

## Leahy And Cornyn Introduce Revised OPEN Government Act, Urge Senate And House To Swiftly Pass FOIA Improvement Bill To Increase Government Transparency

WASHINGTON (Tuesday, Dec. 4, 2007) – Sens. Patrick Leahy (D-Vt.) and John Cornyn (R-Texas) Tuesday introduced bipartisan, revised legislation to increase government transparency and provide the first major reforms to the Freedom of Information Act (FOIA) in more than a decade. The Senate passed an earlier version of the Leahy-Cornyn bill -- the Openness Promotes Effectiveness in our National (OPEN) Government Act -- and the House has passed a counterpart measure, but efforts to reconcile the two bills were stymied over House concerns about “pay-go” issues.

Leahy and Cornyn first introduced the OPEN Government Act in March during the annual “Sunshine Week,” a weeklong effort by news organizations to raise public awareness of the importance of open government. After months of effort by Leahy and Cornyn, the Senate passed the bipartisan legislation in August. Concerns from the House about payment of attorneys and processing fees further stalled the House’s consideration of the Senate legislation. Their revised bill addresses those concerns, and both Leahy and Cornyn Tuesday called for its prompt consideration in both the Senate and the House.

“We have made a strong case for the need to improve and strengthen FOIA, and there is strong, bipartisan support for doing that,” said Leahy. “Now we are finally poised to pass meaningful FOIA reform before the end of the year. We have a strong chance of Senate action on the bill this week, and I hope the House also will swiftly pass this legislation so the President can sign this important act before year’s end.”

“After years of bipartisan work, we’re close to enacting sweeping reforms to let more sunshine in government and increase the people’s right to know,” Cornyn said. “This legislation helps hold politicians and government officials accountable, and will strengthen our democracy. These efforts are embraced by people across the political spectrum. With these minor revisions, I hope the Senate will quickly adopt the bill and our House colleagues will then pass this important legislation without amendment.”

The OPEN Government Act would:

- Restore meaningful deadlines for agency action under FOIA;
- Impose real consequences on federal agencies for missing FOIA’s 20-day statutory deadline;
- Clarify that FOIA applies to government records held by outside private contractors;
- Establish a FOIA hotline service for all federal agencies; and
- Create a FOIA Ombudsman to provide FOIA requestors and federal agencies with a meaningful alternative to costly litigation.

**OPENNESS PROMOTES EFFECTIVENESS IN OUR NATIONAL GOVERNMENT ACT OF 2007**  
**(“OPEN GOVERNMENT ACT OF 2007”) (CORNYN-LEAHY)**  
**SECTION-BY-SECTION ANALYSIS**

**Sec. 1. Short Title.** The Open Government Act of 2007.

**Sec. 2. Findings.** The findings reiterate the intent of Congress upon enacting the Freedom of Information Act (FOIA), 5 U.S.C. 552 as amended, and restate FOIA’s presumption in favor of disclosure.

**Sec. 3. Protection of Fee Status for News Media.** This section amends 5 U.S.C. 552(a)(4)(A)(ii) to make clear that independent journalists are not barred from obtaining fee waivers solely because they lack an institutional affiliation with a recognized news media entity. In determining whether to grant a fee waiver, an agency shall consider the prior publication history of the requestor. If the requestor has no prior publication history and no current affiliation with a news organization, the agency shall review the requestor’s plans for disseminating the requested material and whether those plans include distributing the material to a reasonably broad audience.

**Sec. 4. Recovery of Attorney Fees and Litigation Costs.** This section, the so-called *Buckhannon* fix, amends 5 U.S.C. 552(a)(4)(E) to clarify that a complainant has substantially prevailed in a FOIA lawsuit, and is eligible to recover attorney fees, if the complainant has obtained relief through a judicial or administrative order or if the pursuit of a claim was the catalyst for the voluntary or unilateral change in position by the opposing party. The section responds to the Supreme Court’s ruling in *Buckhannon Board and Care Home, Inc. v. West Virginia Dep’t of Health and Human Resources*, 532 U.S. 598 (2001), which eliminated the “catalyst theory” of attorney fee recovery under certain Federal civil rights laws. FOIA requestors have raised concerns that the holding in *Buckhannon* could be extended to FOIA cases. This section preserves the “catalyst theory” in FOIA litigation. *Adds House pay/go language to require that any attorneys’ fees be paid from annually appropriated agency funds.*

**Sec. 5. Disciplinary Actions for Arbitrary and Capricious Rejections of Requests.** FOIA currently requires that when a court finds that agency personnel have acted arbitrarily or capriciously with respect to withholding documents, the Office of Special Counsel shall determine whether disciplinary action against the involved personnel is warranted. *See* 5 U.S.C. 552(a)(4)(F). This section of the bill amends FOIA to require the Attorney General to notify the Office of Special Counsel of any such court finding and to report the same to Congress. It further requires the Office of Special Counsel to report annually to Congress on any actions taken by the Special Counsel to investigate cases of this type.

**Sec. 6. Time Limits for Agencies to Act on Requests.** The section clarifies that the 20-day time limit on responding to a FOIA request commences on the date on which the

request is first received by the appropriate agency component. *Further, the section states that if the agency fails to respond within the 20-day limit, the agency must refund the FOIA search fees collected in connection with that FOIA request.*

**Sec. 7. Individualized Tracking Numbers for Requests and Status Information.**

Requires agencies to establish tracking systems by assigning a tracking number to each FOIA request; notifying a requestor of the tracking number within ten days of receiving a request; and establishing a telephone or Internet tracking system to allow requestors to easily obtain information on the status of their individual requests, including an estimated date on which the agency will complete action on the request.

*This bill drops the “Specific Citations in Exemptions” provision that was Section 8 of S. 849.*

**Sec. 8. Reporting Requirements.** This section adds to current reporting requirements by mandating disclosure of data on the 10 oldest active requests pending at each agency, including the amount of time elapsed since each request was originally filed, and requires additional breakdowns depending on the length of delay. This section further requires agencies to calculate and report on the average response times and range of response times of FOIA requests. (Current requirements mandate reporting on the median response time.) Finally, this section requires reports on the number of fee status requests that are granted and denied and the average number of days for adjudicating fee status determinations by individual agencies.

**Sec. 9. Openness of Agency Records Maintained by a Private Entity.** This section clarifies that agency records kept by private contractors licensed by the government to undertake recordkeeping functions remain subject to FOIA just as if those records were maintained by the relevant government agency.

**Sec. 10. Office of Government Services.** This section establishes an Office of Government Information Services within the National Archives and Records Administration. Within that office will be appointed a FOIA ombudsman to review agency policies and procedures, audit agency performance, recommend policy changes, and mediate disputes between FOIA requestors and agencies. The establishment of an ombudsman will not impact the ability of requestors to litigate FOIA claims, but rather will serve to alleviate the need for litigation whenever possible.

**Sec. 11. Report on Personnel Policies Related to FOIA.** This section requires the Office of Personnel Management to examine how FOIA can be better implemented at the agency level, including an assessment of whether FOIA performance should be considered as a factor in personnel performance reviews, whether a job classification series specific to FOIA and the Privacy Act should be considered, and whether FOIA awareness training should be provided to federal employees.