CONGRESSIONAL RECORD—SENATE 31423

FREEDOM OF INFORMATION ACT CHANGES

Mr. HATCH. Mr. President, several sections of this important bill will make important changes in the Freedom of Information Act, particularly those which will considerably enhance the ability of Federal law enforcement agencies, such as the FBI and the DEA, to combat crime, including drug offenses.

At this juncture, the Senate has made three technical amendments in this part of the bill. First, we have restored the originally intended language of exemption 10G to provide that that exemption applies to information which "could reasonably be expected to" cause harm to personal privacy interests. This language comports with the other changes being made to other subparts of exemption 7 in this bill. It also is precisely the language that was contained in the earlier Senate-passed bill, S. 744, from which it was agreed all exemption 7 amendments would be taken for purposes of this bill.

Similarly, we have corrected the apparently inadvertent deletion of a phrase in the "review costs" portion of section 109 of the bill, section 109 of the bill (4x(A)(iv)). As corrected, the language now reads: "Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purpose of withholding any portions exempt from disclosure under this section." This language is precisely what was contained in the draft bill negotiated between the Justice Department and the staff of the House Subcommittee on Government Information, Justice and Agriculture this year, which I understand was what was intended to be employed for purposes of this bill and is certainly most appropriate.

Third, we have changed the effective date contained in section 1894(d)(1) of the bill to specify a more realistic 180-day effective date, thereby necessitating a more reasonable period of time in which the Office of Management and Budget and, in turn, Federal agencies, need promulgate new fee regulations. I am certain that no one in this body or in the other House intends that the assessment of any properly applicable FOIA fee be impaired by any difficulty or delay encountered in the development and promulgation of new fee regulations.

As Chairman of the Committee's Subcommittee on the Constitution, which held primary responsibility for considering FOIA reform legislation during these past several years, and as a principal author of much of this bill's FOIA reform sections, I would like to emphasize sever-
al things about the nature of these important provisions and what they are intended to accomplish.

First, it is expected that the law enforcement provisions will greatly enhance the ability of all Federal law enforcement agencies to withhold additional law enforcement information necessary for them to maximize the effectiveness with which they perform their critical functions. As Representative Tom Kefauver has already observed in the House, the important alterations to the language of exemption 7(E) that are made by this bill serve to modify the scope of this exemption. There should be no misunderstanding that, as they derive precisely from the provisions of S. 774, they are intended to broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it.

For example, I do think it should be noted specifically that the bill's substantial broadening of exemption 7(E), designed to permit agencies to withhold information, regardless of whether or not such disclosure could reasonably be expected to risk circumvention of the law. As such, it will directly overrule any lingering effect of the D.C. Circuit's decision in Jordan v. Department of Justice, 591 F.2d 785 (D.C. Cir. 1978) (en banc). Because of the greater sensitivity of such guidelines in the law enforcement context, and the very significant harm threatened to prosecutorial effectiveness if they were to be freely available under the FOIA, this important modification should be applied where necessary to protect critical law enforcement interests, regardless of the extent of their availability within the law enforcement community.

As for the additional law enforcement provisions of the bill, there likewise should be no misunderstanding that they will logically operate as exclusions—not as mere exemptions—to be applied whenever the special circumstances specified in them are found by the agency to exist. Thus, while the effect of these provisions will be somewhat analogous to the situation in which an agency neither confirms nor denies the existence of responsive records—colloquially known as glorification—their operation, both administratively and in court, will of necessity be different. An agency invoking one of these special exclusions will necessarily do so without the specific knowledge of the requester—because anything else would defeat the purpose of the exclusion—and any requester who wishes to challenge an agency's possible application of an exclusion can expect the agency to present its defense of the exclusion and the reasons it was used at the threshold of the automatic filing of an in camera affidavit, regardless of whether the exclusion was in fact employed in that case.

In addition to these critical law enforcement amendments, which should be broadly applied in future FOIA cases to achieve their intended law enforcement protection effects, the bill clarifies and changes the FOIA's provisions regarding fees and fee waivers. A number of points should be noted regarding these provisions, lest there be any misunderstanding about their agreed-upon intended effects. First, as I mentioned in my brief floor statement on September 30, the Senate language, as modified here in the House, is intended to permit a fee waiver to any requester, but only if the status of the respondent is that of a disseminator of public information. In other words, the dissemination of Government information as part of a commercial enterprise is not an activity that should be subsidized by the Government, especially in this time of fiscal shortages, and it is not intended that these provisions have such an effect. Nor is it intended to specially favor the speculative possibility that a fee-lance writer or hopeful author might be able to disseminate requested information. Of course, a true "media" requester, traditional and common sense meaning of that term, should be treated otherwise, as is any provider for in the plain language of the bill.

As a matter of fact, it should be noted that the bill's fee and fee waiver language, as modified here in the Senate, is phrased in very clear and plain terms, which should be construed and applied according to their ordinary meanings. Certainly no extraordinary meaning is intended to be conveyed by use of terms such as "commercial" and "media." Similarly, the bill's language providing for the continued viability of fees chargeable under "a statute specifically providing for setting the level of fees for particular types of records" is plainly intended to preserve the fee structure of any such statute, such as those which are part of the National Technical Information Service (NTIS) statutory scheme, without any particular limitation. As for the bill's new general fee waiver standard itself, it should be likewise taken to mean exactly what it says, which is not so very different from the fee waiver standard found in existing law. The new standard should serve to clarify the law in this area and to permit agencies, under the regulations of the Office of Management and Budget and the guidance of the Department of Justice, to make less controversial fee waiver determinations.

For example, this change will give greater effect to the administrative judgment belatedly reached in the case of Better Government Association v. Department of State, 780 F.2d 65 (D.C. Cir. 1986), in which the agency erroneously failed to apply a proper "public interest" standard at the administrative level. It is quite significant that the bill's clarified general fee waiver standard, as modified in this particular regard here in the Senate, retains the most important touchstone of the previous statutory standard: Both provide, most fundamentally, that a fee waiver is to be granted only where to do so will be in the "public interest." Agencies should keep this standard uppermost in their minds in making determinations under this revised formulation. It is certainly not intended that any waiver be granted under circumstances in which the public's interest is not being served through the FOIA request.

Indeed, this standard focuses on only one issue: the question of "likely to contribute significantly to public understanding of the operations or activities of the Government," which establishes a considerable standard to be satisfied. It is intended that the word "significantly" in this formulation be given its common force and weight in application and that the qualifying word "public" be applied so as to require a breach of benefit beyond any particularly narrow interest that might be presented.

It is also quite significant that the reformulated fee waiver standard retains the firm requirement that, regardless of any other consideration, waivers not be granted where disclosure would be "primarily in the commercial interest of the requester." The term "commercial" here, as elsewhere, should of course be given its common meaning, so that information vendors, data brokers, and other second-hand disseminators of Government information who do so at a price as the means of their economic self-sufficiency, should not qualify under this language. Such requesters, of course, would hardly qualify under any reasonable construction of the term "media"; indeed, such requesters should be required to pay the new review costs provided for in this bill.

Finally, it is not intended that the general approach of the Justice Department's 1985 fee waiver guidelines be repudiated by this bill's alteration of the general fee waiver standard. These guidelines logically required agencies to make careful determinations about the circumstances surrounding a FOIA request before determining whether the public interest standard under the statutory standard. That task will fundamentally be no different under this bill, because agencies will continue to be required to balance the likelihood of reaching the judgment, based upon all information provided by re-
In addition, Lopes also played basketball for the Townies. She graduated from high school in 1963. But Matt Lopes Sr. is also very quick to point to the accomplishment of his other two children—daughters Phyllis, 32, and Carol, 21. As with their other siblings, they too followed in the Townie tradition. Carol, in fact, was a cheerleader. Both Carol and Phyllis are Providence College graduates.

Sitting in the comfortable living room of his two-story home on Avenue Mont, Matt Lopes Sr. is talking about his family. His pride in his children and their accomplishments is evident. "I've never stopped talking if I really started talking about my kids. . . any of 'em. They're good people, good citizens."

Lopes, a youthful-looking 69, was born in Warwick and grew up in Providence's Fox Point section. He graduated from Central High, where he played some sports. "I was the sixth man on the varsity basketball team," he says. "I always liked sports, and I had a lot of fun at Central."

In the 1950s Lopes returned to athletics, coaching the Providence "Agma's" semi-pro basketball team.

Lopes has always been deeply committed to his community and is also familiar with its sports scene. He's a regular at East Providence events and has nothing but praise for the school's coaching staff.

"Billy Stringfellow (AD and head football coach), track coach Ed Crozin and Billy Poland and girls' basketball pilot_Gi uso Duarte. They all treated my kids right. The high school was very supportive to my kids."

Lopes also speaks fondly of the people who have left an impact on his life during their youth: "George Gennari of the East Providence Boys' Club and Joe Desche of the Mohawks pro-team program." They were "people . . . they were there," says Matt Sr.

And while he acknowledges that sports have done much for his children who played games, "academics is important. It's all important!"

Creating an upward glance at a wall lined with his kids' plaques and trophies, Matt Lopes Sr. nods. "I look at all that," he says, "but you know, I'm more proud of what they're doing now."

TRIBUTE TO SENATOR RUSSELL LONG

Mr. PELL. Mr. President, the conclusion of this 99th Congress will mark also the end of a remarkable 38 years of service in the U.S. Senate by our distinguished colleague, Senator Russell Long of Louisiana.

It is remarkable when we realize that Senator Long's service in the Senate spans over one-fifth of the entire 196-year history of the Senate. It is remarkable when we consider that he has served under eight Presidents of the United States, beginning with Harry S. Truman, who was in the White House when Louisiana voters first 'sent Russell Long to the Senate in 1944.

The length of Russell Long's tenure here in the Senate is matched by the quality of his service to the Nation and to the State of Louisiana, serving for 14 years as the chairman of the Senate Finance Committee, he was and is the Congress' foremost expert on our Nation's tax laws. Tax bills, because they have the potential to touch directly the economic status of every person, industry, and economic sector, always have been the most difficult and contentious pieces of legislation to steer through the Senate to passage. In that difficult art, Senator Long gained a well-earned reputation as a superb tactician and floor manager who occasionally lost a skirmish, but never a battle.

Over the years, I found myself in basic agreement with Senator Long on a broad range of tax policy questions, including, for example, his effective advocacy of tax incentives for employees and stock partnership plans.

We have not always agreed. Over the years, Russell Long as a Senator from an oil-producing State, and I as a Senator from an oil-consuming State, understandably found ourselves having differing views on tax, import, and trade policies affecting petroleum. But those differences never prevented Russus. Long from giving a fair consideration, and at times, valuable support to proposals that I had made in other areas. As a member of the Senate Commerce Committee, for example, he worked hard and forthcoming in his support for programs such as rail passenger service improvements in the Northeast corridor and for the National Seagard College Program.

Senator Long's substantive achievements, his knowledge, and his leadership have earned him the respect of all of his colleagues. Beyond that, his unique and effective style of debate has won him the affection of his colleagues. We all have come to look forward to those moments when debate was most heated and when Russell Long would both be heard and make a telling point drawing upon his endless supply of anecdotes. It is difficult, after all of these years, to imagine the Senate without Russell Long. He and his lovely wife, Carolyn, will be sorely missed by me and all his colleagues.

ASYLUM PRACTICES AND PROBLEMS AT THE INS AND STATE DEPARTMENT

Mr. SPECTER. Mr. President, the General Accounting Office has given me a preliminary report on a study I requested on April 4, 1978, examining the asylum practices and procedures at the Immigration and Naturalisation Service and at the State Department. The object of the study was to determine whether applicants for asylum were being fairly treated, regardless of their country or origin, and particularly the eligibility of Central American refugees. The preliminary report appears to back up my concern about politicization of the asylum