforms from being enacted into law.

Despite the unfortunate delay of this bill, I remain deeply committed to enacting FOIA reform legislation this year. Because time is of the essence, I am requesting that this legislation be immediately placed on the Senate Calendar and that the Senate promptly take up and pass this bill by unanimous consent, so that it can be sent to the House.

The version of the bill introduced today includes ``pay/go" language that has been requested by the House and eliminates the provision on citations to FOIA exemptions. After needlessly delaying the enactment of this bill for several months, I hope that the House Oversight and Government Reform Committee will promptly take up this important measure, so that the House can enact this legislation and send it to the President before the end of the year.

As the first major reform to FOIA in more than a decade, the OPEN Government Act will help to reverse the troubling trends of excessive delays and lax FOIA compliance in our government and help to restore the public's trust in their government. This bill will also improve transparency in the Federal Government's FOIA process by: restoring meaningful deadlines for agency action under FOIA; imposing real consequences on federal agencies for missing FOIA's 20-day statutory deadline; clarifying that FOIA applies to Government records held by outside private contractors; establishing a FOIA hotline service for all Federal agencies; and creating a FOIA Ombudsman to provide FOIA requesters and Federal agencies with a meaningful alternative to costly litigation.

Specifically, the OPEN Government Act will protect the public's right to know, by ensuring that anyone who gathers information to inform the public, including freelance journalists and bloggers, may seek a fee

waiver when they request information under FOIA. The bill ensures that Federal agencies will not automatically exclude Internet blogs and other Web-based forms of media when deciding whether to waive FOIA fees. In addition, the bill also clarifies that the definition of news media, for purposes of FOIA fee waivers, includes free newspapers and individuals performing a media function who do not necessarily have a prior history of publication.

The bill also restores meaningful deadlines for agency action, by ensuring that the 20-day statutory clock under FOIA starts when a request is received by the appropriate component of the agency and requiring that agency FOIA offices get FOIA requests to the appropriate agency component within 10 days of the receipt of such requests. The bill allows Federal agencies to toll the 20-day clock while they are awaiting a response to a reasonable request for information from a FOIA requester on one occasion, or while the agency is awaiting clarification regarding a FOIA fee assessment. In addition, to encourage agencies to meet the 20-day time limit, the bill requires that an agency refund FOIA search fees if it fails to meet the 20-day deadline, except in the case of exceptional circumstances as defined by the FOIA statute. To address pay/go concerns, the bill requires that these refunds come from annual agency appropriations.

The bill also addresses a relatively new concern that, under current law, Federal agencies have an incentive to delay compliance with FOIA requests until just before a court decision is made that is favorable to a FOIA requester. The Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources*, 532 U.S. 598, 2001, eliminated the "catalyst theory" for attorneys' fees recovery under certain Federal civil rights laws. When applied to FOIA cases, *Buckhannon* precludes FOIA requesters from ever being eligible to recover attorneys' fees under circumstances where an agency provides the records requested in the litigation just prior to a court decision that would have been favorable to the FOIA requestor. The bill clarifies that *Buckhannon* does not apply to FOIA cases. Under the bill, a FOIA requester can obtain attorneys' fees when he or she files a lawsuit to obtain records from the Government and the Government releases those records before the court orders them to do so. But this provision would not allow the requester to recover attorneys' fees if the requester's claim is wholly insubstantial. To address pay/go concerns, the bill also requires that any attorneys' fees assessed under this provision be paid from annually appropriated agency funds.

To address concerns about the growing costs of FOIA litigation, the bill also creates an Office of Government Information Services in the

National Archives and creates an ombudsman to mediate agency-level FOIA disputes. In addition the bill ensures that each Federal agency will appoint a Chief FOIA Officer, who will monitor the agency's compliance with FOIA requests, and a FOIA Public Liaison who will be available to resolve FOIA-related disputes.

Finally, the bill does several things to enhance the agency reporting and tracking requirements under FOIA. Tracking numbers are not required for FOIA requests that are anticipated to take 10 days or less to process. The bill creates a tracking system for FOIA requests to assist members of the public and the media. The bill also establishes a FOIA hotline service for all federal agencies, either by telephone or on the Internet, to enable requestors to track the status of their FOIA requests. The bill also clarifies that FOIA applies to agency records that are held by outside private contractors, no matter where these records are located.

The Freedom of Information Act is critical to ensuring that all American citizens can access information about the workings of their government. But, after four decades, this open government law needs to be strengthened. I am pleased that the reforms contained in the OPEN Government Act will ensure that FOIA is reinvigorated so that it works more effectively for the American people.

I commend the bill's chief Republican cosponsor, Senator John Cornyn, for his commitment and dedication to passing FOIA reform legislation this year. I also thank the many cosponsors of this legislation for their dedication to open government and I thank the Majority Leader for his strong support of this legislation. I am also appreciative of the efforts of Senator Kyl in helping us to reach a compromise on this legislation, so that the Senate could consider and pass meaningful FOIA reform legislation.

But, most importantly, I especially want to thank the many concerned citizens who, knowing the importance of this measure to the American people's right to know, have demanded action on this bill. This bill is endorsed by more than 115 business, public interest, and news organizations from across the political and ideological spectrum, including the American Library Association, the U.S. Chamber of Commerce, OpenTheGovernment.org, Public Citizen, the Republican Liberty Caucus, the Sunshine in Government Initiative and the Vermont Press Association. The invaluable support of these and many other organizations is what led the opponents of this bill to come around and support this legislation.

I hope that by once again passing this important FOIA reform

legislation, the Senate will reaffirm the principle that open government is not a Democratic issue or a Republican issue. But, rather, it is an American issue and an American value. I encourage all of my Senate colleagues, on both sides of the aisle, to unanimously pass this historic bill.

Mr. President, I ask unanimous consent that the text of the bill be printed in the Record.