

## Analysis of Manager's Amendments to H.R. 2102

**On page 4, line 6, strike “or”.**

**On page 4, line 22, strike “and” and insert “or”.**

**On page 4, after line 22, insert the following:**

*(D) (i) disclosure of the identity of such a source is essential to identify in a criminal investigation or prosecution a person who without authorization disclosed properly classified information and who at the time of such disclosure had authorized access to such information; and*

*(ii) such unauthorized disclosure has caused or will cause significant and articulable harm to the national security; and*

- This amendment responds to a criticism voiced by the U.S. Department of Justice, which has contended that the previous version of H.R. 2102 had an “unduly narrow” exception for national security concerns that would “hinder efforts to investigate and prosecute those who have leaked classified information, undermine the ability of law enforcement to investigate national security breaches that have already occurred, and weaken Federal efforts to mitigate damage to national security that has already taken place.” *See* Letter to Hon. Lamar S. Smith from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Sept. 11, 2007, at p. 2.
- This amendment will enable Federal law enforcement authorities to obtain an order compelling disclosure of the identity of a source in the course of a leak investigation.
- The amendment strikes an appropriate balance between strengthening the hand of law enforcement on the one hand and ensuring the free flow of information on the other, by providing that the disclosure of a leaker’s identity can be compelled whenever the leak has caused “significant and articulable harm to the national security.”
- Thus, the government cannot obtain compelled disclosure merely by incantation of the phrase “national security”; the government must be able to articulate the “significant” harm that has been caused – or will be caused – to national security. Consistent with the version of S. 2035 reported out by the Senate Judiciary Committee, this exception is not limited to past harm, because it includes the phrase “or will cause”. Also, it does not require a showing of “clear” harm, but only of “significant and articulable” past or future harm.
- The amendment requires a showing of “significant and articulable harm to the national security” resulting from a leak of “properly classified information” – rather than compelling disclosure in the case of every single leak of classified information – for a couple of important reasons:

- First, in 2004, 15.6 million documents were classified; billions of pages of documents remain classified from years past. The Executive Secretary for the National Security Council under President Reagan estimates that only 10 percent of classified information was so designated for “legitimate protection of secrets.” If the exception to the privilege were not limited to “properly classified information,” it would undermine the purpose of the Act by compelling disclosure of a source who leaked information that had been classified solely for the purpose of covering up evidence of government lawbreaking or corruption.
- Second, in many situations, the disclosure of classified information has informed the public – including members of Congress – about government misconduct that is of intense and legitimate public concern. For instance, disclosure of classified information to journalists has enabled the public to learn about the treatment of Iraqi prisoners at Abu Ghraib, fraud and abuse in the defense industry, the exposure of workers at a Kentucky uranium plant to excessive amounts of plutonium and uranium, and – through the Pentagon Papers – the government’s activities in the Vietnam War.

**On page 5, after line 19, insert the following:**

*(d) EXCEPTION RELATING TO CRIMINAL OR TORTIOUS CONDUCT.—The provisions of this section shall not prohibit or otherwise limit a Federal entity in any matter arising under Federal law from compelling a covered person to disclose any information, record, document, or item obtained as the result of the eyewitness observation by the covered person of alleged criminal conduct or as the result of the commission of alleged criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the conduct, if a Federal court determines that the party seeking to compel such disclosure has exhausted all reasonable efforts to obtain the information, record, document, or item, respectively, from alternative sources. The previous sentence shall not apply, and subsections (a) and (b) shall apply, in the case that the criminal conduct observed by the covered person or the criminal or tortious conduct committed by the covered person is the act of transmitting or communicating the information, record, document, or item sought for disclosure.*

- This amendment responds to criticism by the U.S. Department of Justice of the previous version of H.R. 2102, which DOJ contended did not have a sufficiently broad exception permitting compelled disclosure in criminal investigations. *See* Letter to Hon. Lamar S. Smith from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Sept. 11, 2007, at p. 2 (contending that the exception for death or significant bodily harm “would not reach a broad range of criminal misconduct”).

- The amendment permits law enforcement to obtain an order compelling disclosure of documents and information obtained as the result of eyewitness observations of alleged criminal or tortious conduct by the covered person.
- It also permits compelled disclosure in cases where the covered person him- or herself is alleged to have committed criminal or tortious conduct.

Section 3(b) provides that this exception does not apply if the alleged crime or tort is the act of leaking the documents or information. Were it not for Section 3(b), the shield law effectively would be gutted, as virtually any leak of information would trigger an exception negating the Act's coverage.

**On page 7, strike lines 14 through 18 and insert the following:**

*(2) COVERED PERSON. – The term “covered person” means a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person’s livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person. Such term shall not include –*

**On page 7, line 22, strike “or”**

**On page 7, line 26, strike the period and insert a semicolon.**

**On page 7, after line 26, insert the following:**

*(C) any person included on the Annex to Executive Order 13224, of September 23, 2001, and any other person identified under section 1 of that Executive order whose property and interests in properly are blocked by that section;*

*(D) any person who is a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or*

*(E) any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).*

- This amendment limits the Act's coverage to a person who “regularly” engages in the listed journalistic activities – such as gathering and publishing news and information for

dissemination to the public – and who does so “for a substantial portion of the person’s livelihood or for substantial financial gain.”

- These limitations will prevent criminal offenders from contending that the Act’s protections somehow apply to their criminal activities. As such, the amendment responds to criticisms from the Department of Justice that the previous version of H.R. 2102 might be exploited by criminals who engage in conduct such as posting child pornography on the Internet or buying and selling stolen credit card numbers in the guise of publishing “news.” *See* Letter to Hon. Lamar S. Smith from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Sept. 11, 2007, at pp. 2-3.
- Offenses such as child pornography and selling stolen credit cards are defined as crimes elsewhere in the federal code, and the Free Flow of Information doesn’t alter that fact or confer any immunity to such conduct. Nor could such activities by any stretch be deemed to fall within the statutory definitions of “covered person” and “journalism.”
- There have been State shield statutes on the books for years, and State courts have routinely decided whether a person or entity qualifies as a journalist under the applicable statutory language. Courts make decisions of that nature every day. There is no reason to doubt the ability of our Federal courts to apply the FFIA statutory language to the facts of the cases before them – and to avoid the absurd results suggested by DOJ’s hypotheticals.
- This amendment also adds three new exceptions to the definition of “covered person,” in response to criticism by the Department of Justice to the effect that the previous version of H.R. 2102 might be exploited by “the Media Wing of a Terrorist Organization.” *See id.* at p. 6.
- An exception is added for “any person designated as a Specially Designated Global Terrorist” by the Treasury Department under Executive Order 13324.
- An exception is added for “any person who is a specially designated terrorist” under 31 U.S.C. 595.311.
- An exception is added for “any terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act.”
- These three exceptions were all proposed by the Department of Justice. *See* Letter to Hon. Lamar S. Smith from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Sept. 11, 2007, at p. 7.