

Federal Shield Law Stalled in Senate Judiciary

Digital Media and Data Privacy Law Blog

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Federal reporter's shield legislation has met with opposition in the Senate Judiciary Committee. The committee addressed S. 448, the Free Flow of Information Act of 2009, in a hearing on September 17 but, ultimately, failed to report the bill out of committee and onto the Senate floor. The inability to move the bill to the floor for a vote by the full Senate is a disappointment to the media and surely to Sen. Patrick Leahy (D-VT), the chairman of the committee and co-sponsor of the bill.

S. 448, as amended, generally protects journalists from having to disclose source information in a federal proceeding unless a federal court has determined that:

- (1) the party seeking to compel disclosure has exhausted all reasonable alternative sources,
- (2) (A) in a criminal investigation or prosecution, (i) there are reasonable grounds to believe a crime has occurred, (ii) the information sought is "essential" to the investigation, prosecution or defense, and (iii) in an investigation of disclosure of classified information, the disclosure has caused or will cause "significant and articulable harm" to national security, or
- (2)(B) in matters other than criminal investigations or prosecutions, the information sought is "essential to the resolution of the matter," and
- (3) nondisclosure would be contrary to the public interest, considering both the public interest in compelling disclosure and maintaining the free flow of information.

Before last week's hearing, an amendment was offered in an effort to strengthen national security protections, and much of Thursday's debate focused on the proposed national security carve-out. The protections from nondisclosure described above would *not* apply to information that would "materially assist in preventing or mitigating, or identifying the perpetrator of (1) an act of terrorism or (2) other significant and articulable harm to national security that would outweigh the public interest in gathering and disseminating the information or news at issue and maintaining the free flow of information." In other words, the federal shield would not apply, and disclosure could be compelled, in such circumstances.

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But, even with the added protections for national security, Sen. Diane Feinstein (D-CA) and others expressed reservations about how the bill would affect leaks of sensitive intelligence documents and other classified national security information.

Rather than voting on the bill in committee, Sen. Jeff Sessions (R-AL), the ranking member, suggested “slowing down” and focusing on the “problems” with the bill. Indeed, the hearing concluded without an up or down vote on the bill, which means that it remains in committee for now.

The federal shield legislation’s fate at this point is unclear. But judging by the remarks of the Senate Judiciary Committee members, particularly Chairman Leahy and Sen. Charles Schumer (D-NY), the committee members will continue working to resolve their differences and working with the Justice Department to craft a compromise. We’ll continue to update you on this important legislation.