

Issue-by-Issue Comparison of H.R. 2102 with S. 2035

<i>Issue</i>	<i>H.R. 2102</i>	<i>S. 2035</i>
<p>Materials and information protected</p>	<p><i>Any testimony of a person engaged in journalism as part of engaging in journalism, whether or not subject to a promise of confidentiality from a source</i></p> <p>The bill covers both confidential and non-confidential information.</p> <ul style="list-style-type: none"> ▪ The bill applies to testimony or documents “related to information obtained or created by such covered person as part of engaging in journalism.” Thus, the bill covers information not subject to a promise of confidentiality from a source, in addition to confidential source information. Sec. 2(a). ▪ As discussed below, it imposes a more stringent test for compelled disclosure of confidential source information than for non-confidential-source information and journalists’ work product. 	<p><i>Only confidential source information or documents containing such information.</i></p> <p>Applies only to confidential information.</p> <ul style="list-style-type: none"> ▪ The bill applies to testimony or documents “relating to protected information.” Sec. 2(a). “Protected information” is “(1) information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism; or (2) any records, communications data, documents, or information that a covered person obtained or created—(i) as part of engaging in journalism; and (ii) upon a promise or agreement that such records, communication data, documents, or information would be confidential.” Sec. 8(6). ▪ Although non-confidential-source information and journalists’ work product is not covered, the bill does not intend to displace court decisions providing protection for such information and materials: Nothing in the bill “shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure of such material.” Sec. 7.
<p>Entities covered</p>	<p><i>“Covered persons” – as defined by a functional test. Journalistic activity must be “regular” and “for a substantial portion of the person’s livelihood or for substantial financial gain.” Excludes foreign agents and terrorists.</i></p> <p>The bill applies to “covered person[s].” Sec. 2(a). The definition excludes foreign agents and terrorists.</p> <ul style="list-style-type: none"> ▪ A “covered person” is 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.” Sec. 4(2) (emphasis added). ▪ A “covered person” does not include (a) a foreign power, as defined by FISA, (b) a 	<p><i>Persons “engaged in journalism” – as defined by a functional test. Need not be professionals, but journalistic activity must be “regular.” Excludes foreign agents and terrorists.</i></p> <p>Like the House bill, the Senate bill applies to “covered person[s].” Sec. 2(a). Also like the House bill, the Senate bill excludes foreign agents and terrorists and requires that journalistic activity be “regular.” Unlike the House bill, the Senate bill does not require that the journalistic activity constitute a substantial portion of the person’s livelihood or be for substantial financial gain.</p> <ul style="list-style-type: none"> ▪ A “covered person” is “a person who is engaged in journalism.” Sec. 8(2). ▪ Journalistic activities must be “regular”: “Journalism” is “the regular 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

<i>Issue</i>	<i>H.R. 2102</i>	<i>S. 2035</i>
	<p>foreign terrorist organization, as designated by the Secretary of State, (c) Specially Designated Global Terrorist, as designated by the Treasury Department, (d) a specially designated terrorist, as defined by federal regulations, or (e) a terrorist organization, as defined by federal immigration law. Sec. 4(2).</p>	<p>dissemination to the public.” Sec. 8(5) (emphasis added).</p> <ul style="list-style-type: none"> ▪ A “covered person” does not include (a) a foreign power, as defined by FISA, (b) a foreign terrorist organization, as designated by the Secretary of State, (c) Specially Designated Global Terrorist, as designated by the Treasury Department, (d) a specially designated terrorist, as defined by federal regulations, or (e) a terrorist organization, as defined by federal immigration law. Sec. 8(2).
<p>Level of privilege</p>	<p><i>Two levels of qualified privilege, for non-confidential-source information and for confidential sources</i></p> <p>The bill provides greater protection for information about confidential-sources than for information that is non-confidential.</p> <ul style="list-style-type: none"> ▪ For information that would not reveal a confidential source, the privilege is subject to the balancing tests provided for criminal and civil proceedings. ▪ For information that would reveal a confidential source, a court can compel disclosure only (A) to prevent or identify any perpetrator of an act of terrorism against the United States or its allies or other significant and specified harm to national security, (B) to prevent imminent death or significant bodily harm; (C) to identify a person who has disclosed (i) a trade secret of significant value in violation of State or Federal law, (ii) personal health information in violation of Federal law, or (iii) personal financial information in violation of Federal law, or (D) to identify the source of a leak of classified information, where the leak has caused or will cause significant or articulable harm to the national security. Sec. 2(a)(3). 	<p><i>Qualified privilege for confidential sources only</i></p> <p>Qualified privilege for confidential-source information. No protection for non-confidential source information.</p> <p>The privilege “shall not apply” in certain additional circumstances:</p> <ul style="list-style-type: none"> ▪ (a) the information was obtained through eyewitness observations of criminal or tortious conduct, Sec. 3; ▪ (b) the information is necessary to stop, prevent, or mitigate a specific case of death, kidnapping, or bodily harm, Sec. 4; or ▪ (c) the information would assist in preventing a specific act of terrorism or other significant and articulable harm to national security, Sec. 5. <p>These exceptions are detailed below.</p>
<p>Burden of proof</p>	<p><i>Preponderance of the evidence</i></p> <p>Compelled disclosure may be ordered only after a court determines “by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person,” that the test for disclosure has been satisfied. Sec. 2(a).</p>	<p><i>Preponderance of the evidence</i></p> <p>Also uses the preponderance standard: Compelled disclosure may be ordered if “a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person,” that the test for disclosure has been satisfied. Sec. 2(a).</p> <p>The relevant sections of the bill, however, do not uniformly and expressly incorporate the evidentiary standard, the requirements of notice and opportunity to be heard, and the explicit</p>

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		<p>requirement that the court decide whether the statutory standards have been met.</p> <ul style="list-style-type: none"> ▪ The exception for criminal or tortious conduct requires that the determination be made by the court, but neither identifies the standard of proof nor provides for notice or an opportunity to be heard. Sec. 3. ▪ The exception for death, kidnapping, or substantial bodily harm does not specifically require that the determination be made by a court, does not specify the standard of proof, and does not provide for notice or an opportunity to be heard. Sec. 4. ▪ The exception for terrorism or harm to national security requires that a court make the finding “by a preponderance of the evidence,” but does not provide for notice or an opportunity to be heard. Sec. 5.
<p>Exhaustion of non-media sources</p>	<p><i>Exhaustion of alternative sources is required</i></p> <p>In both civil and criminal cases, the court must determine that the seeking party “has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document.” Sec. 2(a)(1).</p>	<p><i>Exhaustion of alternative sources is required – but not when information subpoenaed pursuant to exceptions in Sections 3-5.</i></p> <p>Though the Senate bill contains the same limitation as does the House bill, the limitation does not apply to every situation in which disclosure is required.</p> <ul style="list-style-type: none"> ▪ The limitation does not apply to information subpoenaed under the exceptions for criminal or tortious conduct (Sec. 3); death, kidnapping, or bodily harm (Sec. 4); or terrorist activity or harm to national security (Sec. 5). ▪ Otherwise, in both civil and criminal cases, the court must determine that the seeking party “has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document.” Sec. 2(a)(1).
<p>Standard for compelled disclosure in criminal cases</p>	<p><i>Crime has occurred and information is “critical” – plus balancing test</i></p> <p>In a criminal case, non-confidential information can be disclosed in the following circumstances:</p> <ul style="list-style-type: none"> ▪ Whether sought by prosecution or defense, the information must be “critical to the investigation or prosecution or to the defense against the prosecution.” Sec. 2(a)(2)(A)(ii). ▪ The court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or 	<p><i>Crime has occurred and information is “essential” – plus balancing test</i></p> <p>In the Senate bill, the information must be “essential” to the investigation or prosecution or to the defense against prosecution.” This standard applies this standard to confidential information. The Senate bill also has an additional, separate provision addressing cases where the crime is the leak itself.</p> <ul style="list-style-type: none"> ▪ Whether sought by the prosecution or by the defense, the information must be “essential to the investigation or prosecution or to the defense against the prosecution.” Sec.

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	<p>disseminating news or information.” Sec. 2(a)(4).</p>	<p>2(a)(2)(A)(ii).</p> <ul style="list-style-type: none"> ▪ There is a heightened standard when the crime at issue is the leak of information itself: “[I]n a criminal investigation or prosecution of an unauthorized disclosure of properly classified information by a person with authorized access to such information, such unauthorized disclosure has caused significant, clear, and articulable harm to the national security.” Sec. 2(a)(2)(A)(iii). ▪ In either situation, the court must find that “nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” Sec. 2(a)(3).
<p>Standard for compelled disclosure in civil cases</p>	<p><i>“Critical to the successful completion of the matter” – plus balancing test</i></p> <p>In a “matter other than a criminal investigation or prosecution,” non-confidential information can be disclosed in the following circumstances:</p> <ul style="list-style-type: none"> ▪ The court must determine that “the testimony or document sought is critical to the successful completion of the matter.” Sec. 2(a)(2)(B). ▪ The court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4). 	<p><i>“Essential to the resolution of the matter” – plus balancing test</i></p> <p>The Senate bill uses the “essential” standard (discussed above) and also applies the balancing test. This standard governs confidential information (non-confidential information is not protected).</p> <ul style="list-style-type: none"> ▪ In a “matter other than a criminal investigation or prosecution,” the court must determine that “the testimony or document sought is essential to the resolution of the matter.” Sec. 2(a)(2)(B). ▪ The court must also determine that “nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” Sec. 2(a)(3).
<p>Standard for compelled disclosure before agencies</p>	<p><i>“Critical to the successful completion of the matter” – plus balancing test</i></p> <p>Same test as civil litigation (above).</p>	<p><i>“Essential to the successful completion of the matter” – plus balancing test</i></p> <p>Same test as civil litigation (above).</p>
<p>Information held by third parties</p>	<p><i>Covers phone and email records – notice required, but can be delayed for criminal investigations, in certain circumstances.</i></p> <p>The bill has a separate section specifically addressing communications service providers.</p> <ul style="list-style-type: none"> ▪ If a party seeks “any record, information, or other communication that relates to a business transaction between a communications service provider and a 	<p><i>Covers phone and email records – notice required, but can be delayed for criminal investigations, in certain circumstances.</i></p> <p>Like the House bill, the Senate bill has a separate section specifically addressing communications service providers. The Senate bill also provides for delayed notice to the covered person, in certain circumstances, but is more specific about the amount of time that notice can be delayed.</p>

<i>Issue</i>	<i>H.R. 2102</i>	<i>S. 2035</i>
	<p>covered person,” the privilege applies “in the same manner” as it applies to a covered person. Sec. 3(a).</p> <ul style="list-style-type: none"> ▪ The party must also provide the covered person with notice and an opportunity to be heard. Sec. 3(b). Notice can 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. 3(c). 	<ul style="list-style-type: none"> ▪ If a party seeks “any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person,” the privilege applies “in the same manner” as it applies to a covered person. Sec. 6(a). ▪ The party must also provide the covered person with notice and an opportunity to be heard by the court. Sec. 6(b). Notice can be delayed for up to 45 days each time the court determines, by clear and convincing evidence, that “such notice would pose a substantial threat to the integrity of a criminal investigation.” Sec. 6(c).
<p>Terrorism & National Security</p>	<p><i>Mandatory disclosure to prevent or to identify any perpetrator of “an act of terrorism against the United States or its allies or other significant and specified harm to national security” – plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for national security.</p> <ul style="list-style-type: none"> ▪ The court must find that “disclosure of the identity of such a source is necessary to prevent, or to identify any perpetrator of, 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.” Sec. 2(a)(3)(A). ▪ The court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4). 	<p><i>Mandatory disclosure to assist in preventing an “act of terrorism” or “significant and articulable harm to national security” – plus balancing test for the “national security” exception.</i></p> <p>The Senate bill has a lower standard for triggering the exception (“would assist” as opposed to “is necessary”), and it eliminates the balancing test in the terrorism part of the exception.</p> <ul style="list-style-type: none"> ▪ Confidential source information can be compelled if a court finds, by a preponderance of the evidence, that “the evidence would assist in preventing an act of terrorism” or “other significant and articulable harm” to national security. Sec. 5. ▪ Under the exception for “national security,” the national security harm must “outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.” Sec. 5(2).
<p>Classified document investigations</p>	<p><i>Disclosure to identify source of leak of properly classified information, where the leak has harmed or will harm national security – plus balancing test.</i></p> <p>Confidential source information can be compelled under an exception for leaks of classified information.</p> <ul style="list-style-type: none"> ▪ There must be “an unauthorized disclosure of properly classified information by a person with authorized access to such information,” and the disclosure must have “caused or will cause significant and articulable harm to the national security.” Sec. 2(a)(3)(D). 	<p><i>Qualified privilege, with balancing test and additional requirement</i></p> <p>The Senate bill likewise incorporates a special leak provision into the bill’s provisions governing criminal prosecutions.</p> <ul style="list-style-type: none"> ▪ In addition to the requirements set forth for the disclosure of information in criminal prosecutions or investigations, if the investigation or prosecution concerns the “unauthorized disclosure of properly classified information by a person with authorized access to such information,” the disclosure “has caused or will cause significant and articulable harm to the national security.”

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	<ul style="list-style-type: none"> ▪ The court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4). 	<p>Sec. 2(a)(2)(A)(iv).</p> <ul style="list-style-type: none"> ▪ As with all other criminal investigations and prosecutions, the court must also determine that nondisclosure “would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” Sec. 2(a)(3).
Death or injury	<p><i>Compelled disclosure where “necessary to prevent imminent death or significant bodily harm” – plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for death or bodily harm.</p> <ul style="list-style-type: none"> ▪ The court must find that “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.” Sec. 2(a)(3)(B). ▪ The court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4). 	<p><i>No privilege where “reasonably necessary to stop, prevent, or mitigate” a “specific case” of “death, kidnapping, or substantial bodily harm” – no balancing test.</i></p> <p>The Senate bill has a somewhat broader exception, and adds kidnapping to the excepted circumstances.</p> <ul style="list-style-type: none"> ▪ The privilege does not apply to information that is “reasonably necessary to stop, prevent, or mitigate a specific case of—(a) death; (b) kidnapping; or (c) substantial bodily harm.” Sec. 4. ▪ No additional balancing test.
Eyewitness testimony	<p><i>No privilege for eyewitness testimony or tort or crime – exhaustion required.</i></p> <p>The privilege does not apply when the covered person obtained the information by witnessing a crime or participating in a tort or crime. Party must exhaust alternative sources.</p> <ul style="list-style-type: none"> ▪ The privilege does not apply to “any information, record, document, or item obtained as the result of the eyewitness observations of 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.” Sec. 2(e). ▪ Court must “determine[] that the party seeking to compel disclosure has exhausted all other reasonable efforts to obtain the information, record, document, or item, respectively, from alternative sources.” Sec. 2(e). ▪ The exception does not apply, however, if 	<p><i>No privilege for eyewitness testimony or tort or crime – exhaustion not required.</i></p> <p>The Senate bill has a similar provision, with minor differences in phrasing. Party need not exhaust alternative sources.</p> <ul style="list-style-type: none"> ▪ The privilege does not apply “to any information, record, document, or item obtained as a result of the eyewitness observations of alleged criminal conduct or commitment of alleged criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the observed conduct.” Sec. 3(a). ▪ Unlike in the House bill, the Senate bill does not require that the person seeking to compel disclosure have exhausted reasonable efforts to obtain the information from alternative sources. Sec. 3(a). ▪ Like the House bill, the Senate bill has an “exception to the exception,” which provides that the exception doesn’t apply when the crime or tort is the leak itself. While the

<i>Issue</i>	<i>H.R. 2102</i>	<i>S. 2035</i>
	<p>“the alleged criminal conduct observed by the covered person or the alleged 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.” Sec. 2(e).</p>	<p>House bill preserves the privilege when the crime or tort is the act of “transmitting or communicating” the information, the Senate bill preserves the privilege only when the crime or tort is the act of “communicating” the information. Sec. 3(b).</p>
<p>Trade secrets, personal medical information, and personal financial information.</p>	<p><i>Compelled disclosure where necessary to identify a person who has disclosed trade secrets, personal medical information, or personal financial information – plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for trade secrets, medical information, or personal financial information.</p> <ul style="list-style-type: none"> ▪ The court must find finds that “disclosure of the identity of such a source is necessary to identify a person who has disclosed— <ul style="list-style-type: none"> (i) a trade secret, actionable under section 1831 or 1832 of title 18, United States Code; (ii) individually identifiable health information . . . , actionable under Federal law; or (iii) nonpublic personal information . . . of any consumer actionable under Federal law.” Sec. 2(a)(3)(C). ▪ In each situation, the court must also find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4). 	<p><i>No specific provision</i></p> <p>No specific provision, but general provisions would apply.</p>
<p>Public Interest Balancing Test</p>	<p><i>Must be satisfied in all cases of disclosure, except for disclosure under the crime-tort exception. Courts are specifically authorized to consider harm to national security in balancing interests.</i></p> <p>In any case of disclosure, except for disclosure under the exception in section 2(e), the court must find that “the public interest in compelling disclosure of the information or document involved outweighs the public interest in gathering or disseminating news or information.” Sec. 2(a)(4).</p> <p>In applying the balancing test, “a court may consider the extent of any harm to national security.” Sec. 2(b).</p>	<p><i>Must be satisfied for disclosure pursuant to general provision governing civil and criminal cases, including criminal cases governing the leak of classified information. Need not be satisfied for all of the exceptions. No specific guidance about what factors courts may consider.</i></p> <p>When ordering disclosure pursuant to general requirements of section 2, the court must find that “nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.” Sec. 2(a)(3).</p> <p>When ordering disclosure under the national-security component of the exception for terrorism</p>

<i>Issue</i>	<i>H.R. 2102</i>	<i>S. 2035</i>
		<p>or harm to national security, the court must find that the harm to national security “would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.” Sec. 5(2).</p> <p>No balancing-test requirement for disclosure under exception for terrorism, bodily harm, or witness or participation in a crime or tort.</p>
<p>General limitations on the use of subpoenas</p>	<p><i>Minimization and tailoring to exclude nonessential information required in all cases – except when disclosure required under the crime-tort exception.</i></p> <ul style="list-style-type: none"> ▪ Information subpoenaed “shall – <ul style="list-style-type: none"> (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.” Sec. 2(c). ▪ This provision does not apply to the exception for criminal and tortious conduct. Sec. 2(e). 	<p><i>Minimization and tailoring to exclude nonessential information required to the extent possible – but not when information subpoenaed pursuant to exceptions in Sections 3 -5.</i></p> <p>Though the Senate bill contains the same limitation as does the House bill, the limitation does not apply to every situation in which disclosure is required.</p> <ul style="list-style-type: none"> ▪ The limitation does not apply to information subpoenaed under the exceptions for criminal or tortious conduct (Sec. 3); death, kidnapping, or bodily harm (Sec. 4); or terrorist activity or harm to national security (Sec. 5). ▪ Otherwise, in criminal and civil proceedings, the disclosure “shall, to the extent possible— <ul style="list-style-type: none"> (1) 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.” Sec. 2(b).