



Colloquy on S. 337, the FOIA Improvement Act
Senator John Cornyn (TX) and Senator Patrick Leahy (D-VT)
March 15, 2016

Sen. Leahy: Mr. President, I ask consent to engage in a colloquy with Senator Cornyn regarding important aspects of our bill, S. 337, the FOIA Improvement Act. Senator Cornyn and I have worked together to improve and protect the Freedom of Information Act (FOIA)—our nation’s premiere transparency law—for many years, and look forward to continuing this partnership.

The bill we passed today codifies the principle that President Obama laid out in his 2009 executive order in which he asked all Federal agencies to adopt a “Presumption of Openness” when considering the release of government information under FOIA. This policy embodies the very spirit of FOIA. By putting the force of law behind the Presumption of Openness, Congress can establish a transparency standard that will remain for generations to come. Importantly, codifying the presumption of openness will help reduce the perfunctory withholding of documents through the overuse of FOIA’s exemptions. It requires agencies to consider whether the release of particular documents will cause any foreseeable harm to an interest the applicable exemption is meant to protect. If it will not, the documents should be released.

Sen. Cornyn: I thank Senator Leahy for his remarks and for working together on this important bill. This bill is a good example of the bipartisan work the Senate can accomplish when we work together toward a common goal. I agree with Senator Leahy that the crux of our bill is to promote disclosure of government information and not to bolster new arguments in favor of withholding documents under FOIA’s statutory exemptions.

I want to clarify a key aspect of this legislation. The FOIA Improvement Act makes an important change to exemption (b)(5). Exemption (b)(5) permits agencies to withhold documents covered by litigation privileges, such as the attorney-client privilege, attorney work product, and the deliberative process privilege, from disclosure. Our bill amends exemption (b)(5) to impose a 25 year sunset for documents withheld under the deliberative process privilege. This should not be read to raise an inference that the deliberative process privilege is somehow heightened or strengthened as a basis for withholding *before* the 25 year sunset. This provision of the bill is simply meant to effectuate the release of documents withheld under the deliberative process privilege after 25 years when passage of time undoubtedly dulls the rationale for withholding information under this exemption.

Sen. Leahy: I thank Senator Cornyn for his comments and I agree with his characterization of the intent behind the 25 year sunset and the deliberative process privilege. This new sunset should not form the basis for agencies to argue that the deliberative process privilege somehow has heightened protection before the 25 year sunset takes effect. Similarly, the deliberative process privilege sunset is not intended to create an inference that the other privileges—including attorney-client and attorney work product, just to name a few—are somehow heightened in strength or scope because they lack a statutory sunset, or that we believe they should not be released after 25 years. Courts should not read the absence of a sunset for these other privileges as Congress’s intent to strengthen or expand them in any way.

Sen. Cornyn: I thank Senator Leahy for that clarification and agree with his remarks. If there is any doubt as to how to interpret the provisions of this bill, they should be interpreted to promote, not detract, from the bill's central purpose which is to promote the disclosure of government information to the American people.