110TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
110–370

FREE FLOW OF INFORMATION ACT OF 2007

OCTOBER 10, 2007.—COMMITTED TO THE COMMITTEE OF THE WHOLE HOUSE ON THE STATE OF THE UNION AND ORDERED TO BE PRINTED

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 2102]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2102) to maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Free Flow of Information Act of 2007".

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—In any matter arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information obtained or created by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than the covered person) of the testimony or document;

(2) that—

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is critical to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is critical to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that—

(A) disclosure of the identity of such a source is necessary to prevent an act of terrorism against the United States or its allies or other significant and specified harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed—

(i) a trade secret, actionable under section 1831 or 1832 of title 18, United States Code;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), actionable under Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Biley Act (15 U.S.C. 6809(4)), of any consumer actionable under Federal law; and

(4) that the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.

(b) LIMITATIONS ON CONTENT OF INFORMATION.—The content of any testimony or document that is compelled under subsection (a) shall—

(1) not be overbroad, unreasonable, or oppressive and, as appropriate, be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

(c) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed as applying to civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—With respect to testimony or any document consisting of any record, information, or other communication that relates

to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED PERSONS.—A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)—

(1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and

(2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER.—The term "communications service provider"—

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON.—The term "covered person" means a person who, for financial gain or livelihood, is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include—

(A) any person who is a foreign power or an agent of a foreign power, as such terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801); or

(B) any organization designated by the Secretary of State as a foreign terrorist organization in accordance with section 219 of the Immigration and Nationality Act (8 U.S.C. 1189).

(3) DOCUMENT.—The term "document" means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY.—The term "Federal entity" means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM.—The term "journalism" means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

PURPOSE AND SUMMARY

H.R. 2102, the "Free Flow of Information Act of 2007," ensures that members of the press may utilize confidential sources without causing harm to themselves or their sources. It does this by providing a qualified privilege that prevents a reporter's source material from being revealed except under certain narrow circumstances, such as where it is necessary to prevent an act of terrorism or other significant and specified harm to national security or imminent death or significant bodily harm. The bill thus strikes a balance with respect to promoting the free dissemination of information and ensuring effective law enforcement and the fair administration of justice.

BACKGROUND AND NEED FOR THE LEGISLATION

BACKGROUND

The First Amendment and Freedom of the Press

The First Amendment of the Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press." [1] Historically, the press has played an essential role in disseminating information to the public.[2] In addition to providing general news about crimes against the State, the press has been thought to further the values of the First Amendment by providing information on issues of public concern, including on public officials and government corruption.[3] Thus, it has been recognized that the press should be free from most government restrictions on dissemination of information if it is to provide newsworthy information to the general public.[4] The Supreme Court has recognized this and has struck down laws that have restricted the press's ability to broadcast information of public concern.[5] Since confidential sources are thought to be particularly important to bringing unrestricted information of public interest to light, it has been argued that the First Amendment offers protection against the compulsory disclosure of these confidential sources by the Federal Government.[6]

There are typically two bases in the First Amendment supporting the privilege: (1) the need to protect the free flow of information and ideas, and (2) the need to keep the government from interfering with the press or using it as an investigative arm.[7] With respect to the first point, the right to publish is worthless without the right to gather information; shield law protection is necessary because some reporting is dependent on informants, and some informants are unwilling to be named because of fear of embarrassment or harm. Those informants could be deterred by the threat of being named and, as a result, reporters would neither have access to nor be able to publish important information.

With respect to the second point, it is often argued by the press that the extent of interference with the journalistic process is significant: "subpoenas are inherently, invariably, inescapably burden-

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[1] U.S. Const. amend. I.

[2] *See* Bradley S. Miller, *The Big Chill: Third-Party Documents and the Reporter's Privilege,* 29 U. MICH. J.L. REF. 613, 623 (1995–96) (discussing the importance of the press in getting useful information about government to the people); *see also Citizen Pub. Co. v. United States,* 394 U.S. 131, 139–40 (1969) (explaining that a free press is key to a free society as it ensures widespread and diverse dispersal of information).

[3] *See New York Times v. Sullivan,* 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open"); *see also Mills v. Alabama,* 384 U.S. 214, 218 (1966) (asserting that "a major purpose of that Amendment was to protect the free discussion of government affairs"); *Garrison v. Louisiana,* 379 U.S. 64, 77 (1964) (suggesting that there is "paramount public interest in a free flow of information to the people concerning public officials"). *See generally* David A. Anderson, *The Origins of the Press Clause,* 30 UCLA L. REV. 455 (1983) (detailing history of Press Clause).

[4] *See* Bradley S. Miller, *The Big Chill: Third-Party Documents and the Reporter's Privilege,* 29 U. MICH. J.L. REF. 613, 623 (1995–96) (arguing that the press must be free of governmental restrictions so it can remain the "investigative arm of the people," uncovering government corruption and other crimes detrimental to American people); *see also New York Times v. United States,* 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (arguing that in certain areas of government, the only checks and balances against such government may be "enlightened citizenry," and an alert and free press is essential to bestow knowledge on the public).

[5] *See, e.g., Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580 (1980) (overruling limitations on press access to judicial proceedings); *Sullivan,* 376 U.S. at 281 (establishing "actual malice" standard for defamation claims by public officials).

[6] Mark Gomsak, Note, *The Free Flow of Information Act of 2006: Settling the Journalist's Privilege Debate,* 45 BRANDEIS L.J. 597, 601 (2007).

[7] *Id.* at 601.

some."[8] Responding to subpoenas requires much time and expense, and the subpoenas often seek information that is only marginally relevant.[9] The press further asserts that complying with a subpoena may also have an adverse impact on a journalist's credibility, as, in addition to losing credibility with their sources, testifying for one side may make the journalist appear biased.[10]

The Issue of Journalistic Privilege

In *Branzburg v. Hayes,*[11] the Supreme Court ruled on a claim of journalists' privilege for the first time.[12] In an opinion by Justice White, the Court held that a journalist could not rely on an absolute First Amendment-based privilege to refuse to testify when questioned by a grand jury, unless the grand jury investigation was "instituted or conducted other than in good faith."[13] The Court reasoned that the public's interest in prosecuting crime outweighed its interest in journalists' being permitted to preserve their confidential relationships. The Court, however, noted that there was "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards" regarding journalists' privilege.[14] The Court also specifcally invited Congress to craft its own Federal shield law: "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time dictate."[15]

Justice Powell's concurrence in *Branzburg* stressed the need for a test to strike the "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."[16] He explained that a court could quash a subpoena where "legitimate First Amendment interests require protection."[17] In his dissent, Justice Stewart went a step further and proposed a specific balancing test.[18] Under his test, in order to make a journalist comply with a subpoena to appear before a grand jury and reveal confidential sources and information, the government must: (1) show that there is probable cause to believe that the reporter has information that is clearly relevant to a spe-

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[8] *Id.* at 608 (arguing that subpoenas devour time and resources better used for other purposes and entangle people in the criminal process).

[9] *See id.* at 609 (citing Judge Richard Posner's statement that subpoenas can lawfully require testimony about activities both "intensely private and entirely marginal to the purpose of the inquiry").

[10] Bradley S. Miller, *The Big Chill: Third-Party Documents and the Reporter's Privilege,* 29 U. MICH. J.L. REF. 613, 623 (1995–96) (suggesting that the subpoena threat may puncture the cooperative atmosphere between reporter and source by redirecting attention to the question of the reporter's loyalties); *see, e.g., Cohen v. Cowles Media Co.,* 501 U.S. 663, 665 (1991) (concluding that the First Amendment does not prohibit a plaintiff from recovering damages for a reporter's breach of a promise of confidentiality).

[11] 408 U.S. 665 (1972).

[12] The first claim by a reporter that the First Amendment justified a refusal to provide information came in a case in which a columnist reported several allegedly defamatory statements from an anonymous CBS source about actress Judy Garland. *See Garland v. Torre,* 259 F.2d 545, 547 (2d Cir. 1958). Garland sued CBS; in her deposition, the reporter refused to answer questions about the source of the statements. *Id.* The Second Circuit held that the First Amendment did not confer a right to refuse to answer questions, at least when the questions "went to the heart of the . . . claim." *Id.* at 548–50.

[13] 408 U.S. 665, at 707.

[14] *Id.* at 706.

[15] *Id.*

[16] *Id.* at 726 (Powell, J., concurring).

[17] *Id.*

[18] *Id.* at 743 (Stewart, J., dissenting).

cific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) establish a compelling and overwhelming interest in the information.[19]

In the aftermath of *Branzburg,* there have been recurring calls for a Federal shield law or for a reconsideration of that decision.[20] Although nearly one hundred bills were introduced in the 6 years after the *Branzburg* decision,[21] none of these measures was passed, a failure that is partially attributed to an inability to reach consensus on the definition of a "journalist" and to the insistence of the press on an absolute privilege, not a qualified one.[22] In 1970 the Attorney General promulgated guidelines to govern the issue for the Department of Justice.[23] These guidelines require the Department to: balance First Amendment values with the need for the information sought by the subpoena; make a reasonable attempt to get the information from alternative sources; negotiate with the news media before issuing a subpoena; obtain Attorney General approval before issuing a subpoena; and specify reasonable grounds for the Department's belief that the information sought by the subpoena is essential.[24]

Also since the *Branzburg* decision, Federal courts have continued to develop a common law privilege on a case-by-case basis.[25] Some Federal courts have recognized a qualified journalist's privilege in non-grand jury settings, some have extended it to both civil and criminal proceedings, and some have even extended the privilege to non-confidential sources.[26] This lack of uniformity among the Federal courts has prompted calls from journalists, scholars, and State attorneys general for Federal legislation.

The Federal Rules of Evidence

Federal Rule of Evidence 501 states that except as provided by an Act of Congress or in rules prescribed by the Supreme Court, Federal privileges should be governed by the principles of common law. When courts recognize a privilege, it has been for the purpose of protecting information shared in the context of a special relationship, such as the attorney-client or husband-wife. Privileges are created to promote sharing information without the fear that either party will be forced to disclose to a third party.

In 1996, the Supreme Court issued a three-part test for when a new privilege may be created: 1) whether the proposed privilege serves significant public and private interests; 2) whether the recognition of those interests outweighs any burden on truth-seeking

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[19] *Id.*

[20] Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments,* 25 ARIZ. L. REV. 815, 866–67 (1984) (calling for a uniform national standard for the national newsgathering media).

[21] *Id.* at 867.

[22] 23 Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE 5426, at 738–39 (1980) (concluding that the press eventually lost interest in seeking a Federal legislative solution to the subpoena problem).

[23] *See* 28 C.F.R. 50.10 (1970).

[24] *Id.*

[25] *See Riley v. City of Chester,* 612 F.2d 708, 714 n.6 (3d Cir. 1979) (quoting a comment by the principal drafter of the Federal Rules of Evidence that "the language of Rule 501 permits the courts to develop a privilege for newspaperpeople on a case-by-case basis").

[26] Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law, Branzburg v. Hayes, and Recent Statutory Developments,* 25 ARIZ. L. REV. 815, 864 (1984).

that might be imposed by the States; and 3) whether such a privilege is widely recognized by the States.

State Shield Laws

Since *Branzburg,* 49 States and the District of Columbia now recognize some version of a shield law protecting the press, to varying degrees, from unfettered disclosure of sources, work product, and information generally. Whereas 16 of these States recognize a reporter's privilege as a result of judicial decisions, only 13 States and the District of Columbia accord an absolute privilege for a journalist to withhold information, regardless of the State's demonstration of need for the information.

The various State statutes range in scope, from broad protections that provide an absolute journalistic privilege to shield laws that offer a qualified privilege.[27] The majority of State shield laws currently in place offer some form of a qualified privilege to reporters that protects source information in judicial settings, unless the compelling party can establish that the information is: (1) relevant or material; (2) unavailable by other means, or through other sources; and (3) that a compelling need exists for such information.[28] The States tend to vary on the last prong, with some requiring the compelling party to establish whether the need exists as to the party's case, and others whether the need serves a broader public policy.[29] In Federal courts, however, there is no uniform set of standards governing when testimony can be sought from reporters.

NEED FOR THE LEGISLATION

This legislation is essential for journalists to be able to protect confidential sources. Without this protection, many sources of information may be unwilling to come forward with critical information. The privilege is necessary to preserve the free flow of information.

Many people view the press as the fourth branch of government, serving in the checks and balances system that underlies our democracy. Throughout the years, the press has uncovered scandals and corruption in the government, and criminal behavior, often attributable to an undisclosed source. In fact, many stories would not have been published without a promise of confidentiality of sources, such as Watergate, the Pentagon Papers, and Iran-Contra. More recent news stories brought to light based on confidential sources include the conditions at the Walter Reed Army Medical Center, the Abu Ghraib prison scandal, and the abuse of steroids by baseball players.

A Federal shield law is also needed because of the lack of uniform standards—at both the Federal level and State level—to govern when testimony can be sought from reporters. This argument was made by 34 State attorneys general, including the District of Columbia, in an amicus brief filed May 27, 2005.[30] In the brief, the

[27] Carey Lening & Henry Cohen, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes,* CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, Mar. 8, 2005.

[28] *Id.*

[29] *Id.*

[30] Brief for the State of Oklahoma, *et al.* as Amici Curiae Supporting Petitioners, *Miller v. United States,* No. 04–1507 (May 27, 2005).

attorneys general recognize that 49 States and the District of Columbia had some form of a shield law, and state that "[l]ack of a corresponding Federal reporter's privilege undercuts the States' privileges recognized in forty-nine States and causes needless confusion." The attorneys general also suggested that three decades after *Branzburg,* the change in the State law landscape and the confusion in the Federal circuits made the consideration of a Federal reporter's privilege ripe for review.[31]

Finally, because the privilege is not absolute, this law will prevent law enforcement officials from using journalists and the results of their fact-gathering as a shortcut to a proper investigation. With the reporter shield law, law enforcement will be forced to pursue other sources of information before being able to turn to journalists for their notes.

HEARINGS

The full Committee on the Judiciary held 1 day of hearings on H.R. 2102 on June 14, 2007. Testimony was received from Rachel Brand, Assistant Attorney General for Legal Policy, U.S. Department of Justice; William Safire, columnist, N.Y. Times; Lee Levine, partner, Levine, Sullivan Koch and Schultz, LLP; Randall Eliason, Professional Lecturer in Law, George Washington University Law School and Washington College of Law, American University; and Jim Taricani, reporter, WJAR TV, Providence, Rhode Island.

COMMITTEE CONSIDERATION

On August 1, 2007, the full Committee met in open session and ordered the bill H.R. 2102 favorably reported, with amendment, by voice vote, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that there were no recorded votes during the Committee's consideration of H.R. 2102.

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

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[31] *Id.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2102, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 5, 2007.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2102, the Free Flow of Information Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres, who can be reached at 226–2860.

Sincerely,

PETER R. ORSZAG,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 2102—Free Flow of Information Act of 2007.

CBO estimates that implementing H.R. 2102 would have no significant effect on the Federal budget. H.R. 2102 would exempt journalists from being compelled to produce documents, provide testimony, and identify confidential informants unless a court finds that one of the following exceptions applies:

- The party seeking information has exhausted all reasonable alternative sources;
- In criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred, and the testimony or document sought is critical to the investigation, prosecution, or defense;
- In all other matters, the information sought is critical to the completion of the matter;
- If the testimony or document sought could reveal or lead to the discovery of the identity of a source of information, the disclosure of such source is necessary to prevent an act of terrorism, prevent imminent death or significant bodily harm, or identify a person that has exposed a trade secret, certain health information, or nonpublic personal information;
- The public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news information.

The bill also would limit the content of subpoenaed testimony or documents. Additionally, under the bill, communication service pro-

viders (i.e., telecommunications carriers and Internet service providers) could not be compelled to provide testimony or documents relating to a reporter's phone, email, and computer use, unless one of the above exceptions applies.

Under current law, requests to subpoena journalists on matters related to Federal cases typically originate within the Department of Justice (DOJ). Federal prosecutors can request a subpoena of a journalist from a court after an internal review by DOJ. Information from DOJ indicates that very few subpoena requests seeking confidential source information are approved each year and that the bill would not substantially change the number of such requests. The bill might increase Federal attorneys' litigation duties, but CBO estimates that any increase in Federal spending would be insignificant. In addition, based on information from the Administrative Office of the United States Courts, CBO expects that the bill would not appreciably increase the courts' workloads. Therefore, CBO estimates that implementing H.R. 2102 would have no significant budgetary impact.

H.R. 2102 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The staff contact for this estimate is Leigh Angres, who can be reached at 226–2860. The estimate was approved by Theresa A. Gullo, Chief, State and Local Government Cost Estimates Unit, Budget Analysis Division.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 2102 is intended to ensure the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 18 of the Constitution and the First Amendment.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 2102 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short Title. Section 1 sets forth the short title of the bill as the "Free Flow of Information Act of 2007."

Sec. 2. Compelled Disclosure from Covered Persons. Section 2 establishes a procedure by which disclosure of confidential information from a journalist may be compelled. Subsection (a) states that

in any matter arising under Federal law, a Federal entity may not compel a journalist to testify or provide documents related to information obtained or created by the journalist, unless four conditions are met by a preponderance of the evidence and after notice and an opportunity to be heard. First, the party seeking production must have exhausted all reasonable alternative sources of the information. Second, if the privilege pertains to a criminal investigation or prosecution, the party seeking production must have reasonable grounds to believe a crime has occurred and the information sought is critical to the investigation, prosecution, or defense of the case. If it is a civil investigation, the information must be critical to the successful completion of the case. Third, if the information could reveal the identity of a confidential source, disclosure is only allowed if it is necessary to: (1) prevent an act of terrorism against the United States or its allies or other significant and specified harm to national security; (2) prevent imminent death or significant bodily harm; or (3) identify a person who has disclosed a trade secret actionable under 18 U.S.C. § 1831 or § 1832; individually identifiable health information as defined in section 1171(6) of the Social Security Act; or nonpublic personal information as defined in section 509(4) of the Gramm-Leach-Bliley Act. Fourth, the party seeking production must prove that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating news or information.

Subsection (b) states that the content of any information that can be compelled should not be overbroad, unreasonable or oppressive and, where appropriate, should be limited to the purpose of verifying published information or describing surrounding circumstances relevant to the accuracy of the published information, and be tailored in subject matter and period of time so it is not peripheral, nonessential, or speculative information.

Subsection (c) states that this Act may not be construed to apply to civil defamation, slander or libel claims or defenses under State law, regardless of whether or not the claims or defenses are raised in State or Federal court. In providing for the application of State privilege law to State-law defamation, slander and libel claims or defenses, this section—like the Act as a whole—thus incorporates Federal Rule of Evidence 501, which provides that "with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Sec. 3. Compelled Disclosure From Communications Service Providers. Section 3 applies when the Federal entity attempts to get information from a communications service provider ("CSP") that relates to a business transaction between the CSP and the covered person. In that case, subsection (a) states that section 2 applies in the same manner to these transactions. Subsection (a) also clarifies that testimony or documents sought from the CSP of a non-covered person is not protected. Subsection (b) sets out the procedures for notice and hearing. A court may compel testimony or disclosure of documents only after the covered person has notice of the subpoena (no later than the time the subpoena is issued) and an opportunity to be heard before the disclosure is compelled. Subsection (c) provides that notice may be delayed if the court determines by clear

and convincing evidence that not delaying it would pose a substantial threat to the integrity of a criminal investigation.

Sec. 4. Definitions. Section 4 defines various terms. It defines "communications service provider" as a person that transmits information of a customer's choosing by electronic means. The term includes a telecommunications carrier, an information service provider, and an information content provider (as defined in Title 47 of the United States Code). "Covered person" is defined as a person who, for financial gain or livelihood, is engaged in journalism, including supervisors, employers, parents, subsidiaries, or affiliates of a covered person. The term does not include any person who is a "foreign power" or "agent of a foreign power" as defined in section 101 of the Foreign Intelligence Surveillance Act, or any person who is a foreign terrorist organization, designated by the Secretary of State, in accordance with section 219 of the Immigration and Nationality Act. The term "document" includes writings, recordings, and photographs (as defined in the Federal Rules of Evidence). The term "federal entity" is an entity or employee of the judicial or executive branch or an administrative agency with subpoena power. Section 4 defines "journalism" as "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news of information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, the Committee advises that H.R. 2102 makes no changes to existing law.

ADDITIONAL VIEWS

I want to thank the primary authors of H.R. 2102, Mr. Boucher and Mr. Pence, for working with the Department of Justice, interested groups, and Members to develop alternative language to address the legitimate concerns of industry and law enforcement authorities.

The proponents of H.R. 2102 have worked hard over the past three years to balance competing policy interests. The result is an improved bill.

For example, the authors narrowed the definition of a "covered person" to include only professional journalists.

They addressed some of the Department of Justice's concerns by denying protection to persons covered by the Foreign Intelligence Surveillance Act as well as those affiliated with terrorist organizations designated by the Secretary of State.

The manager's amendment adopted at full Committee markup also deletes the "imminent and actual" harm language from the section of the bill that lists exceptions to source protection. The new text would deny protection when disclosure is necessary to prevent "an act of terrorism against the United States or other significant specified" harm to national security.

In addition, the manager's amendment broadens the trade secrecy, health, and non-public personal information exceptions by

linking them to disclosures that are "actionable under" specific statutes.

Further, the manager's amendment specifies that the protections afforded transactions between a covered person and a communications service provider do not apply to a non-covered person.

And finally, the manager's amendment includes new limitations on information content that is compelled: it must not be "overbroad, unreasonable or oppressive and, where appropriate," be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the published information's accuracy.

But despite efforts to accommodate their concerns, the Justice Department still opposes the bill. They believe the stakes are too high in a post 9/11 world to support the Free Flow of Information Act.

The federal government defends our national security. So we must weigh the benefits of a reporter's privilege with the problems it may cause for those who protect our country.

They have pointed out that the "exceptions" language fails to address misconduct that the Department confronts on a daily basis.

To illustrate, the legislation prevents DoJ from obtaining the identity of a news source with knowledge of a child prostitution ring, an online purveyor of pornography, gang violence, or alien smuggling.

And the new text governing source disclosure exceptions only addresses prospective events. The Department may be able to acquire information about a source's identity to prevent a terrorist attack. But the

language does not help if an attack has already occurred and DoJ is searching for plotters or witnesses with knowledge about the event.

Also, the H.R. 2102 does not address "imminent attacks" against our allies, soldiers, embassies, and US citizens in other countries.

It protects trade secrets, but not national secrets.

Despite the changes contained in the reported version of H.R. 2102, I am concerned that the Department will be hamstrung as it goes about the business of conducting investigations and prosecuting criminals.

But DoJ should do more than complain; they should negotiate in good faith and provide the Committee with language that addresses their concerns.

Although a close call, I could not support H.R. 2102 during the Committee markup. I simply believe we must err on the side of caution and not support legislation that could make it harder to apprehend criminals and terrorist or deter their activities.

But DoJ can do a better job of working with the Committee to improve the bill between now and floor consideration of H.R. 2102. Progress was made in the manager's amendment and we should continue to improve this bill before we go to the House floor. If the legitimate security concerns registered by the Department are addressed at that time then I will support H.R. 2102.

LAMAR SMITH.