

TO: SPJ Board of Directors

FROM: Bruce W. Sanford
Bruce D. Brown
Laurie A. Babinski

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SUBJECT: Status of the Free Flow of Information Act of 2007

I. Introduction

The Free Flow of Information Act of 2007 has progressed further in the 110th Congress than any shield bill introduced to date. To follow up on our May 1 memorandum, which provided both a general overview of the key features of the shield law and an explanation of the specific provisions of the bills as introduced, below are brief summaries of the content and status of both the House and Senate versions of the bill to date. Because both the House (H.R. 2102) and Senate (S. 1267) versions were identical as introduced on May 2, we recap the basic provisions of both bills in the section addressing the House bill. H.R. 2102 was reported out of the House Judiciary Committee in August and awaits a full floor vote. The section addressing the Senate bill explains the differences between the bill as introduced by Sens. Richard Lugar (R-Ind.) and Christopher Dodd (D-Conn.), S. 1267, and the compromise Senate bill drafted by Sens. Arlen Specter (R-Pa.) and Charles Schumer (D-N.Y.), S. 2035. S. 2035 was reported out of the Senate Judiciary Committee on Oct. 4 by a 15-2 vote and also awaits a full floor vote.

II. House of Representatives (H.R. 2102)

H.R. 2102 was introduced on May 2 by Reps. Mike Pence (R-Ind.), Rick Boucher (D-Va.), John Conyers (D-Mich.), Howard Coble (R-N.C.), John Yarmuth (D-Ky.) and Greg Walden (R-Ore.) and currently has 66 additional cosponsors. The bill incorporates many of the baseline compromises agreed to in past Congresses. First, the bill contains a qualified – rather than absolute – privilege for information, both confidential and non-confidential, gathered when a person engages in journalism. Second, the bill contains heightened protection for confidential sources. Third, the bill is largely consistent with existing Department of Justice Guidelines regarding the release of information (but has the added

benefit of having the determinations below decided by a judge and not a prosecutor). However, the bill does contain several exceptions that are not detailed in the DOJ Guidelines. Those exceptions include carve-outs for national security, imminent death or significant bodily harm, trade secrets of significant value, personal health information, and non-public personal financial information. Among the salient features:

Application of the bill. The bill applies to any federal entity seeking information, including administrative bodies and military tribunals, but not to state courts, federal courts sitting in diversity cases where the substantive law applied is state law, or Congress.

Definition of a “journalist.” The bill protects only “covered persons” and the information they possess “as part of engaging in journalism.” Journalism is defined as “the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news and information that concerns local, national or international events or other matters of public interest for dissemination to the public.” While the bill does not explicitly afford protection to bloggers, to the extent a court determines that they are engaged in “journalism,” they will be covered by the law. Since introduction, this definition has been further narrowed in both the House and Senate bills.

Exhaustion requirement. The procedure for compelling disclosure of information varies depending on the type of case in which the information is sought. However, the exhaustion requirement applies to all cases – any party seeking to compel information from a covered person must exhaust all “reasonable alternative sources” for obtaining the information.

Criminal investigations/prosecutions. Where the information is sought in a criminal investigation or prosecution, the party seeking the information must prove to a court, by a preponderance of the evidence, that there are “reasonable grounds to believe a crime has occurred” and that the information is “essential to the investigation, prosecution, or to the defense against the prosecution.” Minor changes in language have been drafted into the latest House and Senate versions.

All other cases. Where the information is sought in any other case, the party seeking the information must prove to a court, by a preponderance of the evidence, that the information sought is “essential to the successful completion of the matter.” This language has also undergone minor drafting revisions in the House and Senate versions.

Protection for confidential source information. In addition to the requirements above, information provided by confidential sources that would expose the identity of those sources is generally afforded heightened protection that prohibits compelling such information unless it falls under one of five crucial exemptions. Thus, disclosure of information provided by confidential sources is only permitted:

1. Where the information sought is “necessary to prevent imminent and actual harm to national security with the objective to prevent such harm”;
2. Where the information sought is “necessary to prevent imminent death or significant bodily harm with the objective to prevent such harm”;
3. Where the information sought is necessary to identify a person who has disclosed
 - a. a trade secret of significant value in violation of state or federal law;
 - b. individually identifiable health information in violation of federal law (note that this definition merely enforces HIPAA and does not create new law relating to medical privacy); or
 - c. nonpublic personal information of a consumer in violation of federal law (note that this definition merely enforces the Gramm-Leach-Bliley Act and does not create new law relating to consumer privacy).

The first and second exemptions, respectively for national security and imminent death or significant bodily harm, were drafted to ensure that there is no invocation of these exemptions without a showing of proof to a court that the circumstances are immediate and specific enough to warrant their use. The last three exemptions, again drafted into the bills as introduced at the request of the Chamber of Commerce and other business interests, do not create substantive law in their respective areas. Rather, they seek to ensure that a shield law does not prevent enforcement of those laws.

Balancing test. Under all provisions of this bill, a court must engage in a balancing test and only compel disclosure where nondisclosure would be contrary to the public interest. The proposed balancing test weighs the public interest in compelling disclosure against the public interest in gathering news and maintaining free flow of information.

Limited use of compelled information. In addition, any information actually compelled is limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of published information and should be narrowly tailored (time, subject matter) to avoid compelling “peripheral, nonessential, or speculative information.”

Compelled disclosure from communications service providers. Finally, the bill protects third-party information gathered from communications service providers (including telephone, Internet, e-mail and other online service providers) that could reveal confidential sources to the same extent that such information is protected if it would have been compelled from a person engaged in journalism. There are, however, additional procedural requirements before such information may be compelled. In order for confidential-source information to be compelled from a communications service provider, the subpoenaed provider must notify the covered person of the subpoena and the person notified must have an opportunity to be

heard by the court. Notice by the communications service provider to the covered person can only be delayed if a court determines by clear and convincing evidence that such notice “would pose a substantial threat to the integrity of a criminal investigation.”

On June 14, prior to markup of the bill, the House Judiciary Committee held a hearing. Appearing in favor of a shield law were William Safire, Lee Levine and Jim Taricani; appearing in opposition were Professor Randall Eliason and Assistant Attorney General Rachael Brand. The House Judiciary marked up the bill on August 1. The critical changes to the bill came by way of a Manager’s Amendment offered by Chairman John Conyers (D-Mich.) that addressed Committee concerns over national security and the broad definition of a journalist. The Manager’s Amendment also reflected proposed amendments offered by the minority regarding national security and business concerns. As accepted by the Committee, the Manager’s Amendment:

- Added the requirement that a journalist be defined as someone who for financial gain or livelihood engages in journalism (consistent with what the media coalition agreed to in the previous Congress in the Senate bill), and drafted in language to ensure that the shield does not protect information obtained by a journalist before he was a journalist;
- Lowered the standard for disclosure pursuant to the national security exemption from “imminent and actual” harm to disclosure of information to prevent an “act of terrorism against the United States or other significant specified harm” to national security (again, consistent with what the coalition agree to in the previous Congress in the Senate bill);
- Specifically excluded foreign powers and organizations from protection under the shield by exempting all foreign powers as designated by FISA, Foreign Terrorist Organizations as designated by the Secretary of State (examples of groups that would currently be excluded from protection include al Qaeda, ETA, Hamas, Hizballah, and the Islamic Jihad); and
- Clarified that the privilege does not apply to state libel suits brought in federal court under, for example, diversity jurisdiction, where the court will still apply the applicable shield of the state law argued in the case.

Support for the bill is widespread – the business community dropped its opposition to the bill once the exemptions for trade secrets and personal health and financial information were drafted in at Rep. Boucher’s request, and the American Bar Association has come out in support of the bill. The Department of Justice continues to oppose the bill, citing the overall lack of a need for a shield law, the broad definition of a journalist, infringements on Sixth Amendment rights, and insufficient national security safeguards. The Congressional Budget Office scored the bill as having “no significant budgetary impact.” The bill was successfully reported out of the House Judiciary Committee by voice vote and awaits a full floor vote, which has not yet been scheduled.

III. Senate (S. 1267/2035)

After the House bill was reported out of the Judiciary Committee, attention turned to the Senate. The first shield bill, S. 1267, sponsored by Sens. Lugar and Dodd, was introduced on the same date as the identical House bill. S.1267 was co-sponsored by Sens. Evan Bayh (D-Ind.), Pete Domenici (R-N.M.), Tim Johnson (D-S.D.), Pat Leahy (D-Vt.), Claire McCaskill (D-Mo.), Lindsey Graham (R-S.C.), Mary Landrieu (D-La.), Joe Lieberman (D-Conn.) and Ken Salazar (D-Colo.). Before markup, in an effort to bring Sen. Specter on board while avoiding the introduction of a second bill that would compete with the Lugar/Dodd bill and potentially split votes in support of any shield, Sens. Lugar and Dodd agreed that Sens. Specter and Schumer would introduce their own bill to be offered as a substitute to S. 1267. The Specter/Schumer bill was drafted using the Lugar/Dodd bill as a template and was intended as a wholesale replacement of S. 1267.

The changes in the Specter/Schumer bill, S. 2035, which were not unanticipated given Sen. Specter's position on previous shield bills, cut back on the protections afforded by the S. 1267. Significantly, S. 2035:

- Protects only information or documents related to confidential sources and covers only persons regularly engaged in journalism;
- Does not apply when the information in question was obtained through eyewitness observations of criminal or tortious conduct;
- Uses a "preponderance of the evidence" standard to determine whether information must be disclosed, but does not uniformly incorporate either that standard or the "notice and opportunity to be heard" requirement into certain individual sections of the bill;
- Continues to require exhaustion of alternative sources of information before disclosure is compelled, except when the information is sought pursuant to the exceptions for criminal or tortious conduct, death or bodily harm (which includes kidnapping in this version of the bill), or harm to national security;
- Makes disclosure under the national security exemption mandatory to "assist" in preventing a specific case of terrorism against the United States or a "significant harm to national security" while also invoking an additional balancing test under the exemption requiring that the national security harm must "outweigh the public interest in newsgathering and maintaining a free flow of information to citizens";
- Under the exemption for death or bodily harm, prevents invocation of the privilege where "reasonably necessary to stop, prevent, or mitigate" a "specific case" of "death, kidnapping, or substantial bodily harm" without subsequent application of the standard balancing test;
- Does not include exemptions for trade secrets or personal medical or financial information; and

- Contains a heightened standard when the crime at issue is the “unauthorized disclosure of properly classified information by a person with authorized access to such information” that requires a showing that the unauthorized disclosure has caused “significant, clear, and articulable harm to the national security.”

Sens. Lugar and Dodd signed on as co-sponsors to S. 2035, which the Senate Judiciary Committee began to mark up last Thursday, Sept. 27. More than 20 amendments were submitted by 5 p.m. the night before the markup per Senate rules. Three of those amendments were accepted, including a minor amendment by Sen. Dianne Feinstein (D-Calif.) to the language in the national security exemption. Appeasing Sen. Feinstein was crucial since her role as chair of the Judiciary Subcommittee on Terrorism, Technology and Homeland Security makes her vote essential to moving the bill. The other two accepted amendments by Sens. Sam Brownback (R- Kan.) and Jon Kyl (R-Ariz.) were aimed at excluding foreign powers and terrorist from coverage (a change already made in the House bill) and eliminating the exhaustion requirement from the exemption for information obtained by a journalist who has witnessed a crime or tort, respectively. The rejected amendment, offered by Sen. Kyl, sought to strike the additional restrictions Sens. Specter and Schumer incorporated that are required to compel disclosure when the crime itself is a leak of classified information.

The markup continued Oct. 4, after which the Senate passed the bill out of Committee by a 15-2 vote. Sens. Kyl and Sam Brownback (R-Kan.) were the two “no” votes. Sen. Leahy kept the Committee on task and ensuring that Sen. Kyl’s amendments – he had filed 46 by the Oct. 4 markup – did not prevent prompt passage of the bill. The only amendments passed were minor drafting changes that went through unanimously. Several harmful amendments offered by Sen. Kyl (for example, an amendment to the language that a party seeking the information must prove to a court, by a preponderance of the evidence, that the information sought is “important to the proper presentation of the matter” rather than “essential to the successful completion of the matter,” the latter of which is the current standard under the DOJ Guidelines), were defeated by a wide margin. The co-sponsors promised to work with Sen. Kyl on additional amendments he is seeking that would add exemptions to the bill for information related to the sexual exploitation of children, extensive property damage, and espionage. Sen. John Cornyn (R-Texas) did not offer any amendments at markup, but did express concern about the broad definition of a journalist (and used the SPJ Code of Ethics to make his point). Any proposed amendments agreed to by the leadership after the Committee vote may be worked into a Manager’s Amendment before the bill comes up for a full Senate vote.

The Chamber of Commerce and other business interests remain opposed to S. 2035, which at this time does not include exemptions for trade secrets or personal medical or financial information, as does the Department of Justice.

IV. Conclusion

While not as broad as the House or Senate versions of the bill as introduced in May, both H.R. 2102 and S. 2035 still provide meaningful protection for journalists and their sources. Two key issues that we will face in the weeks ahead are the scope of the national security exemption and the broad definition of a journalist. We will continue to provide you updates as we move toward floor votes in both houses of Congress. SPJ, of course, is on the record endorsing the bills.

If you have any questions, please don't hesitate to contact us.

cc: Terry Harper