

OPEN GOVERNMENT ACT OF 2007

April 30, 2007—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 849]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 849), 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, report favorably thereon without amendments, and recommends that the bill, without amendment, do pass.

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I. PURPOSE OF THE OPEN GOVERNMENT ACT

A. Summary

Chairman Patrick Leahy and Senator John Cornyn introduced the Openness Promotes Effectiveness in our National Government Act (“OPEN Government”) of 2007 on March 13, 2007. This legislation is cosponsored by Senators Specter, Kerry, Feingold, Isakson, Cardin and Brown. This bipartisan legislation promotes and enhances public disclosure of government information pursuant to the Freedom of Information Act (“FOIA”). The legislation will strengthen FOIA by, (1) helping Americans to obtain timely responses to their FOIA requests, (2) improving transparency in the federal government’s FOIA process, (3) providing an alternative to costly litigation for FOIA requesters and the government, and (4) promoting accountability for agency decisions to withhold information under FOIA.

B. Background and Need for Legislation

1. Background

With the enactment of FOIA, 5 U.S.C. §552, et seq., in 1966, the Federal Government established a policy of openness toward information within its control. The FOIA establishes a presumptive right for the public to obtain identifiable, existing records of federal agencies. Any member of the public may use FOIA to request access to government information, and FOIA requesters do not have to show a need or reason for seeking information.

When responding to FOIA requests, the burden of proof for withholding requested information rests with the federal department or agency seeking to deny the requests. Pursuant to FOIA, federal agencies may only withhold documents, or portions of documents, sought under FOIA if they fall within one or more of nine categories of exemptions established by the statute. The exemptions under FOIA allow federal agencies to withhold, among other things, information that relates solely to an agency’s internal personnel rules and practices; internal government deliberative communications about a decision before an announcement; information about an individual that, if disclosed, would cause an unwarranted invasion of personal privacy; and law enforcement records, particularly with regard to ongoing investigations.

The enforcement of FOIA has been affected by memoranda issued by the Department of Justice. Under the Clinton Administration, Attorney General Janet Reno instructed agencies to make discretionary disclosures to FOIA requesters, and to withhold records only if a foreseeable harm existed from that release.¹ In 2001, the Bush Administration reversed this policy with a memorandum from Attorney General John Ashcroft that encouraged agencies to limit discretionary disclosures of information, calling on them to exercise “full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.” Similarly, the memo stated that the Department of Justice would defend decisions to withhold information from requesters unless those decisions “lack a sound legal basis.”² In addition, on December 14, 2005, President Bush issued Executive Order No. 13392 on Improving Agency Disclosure of Information under FOIA.

¹ Janet Reno, Attorney General, Memorandum for Heads of Departments and Agencies, Subject: The Freedom of Information Act (Oct. 4, 1993).

² John Ashcroft, Attorney General, Memorandum for Heads of All Federal Departments and Agencies, Subject: The Freedom of Information Act (Oct. 12, 2001).

2. Need For Legislation

Now in its fourth decade, the Freedom of Information Act remains an indispensable tool in shedding light on bad policies and government abuses. But, today, FOIA also faces challenges like never before. During the past six years, lax FOIA enforcement has undermined FOIA and eroded the public's right to know. As a result, there is an urgent need to update and strengthen FOIA.

Chief among the problems with FOIA are the major delays encountered by FOIA requestors. According to a report by the National Security Archive, an independent non-governmental research institute, the oldest outstanding FOIA requests date back to 1989—before the collapse of the Soviet Union. And, while the number of FOIA requests submitted each year continues to rise, our federal agencies remain unable—or unwilling—to keep up with the demand. Recently, the Government Accountability Office found that federal agencies had 43 percent more FOIA requests pending and outstanding in 2006, than they had in 2002.

Although the Bush Administration has taken some helpful first steps to address the growing problem with FOIA delays, the President's Executive Order on FOIA, E.O. 13392 has not done enough to correct lax FOIA enforcement by federal agencies. More than a year after the President's directive to government agencies to improve their FOIA services, Americans who seek information under FOIA remain less likely to obtain it. For example, a recent study by the Coalition of Journalists for Open Government found that the percentage of FOIA requestors who obtained at least some of the information that they requested from the government fell by 31 percent last year. These and other shortcomings with the current FOIA policy demonstrate that the Congress must play an important role in preserving and strengthening FOIA.

3. The OPEN Government Act

This bipartisan bill contains commonsense reforms to update and strengthen FOIA. The OPEN Government Act addresses concerns with lax FOIA enforcement and compliance by helping Americans obtain timely responses to their FOIA requests and providing government officials with the tools that they need to ensure that our government remains open and accessible. Specifically, S. 849 addresses the growing backlog of FOIA requests and restores meaningful deadlines for agency action, by ensuring that the 20-day statutory clock runs immediately upon an agency's receipt of a

request and by imposing consequences on federal agencies for missing the deadline. 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.

To address concerns about the growing costs of FOIA litigation, the bill also contains an ombudsman provision that creates an Office of Government Information Services within the Administrative Conference of the United States, which would review agency FOIA compliance and offer mediation services for FOIA requestors. 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 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 that is favorable to a FOIA requestor. 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 requestors 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.³

³ In the additional views filed by Senator Kyl, he questions whether reversing *Buckhannon* is good policy. As a policy matter, *Buckhannon* raises serious and special concerns within the FOIA context. Under *Buckhannon*, it is now *theoretically* possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests. Here's how: A government agency refuses to disclose documents even though they are clearly subject to FOIA. The FOIA requestor has no choice but to undertake the time and expense of hiring an attorney to file suit to compel FOIA disclosure. Some time after the suit is filed, the government agency eventually decides to disclose the documents—thereby rendering the lawsuit moot. By doing so, the agency can cite *Buckhannon* for the proposition that, because there is no court-ordered judgment favoring the requestor, the requestor is not entitled to recover attorneys' fees. This straightforward application of the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients—and many FOIA requestors could stop making even legitimate and public-minded FOIA requests—rather than pay what one might call the "Buckhannon tax." The "Buckhannon tax" is not theoretical; it is a reality to FOIA requestors and litigators. In recent years, oversight hearings in both the House and Senate have exposed the reality of government stonewalling in FOIA cases. *See* Hearing before the Senate Committee on the Judiciary on "Open Government: Reinvigorating the Freedom of Information Act" Wednesday, March 14, 2007; House Government Reform Subcommittee on Government Management, Finance, and Accountability

“Information Policy in the 21st Century: A Review of the Freedom of Information Act” Wednesday, May 11, 2005 (discussing cases and examples where the government abandoned dubious legal positions with respect to exemptions and withholding of documents after unreasonable delay and often on the eve of trial).

Finally, the bill enhances the agency reporting requirements under FOIA to ensure that federal agencies provide the information needed to understand FOIA delays and the bill also improves personnel policies for FOIA officials to enhance agency FOIA performance.

The OPEN Government Act is supported by more than 25 different organizations ranging from journalists to librarians to public interest organizations, including, the American Association of Law Libraries, American Civil Liberties Union, American Library Association, American Society of Newspaper Editors, Associated Press Managing Editors, Association of Health Care Journalists, Center for Democracy & Technology, Coalition of Journalists for Open Government, Committee of Concerned Journalists, Education Writers Association, Electronic Privacy Information Center, Federation of American Scientists/Project on Government Secrecy, Free Congress Foundation/Center for Privacy & Technology Policy, Freedom of Information Center/University of Missouri, The Freedom of Information Foundation of Texas, The Heritage Foundation/Center for Media and Public Policy, Information Trust, National Conference of Editorial Writers, National Freedom of Information Coalition, National Newspaper Association, National Security Archive/George Washington University, Newspaper Association of America, People for the American Way, Project on Government Oversight, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and the Society of Environmental Journalists.

II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

A. Hearings

1. March 15, 2005

On March 15, 2005, the Subcommittee on Terrorism, Technology and Homeland Security held a hearing entitled, “Expanding Openness in Government and Freedom of Information.” This hearing focused on three FOIA bills introduced during the 109th Congress, including an earlier version of the OPEN Government Act, S. 394,⁴ which Chairman Leahy and Senator Cornyn had introduced on February 16, 2005. During the hearing, witnesses from the FOIA requestor community and media, including Katherine M. “Missy” Cary, Assistant Attorney General of Texas and Chief, Open Records Division, Walter Mears, former Washington bureau chief and executive editor, Associated Press, Mark Tapscott, Director, Center for Media and Public Policy, The Heritage Foundation, Meredith Fuchs, General Counsel, National Security Archive, Thomas Susman, a longtime practicing FOIA lawyer, and Lisa Graves, a representative

of the ACLU, discussed the need to reform FOIA and for Congress to enact the FOIA reforms contained in the OPEN Government Act.

⁴Senators Leahy and Cornyn introduced essentially identical FOIA reform legislation, S. 394, on February 16, 2005. The Judiciary Committee favorable reported that legislation on September 21, 2006. However the full Senate did not consider the measure before the 109th Congress adjourned.

2. March 14, 2007

On March 14, 2007, the full Judiciary Committee held a hearing on “Open Government: Reinvigorating the Freedom of Information Act,” which examined the OPEN Government Act of 2007, S. 849, and other efforts to reinvigorate FOIA. The hearing also examined a new report by the National Security Archive which found that federal agencies are not complying with the Electronic Freedom of Information Act (“E-FOIA”) amendments of 1996. During this hearing, witnesses from the FOIA requestor community and media representatives, including, Meredith Fuchs, Katherine M. Carey, Sabina Haskell, Editor, Brattleboro Reformer, and Tom Curley, President and CEO of the Associated Press, Representing the Sunshine in Government Initiative, testified about the continuing need for Congress to enact FOIA reform legislation and endorsed the FOIA reforms contained in the OPEN Government Act.

B. Legislative History

Senators Leahy and Cornyn introduced the OPEN Government Act, S. 849, on March 13, 2007. After the Committee hearing on this bill, the bill was considered by the Committee on April 13, 2007. During that consideration, Senator Kyl noted some concerns and filed amendments. However, he agreed to proceed to report the bill without amendment, subject to additional negotiations with the bill’s chief sponsors. The Committee agreed by unanimous consent to report the bill favorably to the Senate.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Sec. 1. Short title

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. Requestors have raised concerns that the holding in *Buckhannon* could be extended to FOIA cases. This section clarifies that *Buckhannon's* holding does not and should not apply to FOIA litigation.

Sec. 5. Disciplinary actions for arbitrary and capricious rejections of requests

The 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 agency. Further, the section states that if the agency fails to respond within the 20-day limit, the agency may not then assert any FOIA exemption under 5 U.S.C. 552(b), except under limited circumstances such as endangerment to national security or disclosure of personal private information protected by the Privacy Act of 1974, unless the agency can demonstrate, by clear and convincing evidence, good cause for failure to comply with the time limits.

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.

Sec. 8. Specific citations in exemptions

5 U.S.C. 552(b)(3) states that records specifically exempted from disclosure by statute are exempt from FOIA. This section of the bill provides that Congress may not create new statutory exemptions under this provision of FOIA, unless it does so explicitly. Accordingly, for any new statutory exemption to have effect, the statute must cite directly to 5 U.S.C. 552(b)(3), thereby conveying congressional intent to create a new (b)(3) exemption.

Sec. 9. 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. 10. 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. 11. Office of Government Information Services

This section establishes an Office of Government Information Services within the Administrative Conference of the U.S. 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. 12. Accessibility of Critical Infrastructure Information

This section requires reports on the implementation of the Critical Infrastructure Information Act of 2002, 6 U.S.C. 133. Reports shall be issued from the Comptroller

General to the Congress on the number of private sector, state, and local agency submissions of CII data to the Department of Homeland Security and the number of requests for access to records. The Comptroller General will also be required to report on whether the nondisclosure of CII material has led to increased protection of critical infrastructure.

Sec. 13. 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.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

Summary: S. 849 would make several amendments to the Freedom of Information Act (FOIA), which generally allows any person the right to obtain federal agency records protected from disclosure. Specifically, the legislation would:

- * Expand FOIA's definition of the news media;
- * Require time limits for agencies to act upon FOIA requests;
- * Allow greater recovery of attorneys' fees and litigation costs by FOIA requestors if information is withheld by the government;
- * Require agencies to provide tracking numbers for FOIA requests and status information;
- * Amend the types of information that are exempt from disclosure under FOIA;
- * Require federal agencies to prepare additional reports to the Congress concerning FOIA activities;
- * Require new reports concerning agencies' FOIA programs from the Government Accountability Office (GAO), the Department of Justice (DOJ), the Office of the Special Counsel (OSC), and the Office of Personnel Management (OPM); and
- * Establish an Office of Government Information Services (OGIS) to review FOIA policies and procedures, conduct audits, and offer mediation services.

CBO estimates that enacting this legislation would increase direct spending by \$6 million in 2008 and \$63 million over the 2008-2017 period to reimburse citizens making FOIA requests for attorney's fees and litigation cost payments. CBO also estimates that enacting S. 849 would result in a loss of certain fees that are recorded in the budget as revenues, for a cost of less than \$500,000 annually over the 2008-2017 period.

In addition, we estimate that implementing the bill would increase costs subject to appropriation by \$9 million in 2008 and \$57 million over the 2008-2012 period to establish the OGIS and implement new agency reporting requirements. S. 849 would

	By fiscal year, in millions of dollars—									
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
SUBJECT TO APPROPRIATION										
Office of Government Information Services:										
Estimated Authorization Level	3	6	6	7	7	7	7	8	8	8
Estimated Outlays	3	5	6	6	7	7	7	8	8	8
FOIA Reporting Requirements:										
Estimated Authorization Level	4	5	5	5	6	6	6	6	6	7
Estimated Outlays	3	5	5	5	6	6	6	6	6	7
Other Reports:										
Estimated Authorization Level	3	2	1	*	*	*	*	*	*	*
Estimated Outlays	3	2	1	*	*	*	*	*	*	*
Total Changes:										
Estimated Authorization Level	10	13	12	12	13	13	13	14	14	15
Estimated Outlays	9	12	12	11	13	13	13	14	14	15
NOTE: * = revenue loss or spending increase of less than \$500,000.										

Direct spending and revenues

Attorneys' Fees and Litigation Costs. Under section 4, FOIA requestors would be entitled to recover any attorneys' fees and litigation costs incurred to receive requested information through a judicial or administrative order or because of a voluntary change in an agency's FOIA policies. Those payments would be made from the Judgment Fund (a permanent, indefinite appropriation for claims and judgments against the United States). The cost of implementing this section would depend on the number of successful challenges to FOIA requests that are either fully or partially denied and any changes in FOIA disclosure policies.

Under current law, when a FOIA request is denied or partially granted, the requestor can administratively appeal the decision. If the administrative appeal is also denied, a requestor has the right to appeal the decision in federal court. Based on a review of FOIA decisions by federal courts over the 2001-2005 period, CBO estimates that about 350 FOIA cases are presented annually, and about 6 percent of complainants subsequently challenge agency decisions and are reimbursed for attorneys' fees and litigation costs. Those payments by the Judgment Fund cost about \$3 million a year. In addition, based on

information from 15 major agencies over the 2001-2005 period, including the Departments of Veterans Affairs, Treasury, Defense, Labor, State, and Justice, CBO estimates that requestors successfully appeal about 1,000 FOIA cases each year.

CBO estimates that the average cost of litigating a FOIA lawsuit or administrative appeal is about \$6,000 per case. Assuming that agencies act on about 1,000 FOIA cases each year, CBO estimates that enacting this legislation would increase direct spending from the Judgment Fund by \$30 million over the 2008-2012 period and \$63 million over the 2008-2017 period.

FOIA Fees. FOIA requests from researchers associated with academic institutions and the news media are charged fees for the duplication of records that are larger than 100 pages. All other requestors are charged fees for research time and duplication costs after the first two hours of research and 100 pages of copying. Those fees are recorded on the budget as revenues and deposited into the general fund of the Treasury. Section 3 would expand the definition of news media researchers to FOIA requestors who have no affiliation with a media outlet but have a publishing history. Based on a review of annual FOIA reports from 15 major agencies over the fiscal year 2003-2005 period, CBO estimates that agencies collect about \$4 million in FOIA fees annually. CBO expects that expanding the definition of the news media would reduce the amount of fees currently collected for retrieval of information. Based on information from some of the 15 major agencies, CBO estimates that the reduction in FOIA fees collected would be less than \$500,000 annually.

Spending subject to appropriation

Office of Government Information Services. Section 11 would establish an Office of Government Information Services within the Administrative Conference of the United States. The office would review FOIA policies and practices, make recommendations, offer mediation services, and conduct audits of agency's FOIA programs.

Based on information from DOJ and the cost of similar offices, CBO estimates that implementing this provision would cost \$7 million annually for additional staff to conduct audits of FOIA programs. CBO expects that the new agency would take about two years to reach that level of effort. We estimate that operations of the new office would cost \$27 million over the 2008-2012 period, assuming appropriation of the necessary amounts.

FOIA Reporting Requirements. Section 9 would add a number of additional reporting requirements to the annual FOIA reports submitted by all federal departments and agencies. This would include FOIA information on the time required to process requests, median and average processing time, expedited and appeal processing time, and the oldest pending requests. In addition, S. 849 would require each agency to provide the raw data used to compile their annual FOIA report. Based on the costs of similar reports, a review of annual reports by 15 major agencies over the 2001-2005 period, and additional information from some of those agencies, CBO estimates that those reporting

requirements would cost about \$5 million annually and \$24 million over the 2008-2012 period, assuming the appropriation of the necessary amounts.

Other Reports. S. 849 would require new reports by a number of government agencies. GAO would be required to report on critical infrastructure information that is collected by the government from the private sector but is exempt from FOIA disclosure. DOJ and OSC would be required to report on legal actions related to the rejection of FOIA requests, and OPM would be required to produce a report on FOIA personnel policies. Based on the costs of similar reports, CBO estimates that implementing those provisions would cost \$6 million over the 2008-2012 period, assuming the availability of appropriated funds.

Other Provisions. Additional provisions would require providing tracking numbers for FOIA requests and would expand the provisions of Executive Order 13392 issued on December 14, 2005. That order calls upon all federal agencies to improve their FOIA operations, including customer service and assistance. Specifically, the order requires agencies to develop FOIA improvement plans, designate a Chief FOIA officer, and establish FOIA requestor centers. Based on information from DOJ and a review of annual reports by 15 major agencies over the 2001-2005 period, CBO estimates that those provisions would not significantly increase agencies' costs to implement FOIA.

Intergovernmental and Private-Sector Impact: S. 849 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO estimate: On March 12, 2007, CBO provided a cost estimate for H.R. 1309, the Freedom of Information Act Amendments of 2007, as ordered reported by the House Committee on Oversight and Government Reform on March 8, 2007. Both bills would amend the Freedom of Information Act but have different provisions, including provisions related to the structure of the OGIS and the payment of FOIA fees. CBO cost estimates for the two bills reflect those differences.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Elizabeth Cove; and Impact on the Private-Sector: Amy Petz.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 849.

VI. CONCLUSION

Passage and enactment of the OPEN Government Act of 2007, S. 849, is long overdue. This bipartisan legislation reaffirms the fundamental premise of FOIA—that government information belongs to all Americans. Open government is not a Democratic issue, or a Republican issue. It is an American issue.

VII. ADDITIONAL VIEWS

A. ADDITIONAL VIEWS OF SENATOR KYL

Although the goals of the OPEN Government Act are laudable, the bill reported by the committee has a number of flaws that must be addressed. Chief among these is the bill's elimination of several FOIA exemptions—including for information that is privileged or law-enforcement sensitive—in cases where a Federal agency misses the statutory deadline for responding to a FOIA request. The Justice Department's Views Letter for this bill, using uncharacteristically strong language, describes this provision as a “draconian remedy with enormous consequences.”

Subsection (b) of FOIA exempts several categories of information from disclosure under FOIA. The OPEN Government Act, however, provides that if an agency does not comply with FOIA's 20-day decision deadline, then no FOIA exemptions shall apply unless disclosure of the information would harm national security, disclose personal private or proprietary information, or is otherwise precluded by law. Among the current, codified FOIA exemptions that would be defaulted under the OPEN Government Act if the 20-day deadline were missed are:

- * information that is privileged in litigation,
- * law-enforcement information whose disclosure could reasonably be expected to interfere with law-enforcement proceedings,
- * information whose disclosure would deprive a person of a fair trial,
- * information whose disclosure could reasonably be expected to disclose the identity of a confidential source,
- * information about the techniques and procedures for law enforcement investigations and prosecutions, and
- * information whose disclosure could reasonably be expected to endanger the life or physical safety of an individual.

Disclosing all of these types of information simply because a 20-day deadline was not met is a harsh and disproportionate remedy. Many of these disclosures would harm individuals who have no control whatsoever over the government's compliance with FOIA requests—individuals who would not even know that a FOIA request had been made. Should we really force disclosure of information “whose disclosure could reasonably be expected to endanger the life or physical safety of an individual” simply because a Federal employee did not meet a FOIA request deadline?

The Justice Department's Views Letter addresses this issue as well. The letter states:

Of greatest concern to the Department is the automatic waiver of the existing exemption for law enforcement information. The wholesale release of law enforcement-related documents would have devastating consequences for ongoing criminal investigations. Sensitive law enforcement techniques could be exposed, and the lives of witnesses, confidential informants, and law enforcement officials would, without a doubt, be placed in imminent danger. Indeed, the very system of confidentiality inherent in the federal government's law enforcement activities would be shattered by the lack of predictability that this provision would yield.

The Justice Department's letter also raises a number of other concerns about the OPEN Government Act that ought to be addressed. For example, the bill legislatively overrules the U.S. Supreme Court's decision in *Buckhannon Board and Care Home v. West Virginia Dept. of Health and Human Services*, 532 U.S. 598 (2001), as that decision applies to FOIA. *Buckhannon* clarifies that a party suing the government is not entitled to attorney's fees under the standard fee-shifting statutes if the government voluntarily changed its position and gave the plaintiff what he wanted. The bill would reverse this rule and allow such a plaintiff to recover attorney's fees.

If the government is forced to pay attorney's fees even if it settles a lawsuit without court action—if it is forced to pay even if it voluntarily or unilaterally agrees to turn over documents, enters into an agreement with the parties, or resolves the matter in administrative proceedings without going to court—then we may well find that the government is less inclined to settle FOIA lawsuits. By punishing the government for changing its position and handing over the requested information, this provision of the bill may undercut the broader purposes of the OPEN Government Act.

Moreover, it is entirely reasonable and to be expected that, over the course of litigation or administrative proceedings, new information is uncovered that causes the government to reevaluate and reverse its initial denial of a FOIA request. The fee-shifting statute should not deter the government from acting on that new information and reversing its earlier FOIA denial. Also, sometimes an initial denial may be reversed for reasons beyond the control of the agency to which the request was made—for example, another part of the government might declassify the requested documents. In these types of situations, the government should not be punished for having initially denied the request.

At the very least, a FOIA plaintiff should not be allowed to recover the costs of maintaining his litigation if the litigation itself was meritless. Even a meritless lawsuit may prove enough of a burden to persuade the government to change its position—or such a lawsuit may generate public pressure that results in such a change in position. That is all very well. But if the lawsuit itself was not legally sound, the plaintiff should not be compensated for bringing the litigation.

The Justice Department's Views Letter raises a number of other important points. Rather than reiterate those points here, I simply include the letter as an attachment to this statement and urge anyone who is interested in this bill to read the letter.

JON KYL.

March 26, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This letter presents the views of the Department on S. 849, the "Openness Promotes Effectiveness in our National Government Act of 2007" or the "OPEN Government Act of 2007," which amends the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The FOIA is a vital and continuously developing government disclosure mechanism that has been refined over time to accommodate both technological advancements and society's maturing interests in a transparent and fully responsible government. The Department is firmly committed to full compliance with the FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality, and preserving personal privacy.

As a sign of the Department's continued commitment to the FOIA, it serves as the lead agency in the implementation of Executive Order 13,392, "Improving Agency Disclosure of Information," issued on December 14, 2005. This Order has immediately brought high visibility and focused attention on the FOIA by mandating the designation of a Chief FOIA Officer, FOIA Requester Service Centers, and FOIA Public Liaisons, in each agency. The Order has also focused on the improvement of FOIA processing by ensuring that agency FOIA operations are both "citizen-centered" and "results-oriented." The benefits of instituting these policies are already felt Government-wide, as agencies have developed comprehensive FOIA improvement plans and have issued their first reports mandated by this Order.

The Department opposes several sections of S. 849, as currently drafted, including, most importantly, section 6, which prevents the Government from relying on a number of FOIA exemptions, including exemptions for highly sensitive law enforcement information and privileged material, if the Government does not meet the statutory deadline for responding to requests. The Department also has concerns with section 3, which expands the definition of "representative of the news media" for purposes of assessing FOIA fees; and section 4, which reinstates the so-called "catalyst theory" for reimbursement of attorneys fees in FOIA litigation. More generally, the Department is very concerned about the substantial administrative and financial burdens that this legislation would impose upon the Executive branch, without authorizing the resources necessary to implement its statutory scheme.

Section 6—Time limits for agencies to act on requests

Of grave concern to the Department is section 6(b) of the legislation, which prevents an agency from relying on a number of statutorily provided exemptions from FOIA unless it meets the twenty-day accelerated deadline established in section 6, or unless the agency can make a “clear and convincing” showing to a court that there was “good cause” for its failure to meet the applicable deadline. Although this provision preserves exemptions for national security information, Privacy Act-protected information, “proprietary information,” and information otherwise protected by law, section 6(b) eviscerates several critical exemptions in FOIA including exemptions for inter- or intra-agency memoranda and highly sensitive categories of law enforcement records, unless an agency persuades a court that it has good cause for failing to meet the deadline.

Section 6 of S. 849 is a misguided attempt to remedy one perceived problem—compliance with the statutory response deadlines—with a measure that would eviscerate a central principle of FOIA—protection of sensitive information. While the basic purpose of FOIA is to ensure an informed citizenry, it balances society’s strong interest in open government with other compelling public interests, such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy.

This provision, which would establish that failure to meet an applicable deadline would lead to the automatic release of all information with only a few narrow exceptions, is a draconian remedy with enormous consequences. For example, the automatic waiver of privileges, including privileges for attorney-client and attorney work-product information that are incorporated in FOIA through Exemption 5 and well-established by common law for centuries, is unprecedented. This would frustrate the policy behind these privileges and, among other things, would doubtless create a chilling effect on policy discussions, create public confusion that could result from disclosure of reasons and rationales that were not the grounds for agency action, and cause the premature disclosure of proposed policies before they have been sufficiently considered. It would also greatly interfere with government attorneys’ work in preparing for litigation, exposing their legal strategies, approaches, and views to their opposing counsel, thereby greatly undermining their ability to represent their client. It would also chill the exchange of information to government attorneys from their clients, reducing their ability to properly represent them.

Of greatest concern to the Department is the automatic waiver of the existing exemption for law enforcement information. The wholesale release of law enforcement-related documents would have devastating consequences for ongoing criminal investigations. Sensitive law enforcement techniques could be exposed, and the lives of witnesses, confidential informants, and law enforcement officials would, without a doubt, be placed in imminent danger. Indeed, the very system of confidentiality inherent in the federal government’s law enforcement activities would be shattered by the lack of predictability that this provision would yield. This is also troubling since there is greater convergence between law enforcement activities and homeland security activities.

Further, under section 6(b), any person or organization with criminal intent (including terrorist organizations) could possibly gain access to internal military force protection information (i.e., information concerning the protection of the Pentagon reservation, munitions sites, and any other military installation) if an agency possessing such information were forced to automatically waive any applicable exemption. Disclosures of such highly sensitive information could have dire consequences for our military.

Among the limited exceptions that section 6 would allow the government to invoke after the twenty-day deadline, the exception stated for “personal private information” would be inadequate in any event. Because this exception is limited to “personal private information protected by section 552a” it would apply only to information protected by the Privacy Act. This lack of protection for information not protected by the Privacy Act could result in the public disclosure of personal information, such as third parties’ social security numbers. Such a disclosure could have severe consequences for unsuspecting third parties, especially if the social security numbers were used for criminal purposes, such as identity theft. Under current law, personnel, medical, and similar files are exempt from FOIA if disclosure “would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. §552(b)(6); see also *id.* §552(b)(7)(C). This category of information is far broader than the information covered by the Privacy Act. The existing exemption has been interpreted by the courts to mean that a government decision-maker must balance the severity of the threat to an individual’s privacy against the public interest in disclosure. *See Dep’t of the Air Force v. Rose*, 425 U.S. 352 (1976). By narrowing this important exemption to protect only information covered by the Privacy Act, S. 849 repudiates the policy of balancing any individual’s privacy interest against the public interests in disclosure. Thus, S. 849 will significantly limit personal privacy safeguards.

Section 6(b) does contain a purported safety valve that would permit a court to waive the harsh application of the section if an agency “demonstrates by clear and convincing evidence that there was good cause for the failure to comply with the applicable time limit provisions.” However, by focusing on the agency’s reason for failing to meet the twenty day deadline, rather than upon the potential harm that reasonably could be expected to be caused by the radical disclosures that would occur, this provision ignores the substantial public interest in avoiding the disclosure of highly sensitive records.

Although section 6(b) would not eliminate the availability of the President’s constitutional privilege to protect the interests covered by the statutory exemptions, section 6(b) would nonetheless raise substantial constitutional concerns that could make it unconstitutional as applied in particular circumstances. The uncertainty created by a system that depends on a court finding “good cause” for delay or upon the invocation of constitutional privilege would likely chill the candor of the constitutionally-protected deliberations of the Executive branch or otherwise harm the interests protected by the statutory exemptions in a way that could compromise the Executive’s discharge of its constitutional functions. Rather than fostering responsible disclosure, this provision actually could well force agencies to deny requests by the twenty-day deadline in order to avoid waiving any exemptions, and thus needlessly increase appeals and litigation. In addition, this provision fails to take into account the complexity of many requests, the

need to consult with other agencies, or the need to search for records in multiple locations, including at Federal records centers, all of which necessarily and reasonably add to the time it takes to respond to a request.¹

¹ If enacted, the penalties imposed by section 6(b) would have an equally adverse effect on NARA's ability to protect under the FOIA records that are also subject to the Presidential Record Act (PRA). When processing requests for Presidential records, the PRA requires NARA to inform the former President of its intent to publicly disclose the requested records. In conjunction with this statutory requirement, Executive Order 13,233, "Further Implementation of the Presidential Records Act," affords the former President (and the incumbent President) ninety days to conduct a records review. As a result of the drastic penalties contained in section 6(b) of S. 849, NARA would, after only twenty-days, forfeit its ability to protect certain records under the FOIA, even if such records contain sensitive private information not protected by the Privacy Act, including FBI background files and other law enforcement or investigatory information. Additionally, it would be an added burden for NARA to attempt to compel a court to waive this provision in an effort to protect information for which it already has a sound legal basis to withhold.

The Department is also opposed to section 6(a) of S. 849, which would amend 5 U.S.C. §552(a)(6)(A)(i) by changing the twenty-day time limit so that it commences on the date that the request "is first received by the agency." This represents a very significant change from current practice in which the twenty-day clock begins once the appropriate element of an agency has received the request in accordance with the agency's FOIA regulations. Beginning the twenty-day time limit as soon as a request "is first received by the agency" does not allow for the practical necessity of forwarding a request to an appropriate field office, division, or component, which could take several or more days.² This provision is thus at odds with the longstanding practice at all Federal agencies, under regulations that have been duly promulgated and followed in accordance with the explicit direction of the Act itself. *See* 5 U.S.C. § 552(a)(3)(A). For example, Department of Justice FOIA regulations provide that "[a] request will be considered [as] received as of the date it is received by the proper component's FOIA office." 28 C.F.R. §16.3 (2006). Additionally, given that agencies make addresses readily available on their Web sites and in their FOIA Reference Guides, it is not imposing any undue burden on a requester to direct his/her request to the appropriate office. Further, when a requester neglects to address his/her request properly, agencies routinely route the request to the proper office, so the requester is not penalized in any way for a failure to properly address a request. Conversely, this proposed change in the way the time periods are calculated penalizes the agency for something completely out of its control. Requesters will have no incentive to properly address their requests. More significantly, they will actually have an incentive to use the most obscure address possible in the hope that the time expended in properly routing it will render the agency unable to meet the response deadline.

² Importantly, additional mail processing time is required in the post-9/11 world because the Department, as well as other agencies, now must x-ray or irradiate incoming mail, including FOIA requests. Five days might pass while the request is being irradiated and before any program office of an agency receives the x-rayed mail.

The Department is opposed to the second clause of section 6(a) which states that the twenty-day time period to respond to a request “shall not be tolled without the consent of the party filing the request.” In the course of processing a FOIA request there are numerous occasions when an agency must stop its processing in order to get information from the requester, and the agency should not be penalized for the time it takes the requester to provide needed information to the agency. For example, after a request is first received by an agency the personnel responsible for processing it might determine that the request fails to reasonably describe the records that are being sought. In such situations agency personnel routinely go back to the requester for clarification of the request. Similarly, during the course of processing a request, the agency may determine that the search for responsive records will take longer than anticipated and so will cost more than the requester has agreed to pay. Again, in such situations the agency routinely goes back to the requester to see if the requester would like to narrow its request to reduce the fees owed, or to see if the requester will agree to pay the fees that are anticipated. In these situations, when the processing of the request is necessarily “on hold” while the agency awaits a decision by the requester, the time period for responding has traditionally been tolled. The language in section 6(a) would not allow that to happen without the consent of the requester. That means that absent consent—which is not likely to be given—the agency will be penalized for the failure of requesters to provide necessary information in order for their requests to be processed. Rather than having an incentive to respond quickly to the agency in order to get their request back on track, this provision will actually give requesters an incentive to delay responding to the agency’s request for clarification, or for a commitment to pay fees, etc. because by doing so, they know that the twenty-day time period is ticking.

We believe that the draconian penalties in section 6 not only are unwise, but are also unnecessary since Executive Order 13,392 has improved FOIA operations by requiring agencies to review their administration of the FOIA and their compliance with the statutory deadlines. The Executive Order also requires agencies to implement improvement plans specifically focused on eliminating or reducing any backlog of FOIA requests. The Department’s preliminary review of reports in this regard indicates that agencies overall are devoting increased resources to processing FOIA requests more efficiently and quickly, and indeed some agencies have already realized meaningful backlog reduction.

Section 3—Protection of fee status for news media

Section 3 of the legislation, titled “Protection of Fee Status for News Media,” expands the definition of “representative of the news media,” and thereby exempts a larger class

of requesters from the obligation to pay what can sometimes be quite significant fees assessed for searching for responsive documents. The current law represents a carefully-struck balance that establishes differing fee levels for different categories of requesters. For example, an agency is permitted to charge a requester for document search time, duplication, and review costs if the request is made for a “commercial use.” 5 U.S.C. § 552(a)(4)(A)(ii)(I). An agency may charge a requester only for document duplication if the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific, or by a representative of the “news media.” 5 U.S.C. § 552(a)(4)(A)(ii)(II). Section 3 of the legislation amends subclause (II) so that an agency “may not deny [to a representative of the news media] status solely on the basis of the absence of institutional associations of the requester, but shall consider the prior publication history of the requester” including Internet publications. Most significantly, it would further require an agency, in the absence of such prior publication history, to “consider the requestor’s stated intent at the time the request is made to distribute information to a reasonably broad audience.” Because it can be assumed that virtually all requesters claiming to be representatives of the news media will readily state that it is their “intent” to distribute the records to a broad audience, this expansion of the definition of “representative of the news media” would render the concept of “representative of the news media” virtually meaningless.

Such an expansion of the definition of “representative of the news media” would have severe fiscal and other practical consequences for the Executive branch, and is ill-advised without empirical evidence that the current definition of “representative of the news media” is insufficient to carry out FOIA’s purposes. The increased taxpayer burden that would result from the changed definition should be undertaken only after careful review by Congress in light of limitations being imposed across the board on domestic discretionary spending. Indeed, the limitation in section 3 on the Government’s ability to collect fees for FOIA processing seems inconsistent with the stated desire of many Members of Congress to improve FOIA timeliness. With no requirement that requesters pay search fees, they have no incentive to tailor their requests and so they are likely to make overly broad requests. This, in turn, will stretch agency resources and will increase the time it takes to process all requests. The Executive branch cannot process FOIA requests expeditiously without adequate manpower and resources, which is dependent on adequate funds, including FOIA processing fees deposited in the Treasury Department’s general fund.

Section 4—Attorneys’ fees

Section 4 of the legislation would reinstate the so-called “catalyst theory” for the reimbursement of FOIA litigation fees. Current law permits a court to assess reasonable attorneys’ fees and litigation costs incurred when the complainant in a lawsuit challenging an agency’s response (or lack thereof) to a FOIA request has “substantially prevailed.” Section 4 of S. 849 would amend 5 U.S.C. §552(a)(4)(E) by altering and expanding the definition of “substantially prevailed” to include situations in which a “complainant has obtained relief through either (I) a judicial order, an administrative action, or an enforceable written agreement or consent decree; or (II) a voluntary or

unilateral change in position by the opposing party, where the complainant's claim or defense was not frivolous." We understand this provision's intent to be the overruling of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and of a number of recent court of appeals decisions that have applied *Buckhannon* to reject the catalyst theory as a basis for FOIA attorneys' fee awards. See *OCAW v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003).

The Department does not support the reinstatement of the catalyst theory, for many of the same reasons enunciated in Chief Justice Rehnquist's *Buckhannon* opinion. Proponents of the catalyst theory have argued that it is needed for two reasons. First, they argue that it would encourage plaintiffs with meritorious but expensive cases to bring suit. Second, they argue that it would prevent defendants from unilaterally mooting an action before judgment to avoid an award of attorneys' fees. As Chief Justice Rehnquist noted in his opinion in *Buckhannon*, however, "these assertions . . . are entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608.

More importantly, the Department is especially concerned that the catalyst theory, if reinstated, will serve as a disincentive to a Government agency's decision to voluntarily change decisions and procedures with respect to FOIA requests, because doing so could make the agency liable for a complainant's legal fees. Such a result would be inconsistent with FOIA's underlying purpose of promoting, rather than inhibiting, disclosure.

Furthermore, it is unclear what is meant by the inclusion of an "administrative action" as a possible means by which a requester can obtain "relief" that would justify attorneys' fees. If it is deemed to apply to a requester who receives documents through the administrative FOIA appeals process, that would be a major departure from long-standing administrative law practice and would severely undercut the traditional function of the administrative appeal process, which is designed to provide the requester with an avenue of further review at the agency, as well as provide the agency with a second opportunity to evaluate its response, thereby reducing the likelihood of a lawsuit. If this provision covers relief provided at the administrative appeal stage, this could increase the FOIA program costs dramatically, and would serve as a disincentive to release records at the administrative appeal stage.

Section 7—Tracking numbers

Section 7 would require agencies to establish systems to assign an individualized tracking number to each request and to notify requesters of this number within ten days. In addition, the legislation mandates the establishment of a telephone line or Internet service to provide information about the status of the request, including receipt date and estimated completion date. The need for this provision has been mitigated by the issuance of the FOIA Executive Order which required that agencies establish FOIA Requester Service Centers to provide requesters with information concerning the status of their FOIA requests. In addition, supervisory personnel have been appointed as FOIA Public Liaisons to ensure that FOIA requesters receive appropriate assistance from the service

centers. Moreover, many agencies which receive higher volumes of requests already notify requesters of assigned tracking numbers when they first acknowledge receipt of requests.

Section 8—Specific citations in exemptions

Section 8 of S. 849 would amend FOIA's Exemption 3, which protects information otherwise statutorily exempted from disclosure, by requiring that newly enacted statutes that purport to limit public disclosure of information specifically cite to this section of S. 849. We believe this amendment is unnecessary. The current version of Exemption 3 was enacted in 1976 (*see* Pub. L. No. 94-409) to limit Exemption 3's availability to specific categories of statutes: those that require agencies to withhold documents with no agency discretion, or, alternatively, that establish particular criteria for withholding or refer to particular types of matters to be withheld. The 1976 amendment to Exemption 3 has worked well now for over thirty years. Courts have recognized that the congressional intent to maintain the confidentiality of particular information is the central consideration in determining whether a statute falls within Exemption 3. In focusing on congressional intent, courts have avoided imposing additional requirements that Congress use any particular "magic words" to establish a statute as an Exemption 3 statute. Thus, the Census Act, the Internal Revenue Code, the National Security Act of 1947, and the grand jury secrecy rule, Fed. R. Crim. P. 6(e), to take several well-known examples, have been determined by the courts to qualify as Exemption 3 statutes even though those statutes do not specifically refer to Exemption 3.

Moreover, subsection (e)(1)(B)(ii) of FOIA now requires agencies to include in their annual FOIA reports a complete list of all statutes that the agency relies upon to authorize withholding under Exemption 3, together with other pertinent information concerning such withholding. Thus, Congress has a ready mechanism under current law, created in the 1996 e-FOIA amendments (Pub. L. No. 104-231), to determine how Exemption 3 is being administered.

Additionally, section 8 could unduly hamper Congress in the future or even constitute a hidden trap. For example, Congress has recently enacted appropriations laws to bar the Bureau of Alcohol, Tobacco, Firearms, and Explosives from releasing certain sensitive law enforcement data to the public. Because congressional intent to maintain the confidentiality of such data is apparent from these appropriations laws, there is no reason to require, in addition, a specific reference to Exemption 3 in every subsequent annual appropriations law. Most significantly, Congress over the years has acted to revitalize certain export laws that periodically expire while Congress deliberates over policy matters. These statutes protect confidential business information submitted to the Government in connection with export applications, and the courts have upheld Exemption 3 protection for such matters, based upon the clear import of the overall statutory scheme. *See Times Publ'g. Co. v. Dep't of Commerce*, 236 F.3d 1286 (11th Cir. 2001). Under S. 849, such confidential business information would necessarily be subject to disclosure if Congress failed to meet the additional requirement imposed by S. 849. Additionally, if this provision is enacted, it is possible that there would be recurring

disagreement as to whether subsequent nondisclosure statutes that do not clearly reference Exemption 3 have impliedly repealed or amended section 8. This sort of uncertainty would eviscerate what appears to be the central purpose of this provision.

Section 9—Reporting requirements

Pursuant to the 1996 e-FOIA amendments (Pub. L. No. 104-231), the Department of Justice has responsibility for collecting information from other Executive branch agencies concerning FOIA compliance, including the number of determinations not to comply with requests for records, the number of appeals, the number of pending requests, and the median time to process such requests. *See* 5 U.S.C. §552(e)(1). Section 9 expands the existing requirements in five principal areas: (1) Agencies' detailed response data based upon the date on which the request was originally received including the average number of days, the median number of days, and the range of dates to respond; (2) data concerning the 10 active requests with the earliest filing dates; (3) data concerning the 10 active administrative appeals with the earliest filing dates; (4) data concerning requests for expedited review; and (5) data on fee waiver requests.

The Department believes that these new reporting requirements would be a largely unnecessary burden upon agencies that, as described above, cuts against the timeliness objectives pursued elsewhere in the bill. In addition, as described above, using the date a request is "originally received by the agency" as the starting point for determining time periods will result in a great distortion of the annual report statistics. If requesters misdirect requests, then the time spent correcting that error (i.e., the time spent forwarding the request to the proper office) would be counted against the agency's processing time. This will result in statistics that do not actually reflect processing time. Further, it is not clear that providing the additional data will provide any new or useful information regarding agency response times. Importantly, as part of their new Executive Order reporting requirements, agencies now report on the range of dates for both pending requests and consults. Moreover, there has been a great deal of focus on the ten oldest requests by agencies.

Section 10—Agency records maintained by a private entity:

Current law defines an agency record as information that is "maintained by an agency in any format, including an electronic format." 5 U.S.C. §552(f)(2). The Supreme Court elaborated on this standard by holding that an "agency record" is a document ". . . either created or obtained by an agency and under agency control at the time of the request." *Dep't of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Supreme Court has also held that Federal participation in, or funding of, the generation of information by a privately controlled organization does not render that information an "agency record" under the terms of FOIA. *See Forsham v. Harris*, 445 U.S. 169 (1980).

Section 10 of S. 849 amends the existing statutory definition in 5 U.S.C. §552(f)(2) to include information "that is maintained for an agency by an entity under a contract between the agency and the entity." The Department does not object to section 10 if its

intention is solely to clarify that agency-generated records held by a Government contractor for records-management purposes are subject to FOIA. On the other hand, the Department would have very serious concerns if section 10 of S. 849 were intended to disturb over twenty-five years of settled law by overruling the *Forsham* and *Tax Analysts* decisions. At the very least, section 10 is ambiguous as currently drafted and should be clarified.

Section 11—Office of government information services

The Department has significant questions and concerns about section 11, which would create an “Office of Government Information Services” within the Administrative Conference of the United States. This new office would be charged with responsibility for reviewing policies and procedures of agencies, conducting audits of those agencies, issuing reports, recommending policy changes to the President and Congress to improve the administration of the FOIA, and offering mediation services between requesters and administrative agencies.

The Department is concerned about any intent that the proposed Office of Government Information Services would be given any sort of policymaking and adjudicative role with respect to FOIA compliance. Such a role is foreign to the traditional mission of the Administrative Conference of the United States, which was tasked with promoting improvements in the efficiency, adequacy, and fairness of procedures of the government’s regulatory programs by conducting research and issuing reports. *See* 5 U.S.C. § 594 (2000). Importantly, the aforementioned policymaking role remains appropriately placed with the Department of Justice, which has long held responsibility for ensuring compliance with the FOIA throughout the Executive branch. This role is all the more important, now that the Department serves as the lead agency in implementing Executive Order 13,392.

Of additional concern is that the Office of Government Information Services would be authorized by S. 849 to provide mediation services between agencies and FOIA requesters. It should be noted that many FOIA disputes are not particularly well-suited to mediation because, *inter alia*, the two matters generally at issue in FOIA litigation—the adequacy of the search and the assertion of exemptions—are questions of law. Moreover, the authority given this Office under the bill may constitute the kind of significant authority that can only be exercised by officers duly appointed under the Appointments Clause, U.S. Const. art. II, sec. 2, cl. 2, and if that is the case, the provision would raise constitutional concerns.

Further, the establishment of such an office would be unwarranted and redundant. Agencies routinely review their FOIA policies and procedures to ensure that they are adequately funded for the administration of the program. In fact, with the recent issuance of Executive Order 13,392, agencies are now required to scrutinize their processing of FOIA requests and report to the Department of Justice on their improvements made in that regard. Agencies then report any deficiencies in the implementation of their improvement plans to the Attorney General and the President’s Management Council.

Also, the Executive Order required agencies to appoint Chief FOIA Officers, who “have agency-wide responsibility for efficient and appropriate compliance with the FOIA.” This requirement ensures high-level visibility and accountability by an agency’s “senior official.” Further, the Department of Justice and the Government Accountability Office (GAO) already perform the function of holding agencies accountable, working quite well together. Indeed, there have been several GAO reports analyzing Government-wide administration of FOIA during just the past four years.

Additionally, the creation of a separate, independent office to provide Ombudsmen-type services to requesters is unnecessary in light of all agencies’ meeting the Executive Order’s requirement to designate FOIA Public Liaisons and establish FOIA Requester Service Centers. The Public Liaisons and Requester Service Centers are there to provide information to the public about the status of their requests, to ensure that agencies use a “service-oriented” approach in responding to FOIA-related inquiries, and to resolve disputes.

Finally, both sections 11 and 13 of the bill appear to require the submission of legislative recommendations to Congress by Executive branch agencies, requirements which conflict with the President’s authority to submit only such legislative proposals as he deems “necessary and expedient.” *See* U.S. Const. art. II, sec. 3. Any such provisions in the bill should be precatory rather than mandatory.

Conclusion

Since its enactment in 1966, FOIA has firmly established an effective statutory right of public access to Executive branch information in the Federal government. But the goal of achieving an informed citizenry is often counterpoised against other vital societal aims, such as the public’s interest in effective and efficient operations of government; the prudent use of limited fiscal resources; and the preservation of the confidentiality and security of sensitive personal, commercial, and governmental information.

Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in providing a workable scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

Regrettably, S. 849, however well intentioned, does not provide a workable regime for effective, efficient compliance with the FOIA, nor does it provide a reasonable balance for the competing and equally compelling governmental aims involved here.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration’s program, there is no objection to submission of this letter.

Sincerely,

RICHARD A. HERTLING,

Acting Assistant Attorney General.

B. ADDITIONAL VIEWS OF SENATOR CORNYN

The National Security Archive,
The George Washington University,
Washington, DC, May 10, 2005.

Hon. JOHN CORNYN,

U.S. Senate,

Washington, DC.

Hon. PATRICK LEAHY,

U.S. Senate,

Washington, DC.

DEAR SENATORSCORNYN and LEAHY: On April 23, 2004, Professor Ralph Begleiter, a University of Delaware professor and a former CNN correspondent, filed a Freedom of Information Act (FOIA) request seeking two categories of information: (1) copies of 361 photographic images of the honor ceremony at Dover Air Force Base for fallen U.S. military returning home to the United States that already had been released to another FOIA requester; and (2) similar images taken after October 7, 2001 at any U.S. military facility.

The unnecessarily prolonged history of this FOIA request demonstrates how plaintiffs often are forced to take the extreme measure of filing a lawsuit to get the government to release information (which in this case probably was not too hard to find or review). And then how, when faced with the obligation to respond in court to the unreasonable denial of the FOIA request or unnecessary delay in processing, the government sometimes simply releases the records. This litigation strategy imposes significant burdens on the FOIA requester, who must locate counsel and participate in litigation, but denies the requester any recompense for fulfilling the “private attorney general” role envisioned by the FOIA, since the absence of a final court ruling requiring the disclosure often denies the plaintiff statutory attorneys’ fees.

On June 30, 2004—48 business days after Professor Begleiter’s request was filed and more than twice the response time permitted under the FOIA—Mr. Begleiter filed an

administrative appeal of his April 23, 2004 FOIA request. The appeal was never acknowledged or responded to by the Air Force.

As of September 2004—five months after the request was filed—Professor Begleiter had received no substantive response to the FOIA request or administrative appeal. Professor Begleiter then contacted each of the two FOIA personnel at the Department of Air Force who had acknowledged receipt of the FOIA request and was told by one person that there were no records and by another that the request was being processed. It was at that point that Professor Begleiter determined to file suit.

On October 4, 2004, Professor Begleiter filed suit for the records requested on April 23, 2004, and in subsequent FOIA requests for similar images. On November 22, 2004, the Air Force provided Professor Begleiter a CD-ROM with the 361 images that had been released six months earlier to another FOIA requester and denied the remainder of his request claiming that it had no more responsive records. When Professor Begleiter demonstrated to the Air Force in an administrative appeal that its response was incorrect—since he had evidence that numerous other photographic images fitting the description in his FOIA request existed—the Air Force asked for additional time to search a range of components and agencies that had not been searched in the first place. Professor Begleiter, through counsel, agreed to provide the Air Force with additional time and the litigation was stayed at the end of December 2004 pending completion of the search. At the end of February 2005, Professor Begleiter agreed to wait another 30 days for the search to be completed. On March 25, 2005, however, Professor Begleiter informed the court and the Air Force that his counsel was preparing a motion for summary judgment based on the Air Force's failure to process the FOIA request. In response to that notice, on April 8, 2005, the government advised Professor Begleiter's counsel that hundreds of additional images would soon be provided. Ninety-two images were provided on April 15, and an additional 268 images were provided on April 25, 2005. Professor Begleiter is in the process of deciding future steps in the lawsuit.

It was not until he filed his lawsuit that Professor Begleiter obtained release of records that previously had been provided to another FOIA requester. It took an entire year, the filing of a lawsuit, and *finally* the notice that a summary judgment motion was being prepared to obtain any additional substantive response to the FOIA request. In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOINs attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests.

Please feel free to contact me with any questions you may have or for more information about Professor Begleiter's lawsuit.

Thank you for your efforts to strengthen the accountability of our government agencies.

Sincerely,

MEREDITH FUCHS,

General Counsel.

Law Office of

Robert Ukeiley,

Berea, KY, May 10, 2005.

Hon. JOHN CORNYN,

U.S. Senate,

Washington, DC.

Hon. PATRICK LEAHY,

U.S. Senate,

Washington, DC.

DEAR SENATOR CORNYN AND SENATOR LEAHY: It is my understanding that Congress is considering changing the language of the Freedom of Information Act (FOIA) to allow for the recovery of attorneys' fees and expenses if the agency turns over the requested documents after a suit is filed, regardless of whether or not a court orders the agency to turn over the documents. I think such a change would serve the public interest.

In the following two cases, I filed suit, and shortly after I filed suit, the agency turned over the requested documents and I did not recovery attorney fees.

Forest Guardians v. U.S. Fish and Wildlife Service, 04-N-1396 (OES)(D.Colo. 2004)

Forest Guardians v. U.S. Fish and Wildlife Service, 04-MW-2529 (OES)(D.Colo. 2005)

I generally represent my clients on a pro bono basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses.

Thank you for your consideration of this important issue.

Sincerely,

ROBERT UKEILEY.

VIII. CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee finds that it is necessary to dispense with the requirement of paragraph 12 to expedite the business of the Senate.