SEC. 4. DISTRESSED, AT-RISK, AND ECONOMICALLY STRONG COUNTIES.

(a) DESIGNATION OF AT-RISK COUNTIES.—Section 14526 of title 40, United States Code, is amended—

(1) in the section heading, by inserting ''**, at-risk,**'' after ''**Distressed**''; and

(2) in subsection (a)(1)—

(A) by redesignating subparagraph (B) as subparagraph (C);

(B) in subparagraph (A), by striking ''and'' at the end; and

(C) by inserting after subparagraph (A) the following:

''(B) designate as 'at-risk counties' those counties in the Appalachian region that are most at risk of becoming economically distressed; and''.

(b) CONFORMING AMENDMENT.—The analysis for chapter 145 of title 40, United States Code, is amended by striking the item relating to section 14526 and inserting the following:

''14526. Distressed, at-risk, and economically strong counties.''.

SEC. 5. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—Section 14703 of title 40, United States Code, is amended to read as follows:

''§ 14703. Authorization of appropriations

''(a) IN GENERAL.—In addition to the amounts made available under section 14501, there are authorized to be appropriated to the Appalachian Regional Commission to carry out this subtitle—

''(1) $95,200,000 for fiscal year 2007;

''(2) $98,600,000 for fiscal year 2008;

''(3) $102,000,000 for fiscal year 2009;

''(4) $105,700,000 for fiscal year 2010; and

''(5) $109,400,000 for fiscal year 2011.

''(b) TELECOMMUNICATIONS AND TECHNOLOGY INITIATIVE.—Of the amounts made available under subsection (a), the following amounts may be used to carry out section 14504:

''(1) $10,000,000 for fiscal year 2007.

''(2) $8,000,000 for fiscal year 2008.

''(3) $5,000,000 for each of fiscal years 2009 through 2011.

''(c) ECONOMIC AND ENERGY INITIATIVE.—Of the amounts made available under subsection (a), the following amounts may be used to carry out section 14508:

''(1) $12,000,000 for fiscal year 2007.

''(2) $12,400,000 for fiscal year 2008.

''(3) $12,900,000 for fiscal year 2009.

''(4) $13,300,000 for fiscal year 2010.

''(5) $13,800,000 for fiscal year 2011.

''(d) AVAILABILITY.—Amounts made available under subsection (a) shall remain available until expended.

''(e) ALLOCATION OF FUNDS.—Funds approved by the Appalachian Regional Commission for a project in an Appalachian State pursuant to a congressional directive shall be derived from the total amount allocated to the State by the Appalachian Regional Commission from amounts made available to carry out this subtitle.''.

SEC. 6. TERMINATION.

Section 14704 of title 40, United States Code, is amended by striking ''2007'' and inserting ''2011''.

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act take effect on October 1, 2006.

CONGRATULATING THE 15TH POET LAUREATE

Mr. REID. Mr. President, I ask unanimous consent that the Senate now proceed to S. Res. 304.

The PRESIDING OFFICER. The clerk will report the title of the resolution.

The legislative clerk read as follows:

A resolution (S. Res. 304) congratulating Charles Simic on being named the 15th Poet Laureate of the United States of America by the Library of Congress.

There being no objection, the Senate proceeded to consider the resolution.

Mr. REID. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 304) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 304

Whereas Charles Simic was born in Yugoslavia on May 9, 1938, and lived through the events of World War II;

Whereas, in 1954, at age 16 Charles Simic immigrated to the United States, and moved to Oak Park, Illinois;

Whereas Charles Simic served in the United States Army from 1961 to 1963;

Whereas Charles Simic received a bachelor's degree from New York University in 1966;

Whereas Charles Simic has been a United States citizen for 36 years and currently resides in Strafford, New Hampshire;

Whereas Charles Simic has authored 18 books of poetry;

Whereas Charles Simic is a professor emeritus of creative writing and literature at the University of New Hampshire, where he taught for 34 years before retiring;

Whereas Charles Simic is the 5th person to be named Poet Laureate with ties to New Hampshire, including Robert Frost, Maxine Kumin, Richard Eberhart, and Donald Hall;

Whereas Charles Simic won the Pulitzer Prize for Poetry in 1990 for his work ''The World Doesn't End'';

Whereas Charles Simic wrote ''Walking the Black Cat'' in 1996, which was a finalist for the National Book Award for Poetry;

Whereas Charles Simic won the Griffin Prize in 2005 for ''Selected Poems: 1963-2003'';

Whereas Charles Simic held a MacArthur Fellowship from 1984 to 1989 and has held fellowships from the Guggenheim Foundation and the National Endowment for the Arts;

Whereas Charles Simic earned the Edgar Allan Poe Award, the PEN Translation Prize, and awards from the American Academy of Arts and Letters and the National Institute of Arts and Letters;

Whereas Charles Simic served as Chancellor of the Academy of American Poets;

Whereas Charles Simic received the 2007 Wallace Stevens Award from the American Academy of Poets; and

Whereas on August 2, 2007, Librarian of Congress James H. Billington announced the appointment of Charles Simic to be the Library's 15th Poet Laureate Consultant in Poetry: Now, therefore, be it

Resolved, That the Senate—

(1) congratulates Charles Simic for being named the 15th Poet Laureate of the United States of America by the Library of Congress; and

(2) directs the Secretary of the Senate to transmit an enrolled copy of this resolution to Charles Simic.

OPEN GOVERNMENT ACT OF 2007

Mr. REID. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar No. 127, S. 849.

The PRESIDING OFFICER. The clerk will report the bill by title.

The legislative clerk read as follows:

A bill (S. 849) to promote accessibility, accountability, and openness in Government by strengthening section 552 of title V, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes.

There being no objection, the Senate proceeded to consider the bill.

Mr. LEAHY. Mr. President, I am pleased that the Senate has passed the Leahy-Cornyn Openness Promotes Effectiveness in our National Government Act'' (the ''OPEN Government Act''), S. 849, before adjourning for the August recess. This important Freedom of Information Act legislation will strengthen and reinvigorate FOIA for all Americans.

For more than four decades, FOIA has translated the great American values of openness and accountability into practice by guaranteeing access to government information. The OPEN Government Act will help ensure that these important values remain a cornerstone of our American democracy.

I commend the bill's chief Republican cosponsor, Senator JOHN CORNYN, for his commitment and dedication to passing FOIA reform legislation this year. Since he joined the Senate 5 years ago, Senator CORNYN and I have worked closely together on the Judiciary Committee to ensure that FOIA and other open government laws are preserved for future generations. The passage of the OPEN Government Act is a fitting tribute to our bipartisan partnership and to openness, transparency and accountability in our government.

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 and Senator BENNETT in helping us to reach a compromise on this legislation, so that the Senate could consider and pass meaningful FOIA reform this legislation before the August recess.

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.

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 requestors 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 journalist 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 prohibits an agency from collecting search fees if it fails to meet the 20-day deadline, except in the case of exceptional circumstances as defined by the FOIA statute.

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 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 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 FOIA 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 ten 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.

In addition, the bill also clarifies that FOIA applies to agency records that are held by outside private contractors, no matter where these records are located. And to create more transparency about the use of statutory exemptions under FOIA, the bill ensures that FOIA statutory exemptions that are included in legislation enacted after the passage of this bill clearly cite the FOIA statute and clearly state the intent to be exempt from FOIA.

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 am also pleased that, by passing this important reform legislation today, the Senate has reaffirmed 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 commend all of my Senate colleagues, on both sides of the aisle, for unanimously passing this historic FOIA reform measure. I hope that the House of Representatives, which overwhelmingly passed a similar measure earlier this year, will promptly take up and pass this bill and that the President will then promptly sign it into law.

Mr. KYL. Mr. President, I rise today to comment on S. 849, the OPEN Government Act. As a result of negotiations between Senators CORNYN, LEAHY, and me, we have reached an agreement on an amendment to this bill that addresses my concerns about the legislation while keeping true to the bill's intended purposes. When this bill was marked up in the Senate Judiciary Committee several months ago, I filed a number of amendments intended to address problems with the bill. Senator LEAHY asked me at the mark up to withhold offering my amendments in favor of addressing my concerns through negotiations with him and with Senator CORNYN. I agreed to do so, and later submitted a statement of additional views to the committee report for this bill that described the nature of some of my concerns, and that included as an attachment the Justice Department's lengthy Views Letter on this bill. After follow-up meetings with the Justice Department and Office of Management and Budget to elucidate the nature of some of those agencies' concerns and to try to come up with compromise language, negotiations among members of the Senate began. I am pleased to report that those negotiations have proved fruitful. Our negotiations have benefited from extensive assistance from the Justice Department and other parts of the executive branch, as well as from the input of various journalists' organizations. While none of these parties has gotten exactly what it wants, I do believe that we now have a bill that strikes the right balance with regard to FOIA—a bill that will make FOIA work more smoothly and efficiently.

Allow me to describe some of the changes that my amendment will make to the underlying bill. Section three of the original bill broadened the definition of media requesters to include anyone who ''intends'' to broadly disseminate information. My concern, which was also expressed by the Justice Department, was that in the age of the internet, anyone can plausibly state that he ''intends'' to broadly disseminate the information that he obtains through FOIA. The media-requester category is important because requesters who receive this status are exempt from search fees. Search fees are one of the principal tools that agencies use to encourage requesters to clarify and sharpen their requests. When someone makes a broad and vague request, the agency will come back with an estimate of the cost of conducting such a search. Often, the individual will then sharpen that request. This saves the agency time and the requester money. According to some FOIA administrators, legitimate media requesters rarely make vague

requests. These requesters usually know what they want and they want to get it quickly. But if virtually any requester could be exempted from search fees by claiming that he intends to widely disseminate the information, search fees would no longer serve as a tool for encouraging requesters to focus their requests. Overall, this would waste FOIA resources and slow down processing of all requests. Such a result would not be in anyone's interest.

The compromise language included in my amendment clarifies the definition of media requester in a way that protects internet publications and freelance journalists but that still preserves commonsense limits on who can claim to be a journalist. At the suggestion of some media representatives, we have incorporated into the amendment the definition of media requester that was announced by the DC Circuit in *National Security Archive* v. *U.S. Department of Defense*. 880 F.2d 1381 (D.C. Cir. 1989). That definition focuses on public interest in the collected information, the use of editorial skill to process that information into news, and the distribution of that news to an audience. It would appear in my view to protect publishers of newsletters and other smaller news sources, as well as, obviously, the types of organizations described in that opinion. On the other hand, given that this construction of the term news media as used in FOIA has been in effect for 17 years, I do not think that anyone can reasonably fear that codifying it will turn the world upside down. I was amused to see that Judge Ginsburg's analysis of the statute's definition of news media relied in part on conflicting legislative statements made by Senators HATCH and LEAHY, two members with whom I currently serve on the Senate Judiciary Committee, regarding the meaning of the 1986 amendments to FOIA. By incorporating a judicially crafted definition of news media, I believe that my amendment spares the courts the indignity of being compelled to parse conflicting Senate floor statements in order to divine the meaning of that term.

The remainder of my amendment's changes to section 3 codify language that has been adopted by some administrative agencies to clarify who is a media requester. Other than stylistic edits, that agency language has been modified in my amendment only to make express that news-media entities include periodicals that are distributed for free to the public. This will protect the fee status of the numerous free newspapers that have become common in American cities in recent years. The agency language codified here also extends express protection to freelance journalists.

Overall, this language should guarantee news-media status for new electronic formats and for anyone who would logically be considered a journalist, even when that journalist's method of news distribution takes on new means and forms. But the language should also prevent gamesmanship by individuals who cannot logically be considered journalists but who are willing to assert that they are journalists in order to avoid paying search fees.

The modified bill also makes important changes to section 6 of the bill. The original version of this section eliminated certain important FOIA exemptions as a penalty for an agency's failure to comply with FOIA's 20-day response deadline. I commented at length on this provision of the bill at the beginning of my additional views to the committee report for the bill. This provision was far and away the most problematic provision of the original bill and I am relieved that Senators LEAHY and CORNYN have agreed to abandon this approach to deadline enforcement.

My amendment adopts a modified version of an approach to deadline enforcement that was suggested by Senators CORNYN and LEAHY. Their approach denies search fees to agencies that do not meet FOIA deadlines. I have modified my colleagues' proposal by including an exception allowing an agency to still collect search fees if a delay in processing the request was the result of unusual or exceptional circumstances. These exceptions have been part of FOIA for many years now and have a reasonably well-known meaning. I expect that these exceptions will account for virtually all of the cases where an agency cannot reasonably be expected to process a particular FOIA request within the paragraph (6) time limits.

Preserving this type of flexibility is important. A penalty that seriously punishes an agency, which I believe that denying search fees would do, would likely backfire if the penalty did not account for complex or broad requests that cannot reasonably be processed within the FOIA deadlines. If the penalties for not processing a request within the deadlines are harsh and include no exceptions, the agency will process every request within 20 or 30 days. It will simply do a sloppy job. That would not improve the operation of the FOIA and would not be in anyone's interest.

The original bill also made FOIA's 20-day clock run from the time when any part of a government agency or department received a FOIA request. Again, the modified bill exempts FOIA requesters from search fees if the 20-day deadline is not met and no unusual or exceptional circumstances are present. These provisions in combination would have created a perverse incentive for a FOIA requester to ignore the addressing instructions on an agency's website and send his request to some distant outpost of an agency or department, in the hope that doing so would prevent the agency from meeting the 20-day deadline and the requester would be exempted from search fees. I would not expect more than a very small portion of FOIA requesters to engage in such gamesmanship. But given the large number of individuals and institutions that make FOIA requests, it is inevitable that some bad apples would abuse the rules if Congress were to create an incentive to do so.

My amendment makes the FOIA deadline run only from the time when the appropriate component of an agency receives the request. To address concerns that an agency might unreasonably delay in routing a request to the appropriate component, I have added language providing that the deadline shall begin to run from no later than ten days after some designated FOIA component receives the request. I think that it is reasonable to expect that requesters send their requests to some designated FOIA-receiving component of an agency, and I think that it is reasonable to expect that once a FOIA component of the agency gets the request, it will expeditiously route that request to the appropriate FOIA component.

My amendment also changes the bill's standard for awarding attorney's fees to FOIA requesters when litigation is ended short of a judgement or court-approved settlement. The original bill would have entitled a requester to fees whenever an agency voluntarily or unilaterally changed its position and handed over the requested information after litigation had commenced. As I noted in my statement of additional views to the committee report, I am concerned that such a standard would discourage agencies from releasing documents in situations where the agency is fully within its rights to withhold a record—for example, because some clear exception applies—but senior personnel at the agency decide to produce the documents anyway. To impose fees in such a situation would be to adopt a rule of no good deed goes unpunished. It would also likely discourage some disclosures. If an exemption clearly applied to the records in question, the only way that the agency could avoid being assessed fees would be to continue litigating. Also, in my view attorney's fee shifting should only reward litigation that was meritorious. A baseless lawsuit should not be rewarded with attorney's fees. There is enough bad lawyering around already. The government should not be paying litigants for bringing claims that lack legal merit.

On the other hand, Senator CORNYN has presented compelling arguments that since the time when the Buckhannon standard was extended to FOIA, some agencies have begun denying clearly meritorious requests and then unilaterally settling the case on the eve of trial to avoid paying attorney's fees. Obviously, such behavior should not be encouraged. Or at the very least, the requester should be compensated for the legal expense of forcing agency compliance with a meritorious request. Senator CORNYN has

made a strong case that the current standard denies the public access to important information about the operations of the Federal Government.

In the spirit of compromise, and out of deference to Senator CORNYN's arguments and persistence, I have agreed to incorporate language into my amendment that does not fully address my concerns about this part of the bill and that is very generous to FOIA requesters. The language of the amendment entitles a requester to fees unless the court finds that the requester's claims were not substantial. This is a pretty low standard. It would allow the requester to be deemed a prevailing party for fee-assessment purposes even if the government's litigating position was entirely reasonable—or even if the government's arguments were meritorious and the government would have won had the case been litigated to a judgment.

Substantiality is a test that is employed in the Federal courts to determine whether a federal claim is adequate to justify retaining jurisdiction over supplemental or other State law claims. It is generally understood to require only that the plaintiff's complaint not be clearly nonmeritorious on its face and not be clearly precluded by controlling precedent. The classic and most-quoted statement of the substantiality standard appears to be that in the Supreme Court's decision in *Levering & Garrigues Co.* v. *Morrin*, 289 U.S. 103, 105 (1933), in which Justice Sutherland explained that a claim may be ''plainly unsubstantial either because obviously without merit, or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'' The same principle is expressed through different words in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 666 (1974), as whether the claim is ''so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a Federal controversy,'' and in *Kaz Manufacturing* v. *Chesebrough-Pond's, Inc.*, 211 F.Supp. 815, 822 (S.D.N.Y. 1962), as whether ''it cannot be said that the claim is obviously without merit or that its invalidity clearly results from the previous decisions of this court or, where the claim is pretty clearly unfounded.''

One aspect of this test that makes it well-suited to evaluating attorney's fee requests is that the ''insubstantiality'' of a claim is a quality ''which is apparent at the outset.'' *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970). It is a standard that courts should be able to apply without further factual inquiry into the nature of a complaint. It thus addresses one of the Supreme Court's major concerns in the Buckhannon case, that ''a request for attorney's fees should not result in a second major litigation.''

Part of the very definition of the substantiality test is that courts can evaluate the complaint on its pleadings or without resolving factual disputes. A claim is substantial so long as ''it cannot be said that [it] is obviously without merit, or clearly foreclosed by prior Supreme Court decisions, or a matter that should be dismissed on the pleadings alone without the presentation of some evidence.'' *Rumbaugh* v. *Winifrede Railroad Company*, 331 F.2d 530, 539–40 (4th Cir. 1964). ''The substantiality of the Federal claim is ordinarily determined on the basis of the pleadings''—on whether ''it appears that the Federal claim is subject to dismissal under F.R.Civ.P. 12(b)(6) or could be disposed of on a motion for summary judgment under F.R.Civ.P. 56.'' *Tully* v. *Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976). Other cases articulating these principles are *Kavit* v. *A.L. Stam & Co.*, 491 F.2d 1176, 1179–80 (2d Cir. 1974) (Friendly, J.); *Scholz Homes, Inc.* v. *Maddox*, 379 F.2d 84, 87 (6th Cir. 1967); *Smith* v. *Metropolitan Development Housing Agency*, 857 F.Supp. 597, 601 (M.D. Tenn. 1994); *In the Matter of Union National Bank & Trust Company of Souderton, Pennsylvania*, 298 F.Supp. 422, 424 (E.D. Pa. 1969).

I hope that these comments on my understanding of the law in this area are of assistance to courts and litigants who will now be forced to adapt to the application of the substantiality test to FOIA fee shifting. Obviously this transition would be easier had we adopted a test more familiar to this area of the law, but the exigencies of legislative compromise have precluded such an outcome. For some recent and very thorough examples of how a substantiality analysis is actually conducted, courts and litigants should also look to Judge Williams's panel opinion in *Decatur Liquors, Inc.* v. *District of Columbia*, 478 F.3d 360, 363–63 (D.C. Cir. 2007), and to the Sixth Circuit's opinion in *Wal-Juice Bar, Inc.* v. *Elliott*, 899 F.2d 1502, 1505–07 (6th Cir. 1990).

Again, I would have preferred that the Senate select some standard that protects from fee assessments an agency that releases information when the law clearly applied an exemption to the requested information. Agencies will still be protected by the discretionary factors considered in the fee-shifting system, but the lacks-a-reasonable-legal-basis factor is not always controlling and does not create a guaranteed safe harbor. I fear that the standard that we adopt today will lead some agency employees to withhold information that they would otherwise be inclined to release out of concern that unilaterally releasing the information would make the agencies subject to fee assessments.

I would also note that the substantiality test would have been unacceptable were this a fee-shifting statute that assessed fees against private parties. If a private party adopts a meritorious position in litigation but then unilaterally settles, the Federal Government could not rightfully force that party to pay attorney's fees. The occasional unfairness of this provision—the fact that it will sometimes require the payment of fees to a party whose litigation position lacked merit—is tolerable only because the only party that will be forced to pay fees under this provision even when that party was in the right is the government.

I would also like to emphasize for the legislative record that I had originally proposed formulating this standard as ''provided that the complainant's claim is substantial''—and I would have been equally content with language along the lines of ''unless the complainant's claim is insubstantial.'' The double negative in the amendment was not my proposal and I accept no responsibility for that grammatical infraction. It is only because others have insisted on that formulation and I can perceive no substantive difference between ''not insubstantial'' and ''substantial'' that the double negative appears in my amendment.

My amendment also makes one other important change to section 4 of the bill. The original bill allowed a requester to be deemed a prevailing party if the requester obtained relief through ''an administrative action.'' Agency administrative appeals of FOIA decisions do not require lawyers, and FOIA requesters should not be compensated for or encouraged to bring lawyers into these proceedings. An agency appeal simply means that the plaintiff asks the agency to reconsider its denial of a request. Every agency has an appeal procedure in which it assigns the case to another agency employee trained in FOIA who then reevaluates the request. These appeals are most often successful when the plaintiff provides more information about his request. Legal arguments are not appropriate to these appeals. There is no reason to bring attorneys-fee shifting into this stage of FOIA. Thus my amendment eliminates the fee-shifting section's reference to relief obtained through an administrative action.

Mr. CORNYN. Mr. President, since coming to the U.S. Senate in 2002, I have made it my mission to bring a little ''Texas sunshine'' to Washington.

The State of Texas has one of the strongest laws expanding the right of every citizen to access records documenting what the government is up to. As attorney general of Texas, I was responsible for enforcing Texas's open government laws. I have always been proud that Texas is known for having one of the strongest and most robust freedom of information laws in the country.

Unfortunately, the Sun doesn't shine as brightly in Washington. The Federal Freedom of Information Act, or FOIA, which was signed into law 41 years ago, was designed to guarantee public access to records that explain what the Government is doing.

Some Federal agencies are taking years to even start working on requests. Far too often when citizens

seek records from our Government, they are met with long delays, denials and difficulties. Federal agencies can routinely and repeatedly deny requests for information with near impunity. Making the situation worse, requestors have few alternatives to lawsuits for appealing an agency's decision.

And when requestors do sue agencies, the deck is stacked in the Government's favor.

Courts have ruled that requestors cannot recover legal fees from agencies who improperly withhold information until a judge rules for the requestor. That means an agency can withhold documents without any consequences until the day before a judge's ruling. Then the agency can suddenly send a box full of documents, render the lawsuit moot and leave the requestor with a hefty legal bill. And the agency gets away scot-free.

In the meantime, the delay can keep mismanagement and wasteful practices hidden and unfixed. Documents obtained through FOIA helped reporters for Knight Ridder—now part of McClatchy Company—show the public that veterans who fought bravely for our country have trouble obtaining the medical benefits they deserve upon returning home. Thousands died waiting for their benefits, many more received wrong information. Legal fees alone topped $100,000 along with the time and effort. Few citizens have such time and budgets.

To address problems of long delays and strengthen the ability of every citizen to know what its government is up to, Senator PATRICK LEAHY and I introduced bipartisan legislation to reform FOIA.

There are, unfortunately, many issues in the Senate Judiciary Committee that have become partisan and divisive. So it is especially gratifying to be able to have worked so closely with Chairman LEAHY on an issue as important and as fundamental to our Nation as openness in government.

Today we are making history by passing the Openness Promotes Effectiveness in our National Government Act of 2007, also known as the OPEN Government Act.

I am grateful to Senator LEAHY and to his staff for all their hard work on these issues of mutual interest and national interest. A special thanks to Lydia Griggsby, Senator LEAHY's counsel, for her diligence and hard work. And I would like to thank and to commend Senator LEAHY for his decades-long commitment to freedom of information.

I also want to especially thank Senators KYL and BENNETT and their respective staff members, Joe Matal and Shawn Gunnarson for their good faith efforts to resolve differences and move this bill out of the Senate. We couldn't have done it without their cooperation and fair-mindedness.

Open-government reforms should be embraced by conservatives, liberals, and anyone who believes in the freedom and the dignity of the individual.

Passage of this important legislation is a victory for the American people. From my vantage point here in Washington, DC, it is about holding accountable the politicians who continue to grow the size and scope of the Federal Government. And it is about holding accountable the bureaucrats who populate the Federal Government's ever-expanding reach over individual liberty.

This legislation contains important congressional findings to reiterate and reinforce our belief that FOIA establishes a presumption of openness, and that our government is based not on the need to know, but upon the fundamental right to know. In addition, the act contains over a dozen substantive provisions, designed to achieve four important objectives: (1) to strengthen FOIA and close loopholes, (2) to help FOIA requestors obtain timely responses to their requests, (3) to ensure that agencies have strong incentives to act on FOIA requests in a timely fashion, and (4) to provide FOIA officials with all of the tools they need to ensure that our government remains open and accessible.

The OPEN Government Act is not just pro-openness, pro-accountability, and pro-accessibility—it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking, and it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

The act has the support of business groups, such as the U.S. Chamber of Commerce and National Association of Manufacturers, media groups and more than 100 advocacy organizations from across the political spectrum. Without their help, this legislation would have been impossible.

We owe it to all Americans to help them know what their government is up to and to make our great democracy even stronger and more accountable to its citizens

Mr. REID. Mr. President, I wish the record to reflect how much I appreciate the work of Senator LEAHY on this very important matter. The Freedom of Information Act is something that has needed amending for some time, and I am happy we are able to do it tonight.

I ask unanimous consent that the amendment at the desk be considered and agreed to, the bill, as amended, be read three times, passed, and the motion to reconsider be laid upon the table; that any statements be printed in the RECORD, with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 2655) was agreed to, as follows:

The bill is amended as follows:

(a) NEWS-MEDIA STATUS.—At page 4, strike lines 4 though 15 and insert:

''The term ''a representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of ''news'') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.''.

(b) ATTORNEYS' FEES.—At page 5, strike lines 1 through 7 and insert:

''(I) a judicial order, or an enforceable written agreement or consent decree; or

(II) a voluntary or unilateral change in position by the agency, provided that the complainant's claim is not insubstantial.''.

(c) COMMENCEMENT OF 20-DAY PERIOD AND TOLLING.—At page 6, lines 1 through 7 and insert:

''(1) IN GENERAL.—Section 552(a)(6)(A)(i) of title 5, United States Code, is amended by striking ''determination;'' and inserting:

''determination. The 20-day period shall commence on the date on which the request is first received by the appropriate component of the agency, but in any event no later than ten days after the request is first received by any component of the agency that is designated in the agency's FOIA regulations to receive FOIA requests. The 20-day period shall not be tolled by the agency except (I) that the agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the FOIA requester or (II) if necessary to clarify with the requester issues regarding fee assessment. In either case, the agency's receipt of the requester's response to the agency's request for information or clarification ends the tolling period;''.

(d) COMPLIANCE WITH TIME LIMITS.—At page 6, strike line II and all that follows through page 7, line 4, and insert:

''(b) COMPLIANCE WITH TIME LIMITS.—

(1)(A) Section 552(a)(4)(A) of title 5, United States Code, is amended by adding at the end the following:

''(viii) An agency shall not assess search fees under this subparagraph if the agency fails to comply with any time limit under paragraph (6), provided that no unusual or exceptional circumstances (as those terms are defined for purposes of paragraphs (6)(B) and (C), respectively) apply to the processing of the request.''.

(B) Section 552(a)(6)(B)(ii) of title 5, United States Code, is amended by inserting between the first and second sentences the following:

''To aid the requester, each agency shall make available its FOIA Public Liaison, who shall assist in the resolution of any disputes between the requester and the agency.''

(e) STATUS OF REQUESTS.—At page 7:

(1) strike lines 17 through 22 and insert:

''(A) establish a system to assign an individualized tracking number for each request received that will take longer than ten days to process and provide to each person making a request the tracking number assigned to the request; and'' .

(2) at line 23, strike ''(C)'' and insert ''(B)''.

(f) CLEAR STATEMENT FOR EXEMPTIONS.—At page 8, strike line 19 and all that follows through the end of the section and insert:

''(A) if enacted prior to the date of enactment of the OPEN Government Act of 2007, requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establishes particular criteria for withholding or refers to particular types of matters to be withheld; or

''(B) if enacted after the date of enactment of the OPEN Government Act of 2007, specifically cites to the Freedom of Information Act.''.

(g) PRIVATE RECORDS MANAGEMENT.—At page 13, lines 14 through 15, strike ''a contract between the agency and the entity.'' and insert ''Government contract, for the purposes of records management.''.

(h) POLICY REVIEWS, AUDITS, AND CHIEF FOIA OFFICERS AND PUBLIC LIAISONS.—Strike section 11 and insert the following:

''SEC. 11. OFFICE OF GOVERNMENT INFORMATION SERVICES.

''(a) IN GENERAL.—Section 552 of title 5, United States Code, is amended by adding at the end the following:

''(h) There is established the Office of Government Information Services within the National Archives and Records Administration. The Office of Government Information Services shall review policies and procedures of administrative agencies under section 552, shall review compliance with section 552 by administrative agencies, and shall recommend policy changes to Congress and the President to improve the administration of section 552. The Office of Government lnfonnation Services shall offer mediation services to resolve disputes between persons making requests under section 552 and administrative agencies as a non-exclusive alternative to litigation and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute.

''(i) The Government Accountability Office shall conduct audits of administrative agencies on the implementation of section 552 and issue reports detailing the results of such audits.

''(j) Each agency shall—

''(1) Designate a Chief FOIA Officer who shall be a senior official of such agency (at the Assistant Secretary or equivalent level).

GENERAL DUTIES.—The Chief FOIA Officer of each agency shall, subject to the authority of the head of the agency—

''(A) have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

''(B) monitor FOIA implementation throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA;

''(C) recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA;

''(D) review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA; and

''(E) facilitate public understanding of the purposes of the FOIA's statutory exemptions by including concise descriptions of the exemptions in both the agency's FOIA handbook issued under section 552(g) of title 5, United States Code, and the agency's annual FOIA report, and by providing an overview, where appropriate, of certain general categories of agency records to which those exemptions apply.''

''(2) Designate one or more FOIA Public Liaisons who shall be appointed by the Chief FOIA Officer.

GENERAL DUTIES—FOIA Public Liaisons shall report to the agency Chief FOIA Officer and shall serve as supervisory officials to whom a FOIA requester can raise concerns about the service the FOIA requester has received from the FOIA Requester Center, following an initial response from the FOIA Requester Center staff. FOIA Public Liaisons shall be responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.''

''(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of enactment of this Act.''.

(i) CRITICAL INFRASTRUCTURE INFORMATION.—Strike section 12 of the bill.

The bill (S. 849) was ordered to be engrossed for a third reading, was read the third time, and passed.

(The bill will be printed in a future edition of the RECORD.)

AUTHORITY FOR COMMITTEES TO REPORT

Mr. REID. Mr. President, I ask unanimous consent that during the recess/adjournment of the Senate, Senate committees may file committee-reported Legislative and Executive Calendar business on Wednesday, August 29, 2007, during the hours of 10 a.m. to 1 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

APPOINTMENT AUTHORITY

Mr. REID. Mr. President, I ask unanimous consent that notwithstanding the recess or adjournment of the Senate, the President of the Senate, the President of the Senate pro tempore, and the majority and minority leaders be authorized to make appointments to commissions, committees, boards, conferences or interparliamentary conferences authorized by law, by concurrent action of the two Houses or by order of the Senate.

The PRESIDING OFFICER. Without objection, it is so ordered.

GOLDEN GAVEL AWARD

Mr. REID. Mr. President, I have been informed the Presiding Officer has received something I have never gotten in all the many years I have been in the Senate, the Golden Gavel Award. For those who are listening, it is given to those people who preside 100 hours, and you have done that. That is tremendous. It is only July, but it shows what a workhorse the Senator from Rhode Island is. There is no better indication than that—presiding. Of course, we will present this award to Senator WHITEHOUSE in the first caucus we have in September.

On this, the most important legislation we dealt with today, FISA—no one worked on it any more than you. The hours you put in on that, well past midnight—you were the talk of the Judiciary Committee. Even though you are a junior member of that committee, your experience as attorney general and as a U.S. attorney, doing all the good things you have done, certainly qualified you, and people looked to you for guidance on that most important piece of legislation.

I say to my friend from Rhode Island how fortunate we are to have you in the Senate.

EXECUTIVE SESSION

NOMINATION OF TEVI DAVID TROY TO BE DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES

Mr. REID. Mr. President, I ask unanimous consent the Senate proceed to executive session, that the Finance Committee be discharged from the nomination of Tevi David Troy to be Deputy Secretary of Health and Human Services; that the nomination be confirmed, the motion to reconsider be laid on the table, that any statements be printed in the RECORD, the President be immediately notified of the Senate's action, and the Senate then return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nomination was considered and confirmed, as follows:

Tevi David Troy, of New York, to be Deputy Secretary of Health and Human Services.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate returns to legislative session.

ORDERS FOR TUESDAY, SEPTEMBER 4, 2007

Mr. REID. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand adjourned until 12 noon, Tuesday, September 4; that on Tuesday, following the prayer and pledge, the Journal of proceedings be approved to date, the morning hour be deemed expired, and the time for the two leaders be reserved for their use later in the day; that there then be a period of morning business until 1 p.m., with Senators permitted to speak therein for up to 10 minutes each, and that the time be equally divided and controlled between the leaders or their designees; that at 1 p.m. the Senate proceed to the consideration of Calendar No. 207, H.R. 2642, the Military Construction/Veterans Affairs appropriations.

The PRESIDING OFFICER. Without objection, it is so ordered.