

## Section-by-Section Overview of S.987, As Passed by Senate Judiciary Committee

### Section 2

- *Materials and Information Protected:* Applies only to confidential information. The bill applies to compelled disclosure of “protected information,” which is “(A) information identifying a source who provided information under a promise or agreement of confidentiality made by a covered journalist as part of engaging in journalism; or (B) any records, contents of a communication, documents, or information that a covered journalist obtained or created—(i) as part of engaging in journalism; and (ii) upon a promise or agreement that such records, contents of a communication, documents, or information would be confidential.” Sec. 11(7).
- *Entities Covered:* The bill applies to “covered journalist[s].”

The Senate bill provides three ways that a person could be covered by the statute:

#### Test 1

A covered journalist is a person who:

A. is, or on the relevant date, was, an employee independent contractor, or agent of an entity or service that disseminates news or information by means of newspaper; nonfiction book; wire service; news agency; news website, mobile application or other news or information service (whether distributed digitally or otherwise); news program; magazine or other periodical, whether in print, electronic or other format; or through television or radio broadcast, multichannel video programming distributor, or motion picture for public showing;

B. with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, engages, or as of the relevant date engaged, in the regular gathering, preparation, collection, photographing, recording, writing, editing, reporting or publishing on such matters by: (1) conducting interviews; (2) making direct observation of events; or (3) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;

C. had such intent at the inception of the process of gathering the news or information sought; and

D. obtained the news or information sought in order to disseminate the news or information to the public.

Sec. 11(1)(A)(i)(I).

#### Test 2

A covered journalist is a person who:

A. at the inception of the process of gathering the news or information sought, had the primary intent to investigate issues or events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, and regularly conducted interviews, reviewed documents, captured images of events, or directly observed events;

B. obtained the news or information sought in order to disseminate it by means of a medium set out in Test 1; and

c. either (1) would have been included in the definition in Test 1 for any continuous one-year period within the 20 years prior to the relevant date or any continuous period within the 5 years prior to the relevant date; (2) had substantially contributed, as an author, editor, photographer, or producer, to a significant number of articles, stories, programs, or publication by a medium set out in Test 1 within 5 years prior to the relevant date; or (3) was a student participating in a journalistic medium at an institution of higher education on the relevant date.

Sec. 11(1)(A)(i)(II).

### **Test 3**

If a person does not fit within the definition of “covered journalist” under Tests 1 or 2, a judge of the United States may exercise discretion to avail the person of the protections of this Act if, based on specific facts contained in the record, the judge determines that such protections would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities under the specific circumstances of the case.

Sec. 11(1)(B).

Covered entities include supervisors, employers, parent companies, subsidiaries, and affiliates.

Sec. 11(1)(A)(ii).

The term “covered journalist” does not include (a) foreign powers, as defined by FISA, (b) foreign terrorist organizations, as designated by the Secretary of State, (c) specially Designated Global Terrorists, as designated by the Treasury Department, (d) specially designated terrorists, as defined by federal regulations, (e) terrorist organizations, as defined by federal immigration law, or (f) any person or entity whose principal function, as demonstrated by the totality of such person or entity’s work, is to publish primary source documents that have been disclosed to such person or entity without authorization.

- *Exhaustion of Non-Media Sources.* In both civil and criminal cases, the court must determine that the seeking party “has exhausted all reasonable alternative sources (other than a covered journalist) of the testimony or document.” The exhaustion requirement does not apply to information subpoenaed under the exceptions for criminal conduct (Sec. 3); death, kidnapping, or bodily harm (Sec. 4); or terrorist activity or harm to national security (Sec. 5).
- *Standard for Compelled Disclosure in Criminal Cases:* A court will not compel disclosure of protected information from a covered journalist in a criminal prosecution or investigation unless four requirements are satisfied:

- If the Federal Government is seeking the information, there must be reasonable grounds to believe that a crime occurred, based on public information or information obtained from a source other than the covered journalist.
  - Whether sought by the prosecution or by the defense, there must be reasonable grounds to believe that the information is “essential to the investigation or prosecution or to the defense against the prosecution,” based on public information or information obtained from a source other than the covered journalist.
  - The Attorney General must certify that the decision to request compelled disclosure was consistent with the Justice Department’s regulations regarding subpoenas to the media.
  - If the previous three factors have been satisfied, the court must find the covered journalist has not established by clear and convincing evidence that disclosure “would be contrary to the public interest, taking into account both the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information and the public interest in compelling disclosure (including the extent of any harm to national security).”
- *Standard for Compelled Disclosure for Civil and Administrative Subpoenas:* Before compelling the disclosure of information in a non-criminal case, the court must find (1) that the protected information sought is essential to the resolution of the matter; and (2) that the party seeking to compel disclosure of the protected information has established that the interest in compelling disclosure clearly outweighs the public interest in gathering and disseminating the information of news at issue and maintaining the free flow of information.
  - *Limitation on Scope of Subpoenas.* Any subpoenas to covered journalists must be “narrowly tailored in purpose, subject matter, and period of time covered so as to avoid compelling disclosure of peripheral, nonessential, or speculative information.”
  - *FFIA and Other Protections:* The FFIA does not preclude the requirement that a Federal or government entity obtain a warrant for certain communications, as required by the Electronic Communications Privacy Act, 18 U.S.C. § 2703. Nor does the FFIA supersede the requirements and procedures regarding search and seizure as set forth in Rule 41 of the Federal Rules of Criminal Procedure.

### **Section 3**

- The privilege does not apply “to any information, record, document, or item obtained as the result of the eyewitness observations of, or obtained during the course of, alleged criminal conduct by the covered journalist, including any physical evidence or visual or audio recording of the conduct.”

### **Section 4**

- *Exception for Certain Criminal Cases.* The qualified privilege does not apply to any protected information that is reasonably necessary to stop, prevent, or mitigate a specific case of (1) death; (2) kidnapping; (3) substantial bodily harm; (4) conduct that constitutes a criminal offense that is a specified offense against a minor; and (5) incapacitation or destruction of critical infrastructure.

## Section 5

- *National Security Exception for Leak Cases:* The privilege does not apply if the federal government is seeking to compel disclosure “in a criminal investigation or prosecution of the allegedly unlawful disclosure of properly classified information,” if the court finds “by a preponderance of the evidence that the protected information for which compelled disclosure is sought would materially assist the Federal Government in preventing or mitigating (i) an act of terrorism; or (ii) other acts that are reasonably likely to cause significant and articulable harm to national security.” Sec. 5(2)(A).

The potential for subsequent unlawful disclosure of information by the source sought to be identified “shall not, by itself and without any showing of additional facts beyond such potential disclosure, be sufficient to establish that compelled disclosure of the protected information would materially assist the Federal Government in preventing or mitigating an act of terrorism or other acts that are reasonably likely to cause significant and articulable harm to national security.”

- *National Security Exception for Non-Leak Criminal Cases:* In any other criminal investigation or prosecution, Section 2’s privilege does not apply if the court finds by the preponderance of the evidence that disclosure to “materially assist” in preventing, mitigating, or identifying the perpetrator of an “act of terrorism” or “other acts that have caused or are reasonably likely to cause significant and articulable harm to national security.”
- *Deference:* In determining harm to national security, the court shall give appropriate deference to the executive branch’s specific factual showings.

## Section 6

- *Notification of Compelled Disclosure from Service Providers:* The bill has a separate section specifically addressing “covered service providers,” which include any person that transmits information of the customer’s choosing by electronic means, a telecommunications carrier or information service, an interactive computer service or information content provider, a remote computing service, an electronic communications service, or any commercial entity that maintains records related to a covered journalist.

If a party seeks from a covered service provider “any document or other information from the account of a person who is known to be, or reasonably likely to be, a covered journalist” the privilege applies “in the same manner” as it would apply to a covered journalist. Sec. 6(a).

- *Exception to Notification Requirement:* Notice can be delayed for up to 45 days if the court determines, by clear and convincing evidence, that “such notice would pose a substantial threat to the integrity of a criminal investigation, would risk grave harm to national security, or would present an imminent risk of death or serious bodily harm.” A judge could extend the delay for one additional 45-day period upon a new independent finding of a substantial threat. Sec. 6(c).

- *Protective Orders:* To determine whether to provide notice to a covered journalist, a judge shall consider whether a protective order to the covered journalist would mitigate any threats of harm.
- *Delayed Notice and ECPA:* The delayed notice requirements in this bill supersede the requirements for delayed notice in ECPA, 18 §§ U.S.C. 2703 and 2705(a).

## **Section 7**

- *Impact on Work Product Produced Without Confidentiality Agreement:* The FFIA does not supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure of information identifying a source who provided information without a confidentiality agreement or promise.

## **Section 8**

- *Ex Parte Submissions:* Upon a showing of good cause, a judge may consider ex parte submissions.
- *Contempt of Court:* A judge may find a covered journalist to be in contempt if the person fails to comply with an order compelling disclosure of protected information.
- *Timely Determination:* To the extent practicable, a judge shall make a determination under this act within 30 days of receiving the motion.
- *Expedited Appeal:* Determinations under this act are subject to interlocutory appeal, and the appellate court shall attempt to expedite the appeal.

## **Section 9**

- *No Preemption:* The FFIA does not preempt defamation claims or modify the requirements under the Privacy Act or grand jury secrecy rules. Nor does the FFIA create new obligations, affect or modify the authorities or obligations of a federal entity regarding the acquisition or dissemination of information under the Foreign Intelligence Surveillance Act of 1978.

## **Section 10**

- *Audit:* Requires the Inspector General of the Justice Department to conduct comprehensive audits of the use of the FFIA.

## **Section 11**

- *Definitions:* Explained in the summary of Sections 2 and 6.