comprehensive drug bill, it makes sense to beef up ongoing programs with proven records before creating expensive new ones.

Although I believe we could have developed an even better bill had there been more time in which to do so, I feel this measure demonstrates our determination to act. This bill offers a solid foundation upon which to build. It has always seemed to me that one of the greatest needs in combatting drug abuse is greater coordination of efforts. This is an area which I think is deserving of particular attention when we revisit this issue in the 100th Congress.

Mr. QUAYLE. Mr. President, I am casting my vote in favor of this bill. While I have reservations about aspects of this proposal and the rapid process used to develop it, I believe it represents an improvement over the House-passed proposal and responds to the outcry we have heard from the American people about the need for stricter law enforcement and a stronger treatment and prevention effort.

However, I must caution my colleagues and the American people, that neither this legislation nor the dollars we will spend to implement it over the years are going to make a significant inroad in eradicating the drug habits of millions of Americans until our society decides that drug use in any form will no longer be tolerated. As I have stated before, societal tolerance of the drug culture is the most significant hurdle we must overcome if we are going to do anything meaninfgul about drug abuse. While the Federal Government is a powerful force in our society, it cannot solve a problem that society itself is unwilling to address.

Finally, I would like to take this opportunity to commend my distinguished colleagues, Mr. LEAHY and Mr. HATCH, for developing a compromise amendment which resolved concerns about a provision in the drug abuse bill which could have led to inappropriate restrictions on the press under the Freedom of Information Act.

This provision would have amended the Freedom of Information Act by giving the Attorney General complete discretion to withhold all files relating to organized crime under FOIA for a minimum period of 5 years. The intent of this provision was to prevent targets of orgnaized crime investigations from using the disclosure provisions of FOIA to find out if they were under investigation and to protect the identity of informants. While I wholeheartedly agreed with this goal, there was concern that the original language might virtually terminate public knowledge of government activities relating to organized crime. Clearly, one important rationale for the first amendment is to allow the public the opportunity to monitor the activities of its government. I appreciate Mr. HATCH's sensitivity to this concern and his willingness to address it.

Mr. LEAHY. Mr. President, I rise to express my strongest support for this major new piece of legislation to fight drugs. I am especially proud to have been appointed to the task force that drafted major portions of this bill. It is a truly remarkable achievement, and I want to thank and congratulate Senators BIDEN and CHILES who coordinated the effort on this side of the aisle, and the leaders of both parties for producing this bipartisan package.

I believe this is the most comprehensive, hard-hitting antidrug bill ever written. Its 250 pages and $1.4 billion price tag reflect the magnitude of the problem we face. The fact that we are going to pass a bill of this size is a tribute to Congress' ability to respond to the heightened public awareness of the drug problem, and to the new momentum to combat it. This bill takes a full swing at the drug problem from every angle—at the source, at the border, in enforcement, education, treatment, and rehabilitation.

Drug trafficking and drug and alcohol abuse have infected this country. Drug abuse among young people has reached epidemic proportions. More and more children from families of all income levels, from rural as well as urban communities, are smoking marijuana, using cocaine and experimenting with other dangerous drugs.

There are half a million heroin addicts in this country.

Between 4 and 5 million Americans regularly use cocaine. Seventeen percent of high school seniors have tried cocaine. Requests for treatment for cocaine use have increased 600 percent in the past 3 years.

My own State of Vermont is not immune from this plague.

Last year, the Vermont State Police investigated over 400 cases involving the sale or manufacture of illegal drugs. There were another 838 investigations of the possession of regulated drugs. Many of the crimes involving young people in Vermont, including burglaries, robberies, and assaults are directly related to drugs and alcohol.

Illegal drugs is a growth industry. Its price is addiction, misery, ruined lives, and death.

Drug merchants are now pushing a new craze that is sweeping the Nation. Crack is available to the young, and it will be in the schools this fall. I have heard stories of children as young as nine who are already crack users. The sellers also use these children as lookouts and as workers in houses that manufacture crack. One hit costs just $10. Users say addiction can begin after only the second use of crack.

As a member of the Judiciary Committee I have supported bills to address specific aspects of the drug problem. Two years ago we strengthened the bail law to permit pretrial detention of drug traffickers. We amended the forfeiture statutes to deprive them of the profits of their crimes.

Despite these efforts, the drug problem has gotten worse.

This year I supported bills to combat money lanudering and new designer drugs, which have been incorporated into this package. But these address very specific problems. We desperately need a comprehensive strategy that attacks drugs from their source to their youngest victims.

That is what this bill does.

I will not take the time to describe the many provisions of this bill. Other Senators have already done a fine job of that. I will limit myself to mentioning the sections which I am especially pleased about.

The first is the new section on forfeiture. Fighting drugs is expensive. The forfeiture amendments we passed 2 years ago provide for the seizure and forfeiture of the profits of the drug trade and property used in connection with it—businesses, airplanes, and so forth. But under those laws, no more than $20 million of forfeited assets can be used to fund antidrug programs. This bill removes that cap, and requires that all money remaining in the Customs and Justice Departments' forfeiture funds after paying administrative costs, be used to fund Federal and State drug programs—for law enforcement, education, treatment, and rehabilitation. This program is expected to net $150 million in 1986, to help pay the cost of this bill.

The bill also closes a loophole in the current law, by permitting the seizure and forfeiture of substitute assets if a drug trafficker has transferred his profits to a third party or placed them beyond the jurisdiction of the court.

Another important section of this bill squarely addresses the need to stop production of drugs at the source. It cuts off all foreign aid to countries that have not taken significant steps to stop illegal drug production and prosecute drug traffickers.

A major part of this bill involves deterrence. Of special importance to a former State prosecutor like myself is a $115 million matching grant program for State and local law enforcement for each of the next 3 years. These grants will be available to States that have developed their own strategies for prosecuting, punishing, and treating drug offenders.

Two years ago I supported the Armed Career Criminal Act which provided for enhanced penalties for dangerous repeat offenders. This bill expands the scope of that act to include a mandatory 15 year minimum sentence for drug offenders who have three prior convictions for crimes of violence.

It also includes mandatory sentences of 20 years to life for major drug traffickers.

It creates a new offense with enhanced penalties for using children to traffic drugs, and for manufacturing illegal drugs within 1,000 feet of a school.

These penalties are appropriately aimed at the drug kingpins. They will

deter any would-be trafficker who is capable of being deterred.

I want to make special mention of the other parts of this legislation that deal with education, treatment, and rehabilitation.

We need to stop the demand for drugs, as well as the supply.

The Administrator of DEA has called prevention the long-term solution to the Nation's drug problem. I agree. I support longer jail sentences for traffickers and better equipment to catch them, but for too long we have neglected what I believe should be the cornerstone of our fight against drug abuse—education of our children about the dangers of alcohol and drugs, and treatment for those who are hooked.

This bill attacks these monumental tasks head on. It establishes a new $150 million State-administered grant program to establish drug free schools and communities. That is fifty times what we are currently spending. Eighty percent of these funds would be divided among the States to teach children about the dangers of drugs and alcohol, and to train parents, teachers, and law enforcement officials to take an active part in that process.

It also provides for model programs for young people who are particularly at risk of becoming drug or alcohol abusers—including school dropouts, pregnant teenagers, and the children of drug abusers.

Education is vital—parents, teachers, and school administrators have to intervene between children and drugs. We need to act before the drug problem begins. The do drugs message school children receive from their peers, and the easy access to drugs in our society, must be stopped. We need to send a stronger message to our children—drugs kill.

One thing we can expect from this crackdown on drugs is a wave of new customers for drug treatment programs. Thousands of drug addicts are on waiting lists because of this administration's cuts in funding for drug treatment and rehabilitation. Everywhere I go I hear stories of children on drugs who are waiting to get help, whose families cannot afford the high cost of treatment. The American public wants treatment, and this bill reauthorizes the Alcohol, Drug Abuse and Mental Health Services Block Grant Program at higher funding levels of $675 million. Eighty percent will be used for alcohol and drug treatment and rehabilitation services.

Mr. President, Americans consume 60 percent of the world's illegal drugs. Cheaper drugs of greater purity have boosted rates of addiction and death. Sophisticated drug rings will reap profits of $100 billion from the sale of illegal drugs this year.

If we are going to win this war we have to fight it on every front.

Turning this country off of drugs will take a massive effort. Not just by government, but also by the private sector, the medical community, religious institutions, by teachers and school administrators, and most importantly, by parents. We have launched that effort with this bill, and I am very pleased to have played a part in writing it.

Mr. President, I would also like to discuss two amendments of mine which were adopted on Saturday night.

I am very pleased that the Senate adopted the Leahy-Mathias communications privacy legislation as an amendment to the Anti-Drug Abuse Act of 1986.

This legislation is good for law enforcement. It strengthens the Federal wiretap statute and sets clear standards for law enforcement agencies to obtain access to electronic communications and an electronic communications system's records.

It is good for American businesses because business people need to know their proprietary and other business communications are secure.

It is good for private citizens who are using new technology like cellular telephones and computer links every day.

It is good for America's high technology industry because it will encourage continued technological innovation.

That is why this legislation is supported by a broad coalition which includes everyone from the Justice Department to the ACLU to America's leading telecommunications and computer companies.

This legislation is needed because right now the laws designed to protect the security and privacy of business and personal communications do not cover data transmissions, computer-to-computer links, and a wide variety of other new forms of telecommunications and computer transmissions.

Let me just pose a few examples to illustrate my point. In the first example, two business people are discussing their company's financial data over the telephone. They do not know it, but a member of a competitor company is listening in on their conversation by means of a phone tap. Across town, a drug enforcement agent has a hunch that Jane Doe is involved in drug trafficking. He goes to the Post Office and tells postal officials that he wants to open and read Ms. Doe's mail and then have it resealed and delivered. In the third, two reporters are working together on a fast-breaking story. One picks up the telephone and calls the other with some new information. That call is intercepted by means of a wiretap.

I think all of my colleagues would agree that in each example, the eavesdropper's conduct is wrong. It is also illegal.

Now let me change my examples just a little bit to bring them into the 1980's.

In the first case, instead of discussing financial matters over the telephone, the two business people use a video teleconference system which displays their proprietary data on their video screens. Again, their competitor picks up that data. In the second case, the drug enforcement officer goes to an electronic mail company. Ms. Doe is a user of that electronic mail system, and the drug enforcement officer asks to see all of her messages. In the third case, rather than speaking on the telephone, the reporter uses a computer keyboard to type a message to his colleague who picks it up on his terminal screen. Again, that message is intercepted.

In each case, the eavesdropper's conduct is still wrong. However, it is not clear that it is also illegal. The Leahy-Mathias Electronic Communications Privacy Act, which is now a part of the Senate drug package, updates the Federal wiretap statute to bring it into the computer age and address these new communications media.

It is designed to provide a reasonable level of Federal privacy protection to new forms of telecommunications and computer technology like electronic mail, computer-to-computer data transmissions, remote computing services, and private video teleconferencing. At the same time, it protects legitimate law enforcement needs. The Justice Department wants it because it will be particularly helpful in our fight against drug trafficking and drug abuse.

Let me point out that a summary of the Leahy-Mathias communications privacy amendment has been printed in the CONGRESSIONAL RECORD for Saturday, September 27. The relevant legislative history is the Senate Judiciary Committee's report on S. 2575.

Finally, let me discuss the provisions concerning the Freedom of Information Act in the bill, and the Leahy-Hatch-Denton amendment to that section of the bill.

Section 1801 of the bill amends paragraph (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain explanatory case law, and clarify congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

The language of these amendments is identical to that proposed in section 10 of S. 774, proposed FOIA reform legislation which passed the Senate, but was not acted upon in the House, during the 98th Congress. The meaning and intended effect of the amendments was carefully explained in the report of the Senate Judiciary Committee on S. 774: Senate Report 98-221. This report sets out the legislative history which should be consulted to determine the scope of the section we are adopting in this bill.

The Congressional Research Service of the Library of Congress recently analyzed the proposed amendments

garding the substitution of "could reasonably be expected to" for "would" in several of the subparagraphs in (b)(7), as well as the change in language to include State, local, and foreign agencies and private institutions within the meaning of "confidential source" under subparagraphs (b)(7)(D). Its conclusions were that in both instances the proposed changes in statutory language substantially reflect current judicial interpretations and would not appreciably alter the meaning of the affected provisions in their practical application. What the amendment does is to give the agencies and courts some commonsense direction in applying the provisions of the exemptions. I ask unanimous consent that the CRS memorandums be included in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection it is so ordered.

(See exhibit 1.)

Section 1802 of H.R. 5484 amends the FOIA so that criminal law enforcement agencies, in certain circumstances, are not required to acknowledge the existence of records concerning an ongoing and undisclosed criminal investigation; informant records maintained under an informant's name or personal identifier; or, classified records of the FBI pertaining to foreign intelligence, counterintelligence, or international terrorism investigations, in response to a FOIA request.

This provision permits criminal law enforcement authorities in limited circumstances to avoid confirming the investigatory status of specific individuals or incidents in responding to FOIA requests. It is a narrow and specific statutory authority for criminal law enforcement agencies to act on the principle that "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exemption." *Gardels* v. *CIA*, 689 F.2d 1100, a1103 (D.C. Cir. 1982), citing *Phillippi* v. *CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976).

Although Federal courts have generally recognized that the FOIA exemption scheme permits an agency to withhold the fact of the existence or nonexistence of specific records when disclosure of that fact would itself cause the harm that a specific exemption is intended to avoid, the Director of the FBI, William Webster, requested specific statutory authority to exercise this right so that there would be no ambiguity regarding its propriety.

Subsection (a) of section 1802 sets forth the criteria for three specific circumstances in which criminal law enforcement agencies would not be required to acknowledge the existence of agency records in response to an FOIA request.

The first circumstance, provided under paragraph (1) of subsection (a), permits agencies to refuse to acknowledge the existence of records when their disclosure would interfere with a criminal law enforcement proceeding under exemption (b)(7)(A), and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency. While the agency is thus able to prevent a tipoff of investigatory activity to someone using the FOIA to find out if such activity is underway, its authority to do so is narrowly drawn and closely circumscribed. It cannot, for example refuse to acknowledge requested records under this authority unless the records concern a criminal, rather than civil, law enforcement proceeding and would already be exempt from disclosure by virtue of exemption (b)(7)(A). Moreover, its authority to refuse to acknowledge such records under this provision exists only so long as there is reason to believe that the subject of the proceeding is not aware of its existence. Thus the provision gives agencies no new substantive withholding authority, since it does not apply to records that are not already exempt from disclosure, and it would not be available to an agency when there is reason to believe that the subject of an investigation or proceeding is aware of its pendency.

The second circumstance where an agency is not required to acknowledge the existence of specific requested documents concerns FOIA requests for informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier. The authority provided under subsection 1802(a)(2), however, is limited to those instances in which the request for such informant records is form a third party who specifically requests them by the informant's name or personal identifier. Moreover an agency must acknowledge the existence or non existence of such records when the informant's status as an informant has been officially confirmed.

In referring to a similar provision in S. 774, the Senate Judiciary Committee noted the obvious limitations of the exclusion authority thus permitted:

> Where the requester is the informant himself, or a third party who describes the responsive records without reference to the informant's name or personal identifier, the records are subject to ordinary consideration under the provisions of the FOIA. (S. Rpt. 98-221 at 25)

The third provision under section 1802 applies to classified FBI records pertaining to foreign intelligence or counterintelligence—as defined in Executive order 12333—or international terrorism—as defined in the Foreign Intelligence Surveillance Act—but only to the extent that the fact of the existence of such records itself remains properly classified information. Like the first part of this section, subparagraph (a)(3) permits nonconfirmation of the investigatory status of specific individuals or incidents in the context of activities regarding foreign intelligence, counterintelligence, or international terrorism. But it gives the FBI no new substantive withholding authority since it applies only to FBI records that are properly classified as national security information and, therefore, already exempt from disclosure pursuant to exemption (b)(1) of the FOIA.

Agency actions pursuant to these provisions, like agency determinations to withhold acknowledged records pursuant to subsection (b) of the FOIA, are subject to de novo judicial review. The manner in which the Federal courts will review agency refusals to acknowledge or deny the existence of records has already been well established in *Gardels* v. *CIA*, 689 F.2d 1100 (D.C. Cir. 1982) and *Phillipi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976). In applying these new provisions, the Federal courts should follow the proceedings outlines in Gardels and Phillipi.

It is important to note that the provisions in section 1802 regarding law enforcement records were derived from a draft bill which was the subject of negotiations between the Department of Justice and the House Government Operations Subcommittee on Government Information, Justice and Agriculture earlier this year. During the course of these negotiations, the Department agreed that their implementation, as now provided by section 1802, would require that a notice of the authority to refuse to confirm the existence of requested records be included in every FOIA response by agencies permitted to exercise such authority. The Senate adopted the provision with the explicit understanding of the amendment's sponsors that such notice would be required.

The bill revises the rules governing fees and fee waivers under the FOIA. Each agency is requested to promulgate regulations specifying the schedule of fees and establishing procedures and guidelines for determining when such fees should be waived or reduced. Agency fee schedules must conform to guidelines promulgated by the Office of Management and Budget.

There are three categories of requesters for purposes of assessing fees. First, when records are requested for commercial use, fees shall be limited to reasonable standard charges for document search, duplication, and review. This provision allows the charging of review costs for the first time, but review costs many only be charged to commercial users. A commercial user is one who seeks information solely for a private, profit making purpose. Except for requests that are described in the second category, requests from a corporation may be presumed to be for commercial use unless the requester can demonstrate that it qualifies for a different fee schedule. A request from an individual or a public interest group may not be presumed to be for commercial use unless the nature of the request suggests otherwise. The resale of documents ob-

tained from the Government is not a commercial use.

Review costs include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed. Review costs are not intended to include any costs incurred in resolving issues of law and policy that may be raised in the course of processing a request.

Second, when records are not sought for commercial use and are requested by (a) an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or (b) a representative of the news media, fees shall be limited to reasonable standard charges for document duplication. A request made by a professor or other member of the professional staff of an educational or noncommercial scientific institution should be presumed to have been made by the institution. A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision.

The bill provides the most favorable fee provision for those in the information dissemination business because the use of the FOIA for public dissemination of information in Government files is in the public interest. The fact that a newspaper or a publisher seeks to make a profit through publication does not affect the public interest nature of the information dissemination. It is critical that the phrase "representative of the news media" be broadly interpreted if the act is to work as expected. As new technologies expand, there are new methods of communications which disseminate information to people through media other than traditional print or broadcast media, and these entities should be considered as "representatives of the news media." In addition, some organizations publish magazines or periodicals in addition to carrying out other functions. Certainly, American Legion magazine, Common Cause magazine or Consumer Reports are "representatives of the news media," even though their parent organizations engage in activities other than publishing magazines. In fact, any person or organization which regularly publishes or disseminates information to the public, whether in print or electronically, should qualify for waivers as a "representative of the news media."

Third, for all other requesters, fees are limited to reasonable standard charges for document search and duplication. This is current law.

All of the fees chargeable to any requester may be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. This is a change in the current fee waiver language and is specifically intended to overturn the January 1983 Justice Department fee waiver guidelines.

It is important to reaffirm that fee waivers play a substantial role in the effective use of the FOIA, and they should be liberally granted to all requesters other than those who are commercial users.

A major problem identified during our earlier Judicary Committee hearings on FOIA legislation was the fact that the 1983 Department of Justice guidelines construing the "primarily benefiting the general public" language took an unduly restrictive approach to the legislation. This approach was criticized by the Senate Judiciary Committee when it reported out S. 774 in the last Congress, and it has also been criticized by the House Government Operations Committee in its report on H.R. 4862, which recently passed the House. By making a change in the statutory standard for fee waivers, our intention is to repudiate the 1983 Department of Justice guidelines on fee waivers and to enact a broader and more precise standard which will make it easier for noncommerical requests to get waivers.

The requirement that the disclosure be "likely to contribute significantly to public understanding of the operations or activities of the Government" is to be liberally construed in favor of waivers for noncommercial requesters. We do not mean that waviers are appropriate only for items of compelling public interest at a given time, such as articles that are being prominently covered in the news media. Nor are we saying that the information sought must, standing alone, provide a complete and thorough understanding of the issue. Rather, we intend that agencies will grant fee waivers when they receive requests for many categories of information that contribute to public understanding in any meaningful way, even if the requester is seeking only a limited amount of information and even if the request covers only one facet of an issue. As one court put it, "a single document can substantially enrich the public domain." *Eudey* v. *CIA*, 478 F. Supp. 1175, 1178 (D.D.C. 1978).

Nor do we mean that a waiver is appropriate only if the requester intends to disseminate the requested information widely to the public. Our democracy depends on a knowledgeable citizenry, and public understanding of the operations or activities of Government is greatly enhanced every time that a single citizen uses the FOIA to obtain records which help that person understand what Government is doing on an issue of concern to that person.

It is important for agencies to administer this new statutory standard in an objective manner and should not rely on their own, subjective view as to the value of the information requested to the public. A good example is the case of *Better Government Association* v. *Department of State*, 780 F.2d 86 (D.C. Cir. 1986), where the requester sought information about how U.S. Embassies are spending money and using personnel to entertain visiting dignitaries. That is the sort of information which should qualify for a fee waiver under the current standard and should continue to qualify under this bill.

Along the same line, the phrase "operations and activities of the government" should be broadly construed. Agencies deal with private entities on a range of regulatory, enforcement, procurement and other activities, and records which cast light on those relationships should be routinely made available with a waiver. It is impossible to understand the "operations and activities" of the Food and Drug Administration, for example, without ready access to records filed by the companies which the FDA regulates.

In addition, there is a legitimate public interest in being able to obtain a fee waiver in order to learn about Government inaction, as well as Government action. If, for example, a requestor is seeking records because it wishes to learn if an agency has been less than vigorous in working to protect public health and safety or to see how effectively procurement dollars are being spent, a waiver should be granted. Indeed, experience suggests that agencies are most resistant to granting fee waivers when they suspect that the information sought may cast them in a less than flattering light or to may lead to proposals to reform their practices. Yet that is precisely the type of information which the FOIA is supposed to disclose, and agencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information to learn about what Government is not doing, as well as what it is doing.

A request can qualify for a fee waiver even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.

The bill includes several general limitations on the imposition of fees by agencies. First, fee schedules can only provide for the recovery of direct costs of search, duplication, or review. Second, no fee may be charged if the costs of routine collecting and processing the fee allowable under the FOIA are likely to equal or exceed the amount of the fee.

Third, except for requests for commercial use that are subject to review charges, an agency may not charge any requester for the first 2 hours of search time or for the first 100 pages of duplication. A requestor may not file multiple requests at the same time

each seeking portions of a large document solely in order to avoid payment of all fees. However, if requests are made more than 30 days apart, each request must be treated separately.

Fourth, no agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion or unless the agency has determined that the fee will exceed $250. This to prevent agencies from attempting to use fees to harass or discourage requesters.

The fee schedules in the FOIA do not supersede fees chargeable under a statute that specifically provides for setting of a level of fees for particular types of records. This provision does not change current law.

Finally, in any action brought by a requester regarding the waiver of fees, the court shall determine the matter de novo, except that the court's review of the matter shall be limited to the record before the agency. The purpose of this provision is to allow the courts to exercise independent judgment on the issue of whether a requester is entitled to a fee waiver.

In closing, I should like to thank Senator HATCH, the distinguished chairman of the Subcommittee on the Constitution, for working with me to fashion a balanced amendment which meets the needs of law enforcement and improves the fee and fee waiver provisions of the act for the news media and public interest users of FOIA. We have done that while preserving all of the essential features of the act. I compliment him and his staff for their tireless work on this issue.

EXHIBIT 1

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC., March 10, 1986.

To: House Government Operations Subcommittee on Government Information, Justice, and Agriculture, attention: Robert Gellman.

From: American Law Division.

Subject: Protection of Institutional Confidential Sources Under Proposed Amendments to the Freedom of Information Act.

The Freedom of Information Act (FOIA) exempts from mandatory disclosure "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would . . . (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source." 5 U.S.C. 552(b)(7)(D)(1982). a proposed amendment to this provision would add a parenthetical phrase after "confidential source" providing that the term is to include "a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis."

The proposed amendment to Exemption 7(D) of the FOIA reflects the current weight of judicial authority on this question. Some early District Court cases confined the scope of the term "confidential source" to persons, pointing to references in the legislative history of the provision to individuals as sources. See, *Ferguson* v. *Kelley*, 448 F.Supp. 919 (N.D.Ill. 1977) on rehearing, 455 F.Supp. 324 (N.D.Ill. 1978; *Katz* v. *Department of Justice*, 498 S.Supp. 177 (S.D.N.Y. 1979) (state and local law enforcement agencies may be confidential sources but not private institutions). However, these cases have been rejected by the majority of courts, including Courts of Appeals and District Courts in the district in which the cases arose. The Seventh Circuit, which embraces the Northern District of Illinois, noted the courts have applied Exemption 7(D) to commercial institutions and non-federal law enforcement agencies without citing *Ferguson. Terkel* v. *Kelly*, 599 F.2d 214, 216 (7th Cir. 1979). District Courts in New York have also held that the exempting protects institutional confidential sources, including commercial entities such as banks and credit bureaus. *Biberman* v. *Federal Bureau of Investigation*, 528 F.Supp. 1140, (S.D.N.Y. 1982); *Malizia* v. *Department of Justice*, 519 F.Supp. 338, 350 (S.D.N.Y. 1981).

Courts have pointed to the rationale for the protection of confidential sources and the non-restrictive plain meaning of the term "source" in holding that the exemption encompasses both individual and institutional sources, public and private. See, *Johnson* v. *Department of Justice*, 739 F.2d 1514 (10th Cir. 1984) (local law enforcement agencies); *Lesar* v. *Department of Justice*, 636 F.2d 472 (D.C.Cir. 1980) (state and local law enforcement agencies); *Baez* v. *Department of Justice*, 647 F.2d 1328 (D.C.Cir. 1980) (foreign agency source); *Founding Church of Scientology* v. *Regan*, 670 F.2d 1158 (D.C.Cir. 1981)(same); *Keeney* v. *Federal Bureau of Investigation*, 630 F.2d 114 (2d Cir. 1980)(local law enforcement agency); *Liverman* v. *Department of Justice*, 597 F.Supp. 84, 88 (E.D.Pa. 1984)(financial institution); *Founding Church of Scientology* v. *Levi*, 679 F.Supp. 1060, 1063 (local law enforcement agency and commercial institution); *Fiumara* v. *Higgins*, 572 F.Supp. 1093, 1110 (D.N.H. 1983)(local law enforcement agency). See also, Anno., 59 A.L.R.Fed. 550, 555-557 (1982).

Thus, the inclusion of language indicating that "confidential source" is to include state, local and foreign agencies as well as private institutions that supply confidential information to a federal law enforcement agency would reflect the interpretation given the exemption by most courts.

RICHARD EHLKE,
Specialist in American Public Law.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, February 28, 1986.

To: House Government Operations Committee, Subcommittee on Government Information, Justice, and Agriculture, attention: Bob Gellman.

From: American Law Division.

Subject: Proposed Amendment to Exemption 7 of the Freedom of Information Act.

Exemption 7 of the Freedom of Information Act provides that the disclosure mandate of the Act does not apply to investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. 5 U.S.C. 552(b)(7)(1982).

A proposed amendment to the exemption would change the phraseology of subsections (A), (D) and (F), by substituting "could reasonably be expected to" for "would." The provision would then permit exemption if, inter alia, production of a record "could reasonably be expected to" interfere with enforcement proceedings, disclose the identity of a confidential source or endanger the life or safety of any individual. This memorandum briefly analyzes the relationship of this proposed amendment to current judicial interpretation of the exemption.

The proposed amendment is similar to that contained in the Freedom of Information Reform Act, S. 774, reported by the Senate Judiciary Committee in the 98th Congress. The Senate bill, however, would have also amended subsection (C) (personal privacy) by substituting the "could reasonably be expected to" language for "would" in that subsection. S. Rept. No. 98-221, 98th Cong., 1st Sess. 23 (1983). The amendment, according to the Senate Report, was intended to clarify the degree of risk of harm from disclosure which must be shown to justify withholding records under any of these subparagraphs [of Exemption 7]. The FBI and other law enforcement agencies have testified that the current "would" language in the exemption places undue strictures on agency attempts to protect against the harms specified in Exemption 7's subparts.

This burden of proof is troubling to some agencies in the context of showing that a particular disclosure "would" interfere with an enforcement proceeding. Moreover, as the FBI has testified, it is particularly vexing with respect to whether production of requested records "would" disclose the identity of a confidential source, substantially contributing to the asserted "perception" problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA. S. Rept. No. 98-221 at 23.4.

The effort to "clarify the degree of risk of harm from disclosure which must be shown to justify withholding records" pursuant to Exemption 7 has been a consistent part of reform proposals over the years. These proposals have focused on the confidential source subsection and would have substituted the phrase "would . . . disclose the identity of a confidential source" with "would tend to disclose . . ." See, Hearings on Freedom of Information Act Before the Subcomm. on the Constitution of the Senate Judiciary Comm., 97th Cong., 1st Sess. 690 (1981); FBI Proposals to Amend the Freedom of Information Act 31 (June 19, 1979).

The proposed amendment does not appear to be prompted by any particular case or line of cases that have enunciated a contrary standard of the degree of risk of harm that must be shown to justify assertion of Exemption 7 (A), (D) or (F). In fact, the earlier proposals (those that employed the "tend to" phraseology) were portrayed as being reflective of judicial interpretation. See, Hearings, supra at 690. The current proposed formulation ("could reasonably be expected to") would also seem to be consistent with both the case law and the legislative history of the provision.

Exemption 7 was overhauled as part of the 1974 amendments to the Act. With respect to the protection of confidential sources, the sponsor of the provision, Senator Hart, stated at the time of its introduc-

tion that "[i]t protects both the identity of informers and information which might reasonably be found to lead to such disclosure." 120 Cong. Rec. 17034 (1974). The Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act echoed this construction of the provision:

The general policy underlying the seventh exemption is maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies and affected persons. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974).) A central issue which must be faced in every case is the type of showing needed to establish that disclosure "would" lead to one of the consequences enumerated in clauses (A) through (F). The President and some opponents of the bill voiced concern that "would" connoted a degree of certainty which in most cases it would be impossible to establish. (See Weekly Compilation of Presidential Documents 1318 (1974); 120 Cong. Rec. S 19814 (Nov. 21, 1974)(Senator Hruska); 120 Cong. Rec. S 19818 (Nov. 21, 1974)(Senator Thurmond).) The bill's proponents, including the sponsor of the amendment, did not accept the interpretation that would result in such a strict standard. (See, e.g., 120 Cong. Rec. H 10865 (Nov. 20, 1974)(Congressman Moorhead); 120 Cong. Rec. S 19812 (Nov. 21, 1974)(Senator Hart).) This legislative history suggests that denial can be based upon a reasonable possibility, in view of the circumstances, that one of the six enumerated consequences would result from disclosure. Attorney General's Memorandum at 12-13, reprinted in Freedom of Information Act and Amendments of 1974 Sourcebook, Joint Committee Print, House Government Operations Comm. and Senate Judiciary Comm., 94th Cong., 1st Sess. 522-3 (1975).

The courts have not appeared to have focused on the precise standard to be used in evaluating the degree of risk of disclosure under Exemption 7. The statements in the few cases that have been found, however, suggest a standard that would seem to be consistent with either the "tend to" or "could reasonably be expected to" formulation. For instance, in *Yeager* v. *Drug Enforcement Administration*, 678 F.2d 315 (D.C.Cir. 1982), the court held to be the proper standard the District Court's holding that disclosure "could reasonably be expected to lead to the identification of subjects." 678 F.2d at 323. Similarly, the court in *Radowich* v. *U.S. Attorney, Dist. of Maryland*, 658 F.2d 957, 961 (4th Cir. 1981) was of the view that Congress intended to protect "all information reasonably likely to disclose the identity of a confidential source." 658 F.2d at 961. The court elsewhere described the degree of protection provided by Exemption 7(D):

The protection afforded by the first clause of 7(D) extends expressly to all information furnished by the informant which *might dislcose* or *point to* his identity. Of course this particular clause does not extend to information which does not provide any clue to the informant's identity. But the clause does offer protection to any statement of the informant *which gives a clue to his identity* . . . 658 F.2d at 961(emphasis added).

See also, *Wightman* v. *Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982 (1st Cir. 1985)("could lead to"); *Pollard* v. *F.B.I.*, 705 F.2d 1151, 1155 (9th Cir. 1983) ("would tend to reveal").

Courts have given a similar flexible interpretation of the degree of risk of harm that must be shown under Exemption 7(A). The court in *Moorefield* v. *United States Secret Service*, 611 F.2d 1021 (5th Cir. 1980), cert. den. 449 U.S. 909 (1981) upheld on the basis of Exemption 7(A) the withholding of records relating to an active Secret Service investigation of the plaintiff. It stated that "disclosure...could tend generally to inform targets of Service investigations of the means the Service employs to keep abreast of them, and, specifically, to enable Moorefield to elude the scrutiny of the Service." 611 F.2d at 1026. Similarly, in *Antonelli* v. *Drug Enforcement Administration*, 739 F.2d 302, 304 (7th Cir. 1984), the court found that "[i]t is quite likely, indeed, that the requested information would jeopardize the identity of several individuals and the existence of ongoing DEA investigations."

The use of the phrase "could reasonably be expected to" in place of "would" in Exemption 7 would, therefore, not seem to materially alter the construction that the courts have already given to the provision. The amendment would also seem consistent with the legislative history of the exemption. Finally, from a linguistic point of view, "would" is often used interchangeably with "reasonably expected" and conveys what is probable or might be expected. See, Black's Law Dictionary (5th ed. 1979); *Correll* v. *Costello*, 404 N.Y.S.2d 836, 838 (Sup. Ct. 1978); *Taylor* v. *Metropolitan St. Ry. Co., Inc.*, 165 S.W. 327, 332 (Mo. 1914).

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BIPARTISAN DRUG BILL

Mr. BYRD. Mr. President, I am proud to have joined the distinguished majority leader in offering the bipartisan drug control package. The package as introduced reflected our best efforts to negotiate a compromise between two bills which, in many places, were quite divergent in approach as well as in substance. But come together we did, because of the strong interest and commitment which exists on both sides of the aisle in this body to address the drug abuse epidemic ravaging our country.

I want to give credit where credit is due to the very excellent, committed, and diligent work of the two cochairs of the Democratic Working Group on Drug Abuse in this effort. I will state emphatically that we would not be at this point today—about to pass a bipartisan bill—if it were not for Senators CHILES and BIDEN—and, of course, the other members of the working group—Senators CRANSTON, DECONCINI, DODD, LEAHY, NUNN, SASSER, ROCKEFELLER, MITCHELL, and MOYNIHAN. Also contributing directly to our efforts to produce this bipartisan bill were Senators KENNEDY, PELL, and METZENBAUM and their staffs.

Mr. President, our bipartisan bill is a compromise between the Democratic bill we introduced September 9, and the bill the Republicans introduced early last week. As a compromise, it does not read precisely as we would wish in all sections—not surprisingly, we would certainly have preferred our own Democratic bill—but this proposal is strong, it is comprehensive, and, I believe, it deserves our support.

Mr. President, we are beginning to see stories in the press and on the electronic media suggesting that there may be an over-reaction to the drug abuse situation in our country. They suggest that there may be a "media hype" situation occurring which is blowing the story out of realistic proportions. Well, Mr. President, I agree that drug stories are the "rage" in the media right now. And I agree that these stories may be scaring some people who otherwise would ignore the drug crisis.

But, Mr. President, I most emphatically do not agree to any suggestion or implication that we in Congress should refrain from action in the expectation that the public's enthusiasm for drug control measures will wane. We have reports from reliable experts from around the country documenting the extent of the drug crisis—and the numbers are truly frightening. I maintain that if there is only one child who is led into the pernicious world of drug abuse, that is one child too many, and we in Congress should take every step necessary and proper to try to keep that from happening. So, too, in the case of the boatload of illegal drugs reaching our shores, and one adult life ruined due to the ravages of cocaine abuse.

We must state unequivocally that we will not tolerate drug abuse and the illegal drug industry in our country, and then we must back up that statement with concrete, comprehensive, and effective actions. I believe the bipartisan bill which we are about to pass today makes that statement and prescribes those actions.

It will provide new and urgently needed funds for our interdiction efforts, so that more illegal drugs will be stopped before they ever reach our borders. It provides funds for our international efforts directed at eradication and other programs to decrease the production of drugs in foreign countries. It levies enhanced penalties and stronger sanctions on those who would import illegal drugs.

The bill provides for enhanced education, prevention, and treatment programs, including funding directed specifically to at-risk youth, and to veterans' treatment programs.

The bill also will direct more funds to State and local governments and agencies to augment and strengthen their enforcement efforts directed at the illegal drug industry.

These provisions, and others I have not mentioned here, Mr. President, are worthy, and deserve the support of this body.

I would like to focus for a moment, Mr. President, on a specific portion of this bill which I believe to be especially critical.

The bipartisan bill contains all the tough, new law enforcement provisions that were contained in the Democratic package which we introduced on September 9, 1986. Those provisions are contained in the title which I sponsored, and they appear in the bipartisan package which is before us as part of title I.

I am pleased that our colleagues on the other side of the aisle agreed with