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Journalists' Privilege: Overview of the Law and Legislation in the 109th and 110th Congresses

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Henry Cohen
Legislative Attorney
American Law Division

Kathleen Ann Ruane
Law Clerk
American Law Division

Congressional Research Service

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Summary

In *Branzburg v. Hayes*, the Supreme Court wrote journalists claim "that to gather news it is often necessary to agree either not to identify the source of information published or to publish only part of the facts revealed, or both; that if the reporter is nevertheless forced to reveal these confidences to a grand jury the source so identified and other confidential sources of other reporters will be measurably deterred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment." The Court held, nonetheless, that the First Amendment did not provide even a qualified privilege for journalists to refuse "to appear and testify before state or federal grand juries." The only situation it mentioned in which the First Amendment would allow a reporter to refuse to testify was in the case of "grand jury investigations ... instituted or conducted other than in good faith.... Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."

Though the Supreme Court concluded that the First Amendment does not provide a journalists' privilege in grand jury proceedings, 49 states have adopted a journalists' privilege in various types of proceedings; 33 have done so by statute, and 16 by court decision. Journalists have no privilege in federal proceedings.

On July 6, 2005, a federal district court in Washington, DC, found Judith Miller of the New York Times in contempt of court for refusing to cooperate in a grand jury investigation relating to the leak of the identity of an undercover CIA agent. The court ordered Ms. Miller to serve time in jail. Ms. Miller spent 85 days in jail. She secured her release only after her informant, I. Lewis Libby, gave her permission to reveal his identity.

Congress has considered creating a journalists' privilege for federal proceedings, and bills to adopt a journalists' privilege have been introduced in the 109th and 110th Congresses, in both the House and the Senate. These bills generally would provide for a more narrow privilege than the privileges provided by state laws. During the 109th Congress three bills were introduced: S. 1419, S. 2832, and H.R. 3323. Three bills have also been introduced in the 110th Congress: S. 1267, S. 2035, and H.R. 2102.

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Introduction

On July 6, 2005, a federal district court in Washington, DC, found Judith Miller of the New York Times in contempt of court for refusing to cooperate in a grand jury investigation relating to the leak of the identity of an undercover CIA agent. The court ordered Ms. Miller to serve time in jail. Ms. Miller spent 85 days in jail. She secured her release only after her informant, I. Lewis Libby, gave her permission to reveal his identity.

This incident drew attention to the question whether journalists should have a right to withhold information sought in judicial proceedings. Most states afford journalists some protection from compelled release of their confidential sources.[1] The question remains, however, as to whether a concomitant federal privilege exists.[2] The Supreme Court has addressed the issue of journalists' privilege under the First Amendment only once; in *Branzburg v. Hayes*, it left open the question of whether the First Amendment provides journalists with any privilege. Whether or not journalists are protected from revealing confidential sources under the First Amendment, Congress may provide that protection through legislation.

Overview of the Law

The Supreme Court has written only one opinion on the subject of journalists' privilege: *Branzburg v. Hayes*, in which the Court decided three cases. After explaining the grounds on which journalists seek a privilege, the Court noted that the reporters in the cases it was considering were seeking only a qualified privilege not to testify: "Although the newsmen in these cases do not claim an absolute privilege against official interrogation in all circumstances, they assert that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the

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[1] For an overview of state laws that provide journalist privileges, *see* CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes*, by Henry Cohen.

[2] *See* discussion of *In re: Grand Jury Subpoena, Judith Miller*, *infra*, note 8.

information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure."[3]

In *Branzburg v. Hayes*, however, the Court held that the First Amendment did not provide even a qualified privilege for journalists to refuse "to appear and testify before state or federal grand juries."[4] The only situation it mentioned in which the First Amendment would allow a reporter to refuse to testify was in the case of "grand jury investigations ... instituted or conducted other than in good faith.... Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification."[5]

The reporters in all three of the cases decided in *Branzburg* had sought a privilege not to testify before grand juries. At one point in its opinion, however, the Court wrote that "reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial."[6] The reference to criminal trials should be considered dictum, and therefore not binding on lower courts.

Branzburg was a 5-4 decision, and, though Justice Powell was one of the five in the majority, he also wrote a concurring opinion in which he found that reporters have a qualified privilege to refuse to testify regarding criminal conduct:

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the Court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.[7]

Powell's opinion leaves it uncertain whether the First Amendment provides a qualified privilege for journalists to refuse to testify before grand juries.[8] But "courts in almost every circuit around the country interpreted Justice Powell's concurrence, along with parts of the Court's opinion, to create a balancing test when faced with

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[3] *Id*. at 680.

[4] *Id*. at 667.

[5] *Id*. at 707-708.

[6] *Id*. at 691.

[7] *Id*. at 710.

[8] Justice Stewart's dissenting opinion in *Branzburg* referred to "Justice Powell's enigmatic concurring opinion." *Id*. at 725. Judge Tatel of the D.C. Circuit wrote, "Though providing the majority's essential fifth vote, he [Powell] wrote separately to outline a 'case-by-case' approach that fits uncomfortably, to say the least, with the *Branzburg* majority's categorical rejection of the reporters' claims." *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 987 (D.C. Cir. 2005) (Tatel, J., concurring) (citation omitted), *rehearing en banc denied*, 405 F.3d 17 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 545 U.S. 1150 (2005), *reissued with unredacted material*, 438 F.3d 1141 (D.C. Cir. 2006).

compulsory process for press testimony and documents outside the grand jury context."[9]

Whether or not the First Amendment provides a journalists' privilege, Congress and state legislatures may enact statutory privileges, and federal and state courts may adopt common-law privileges.[10] Congress has not enacted a journalists' privilege, though bills that would do so have been introduced in the 110th Congress and are discussed below. Thirty-three states and the District of Columbia have enacted journalists' privilege statutes, which are often called "shield" statutes.[11]

As for federal courts, Federal Rule of Evidence 501 provides that "the privilege of a witness ... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[12] The federal courts have not resolved whether the common law provides a journalists' privilege. The U.S. Court of Appeals for the District of Columbia, for one, "is not of one mind on the existence of a common law privilege [in federal court].... However, all [three judges on the panel for the case] believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing."[13]

As for state courts, those in 16 states provide common law protection, making a total of 49 states plus the District of Columbia that have a journalists' privilege.[14] Wyoming is the state without either a statutory or common-law privilege.

In 1980, the Department of Justice adopted a rule, which remains in effect without amendment, providing in part, "In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in every case must be to strike the proper

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[9] Association of the Bar of the City of New York, *The Federal Common Law of Journalists' Privilege: A Position Paper* (2005) at 4-5 [http://www.abcny.org/pdf/report/White%20paper%20on%20reporters%20privilege.pdf]

[10] Branzburg v. Hayes, 408 U.S. 706 (1972).

[11] These statutes are set forth in CRS Report RL32806, *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes.* Eighteen of these statutes existed at the time of *Branzburg*; 15 states and the District of Columbia have enacted them since 1972. Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 Yale Law and Policy Review 97, 110 (2002).

[12] Rule 501 also provides that, in civil actions and proceedings brought under state law, the privilege shall be determined in accordance with state law. The Federal Rules of Evidence are codified in title 28 of the U.S. Code.

[13] *In re: Grand Jury Subpoena*, *supra*, note 8, at 972.

[14] The figure of 18 appears in *In re: Grand Jury Subpoena*, *supra*, note 8, at 994, but since the decision in this case, two more states enacted shield statutes. Citations to 14 of these 18 appear in footnote 6 on page 18 of Association of the Bar, *supra,* note 9.

balance between the public's interest in effective law enforcement and the fair administration of justice."[15]

In re: Grand Jury Subpoena, Judith Miller

In re: Grand Jury Subpoena, Judith Miller is the federal court of appeals decision that declined to overturn the finding of civil contempt against journalists Judith Miller and Matthew Cooper for refusing to give evidence in response to subpoenas served by Special Counsel Patrick Fitzgerald in his investigation of the disclosure of the identity of a CIA agent.[16] After the Supreme Court declined to review the decision, Matthew Cooper agreed to testify, but Judith Miller continued to refuse and was imprisoned as a result.

The case was decided by a three-judge panel that issued an opinion for the court written by Judge Sentelle, with all three judges — Sentelle, Henderson, and Tatel — issuing separate concurring opinions. The court's opinion, citing *Branzburg*, held that the First Amendment does not permit journalists to refuse to testify before a grand jury and said (as quoted above) that the court was not of one mind on the existence of a common-law privilege but that, even if there is one, the special counsel had overcome it.

As for the three concurring opinions, Judge Sentelle expressed his view that there is no common-law privilege; Judge Henderson expressed her view that, in the interest of judicial restraint, the court should not "decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect"; and Judge Tatel addressed the issues of both the constitutional privilege and the common-law privilege.[17]

As for the constitutional privilege, Judge Tatel said that he was "uncertain," in the light of Justice Powell's "enigmatic concurring opinion" in *Branzburg*, that there is no "constitutional reporter privilege in the grand jury context." Even if there is, however, he agreed that such a privilege would not benefit Miller or Cooper in the case before the court. As for the common-law privilege, Judge Tatel concluded that "'reason and experience' [quoting Federal Rule of Evidence 501] as evidenced by the laws of forty-nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential

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[15] 28 C.F.R. § 50.10.

[16] *In re: Grand Jury Subpoena*, *supra*, note 8.

[17] Judge Tatel also wrote that, to conclude, as Judge Henderson had, "that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," requires the adoption of a standard by which to determine when the privilege is overcome. But, to adopt a standard without first determining that a privilege exists would be, if a privilege does not exist, to "establish a precedent, potentially binding on future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary." This would be "an undertaking hardly consistent with principles of judicial restraint." *Id*. at 989-990.

sources." Judge Tatel found, however, that, in the present case, "the special counsel has established the need for Miller's and Cooper's testimony."

Congressional Response in the 109th Congress

On July 18, 2005, identical bills were introduced in the Senate and the House (S. 1419 and H.R. 3323), introduced by Senator Lugar and Representative Pence, respectively, but both with bipartisan support.[18] On October 19, 2005, the Senate Committee on the Judiciary held a hearing on S. 1419. Previously, on July 20, 2005, the Committee held a hearing on "Reporters' Shield Legislation: Issues and Implications." Matthew Cooper, mentioned above in connection with *In re: Grand Jury Subpoena, Judith Miller*, reportedly testified that, "[w]ithout whistle-blowers who feel they can come forward to the reporters with a degree of confidence, we might never have known the extent of the Watergate scandal or Enron's deceptions or events that needed to be exposed."[19] The Department of Justice, however, opposed the legislation, with Deputy Attorney General James Comey stating in written testimony that "[t]he bill is bad public policy primarily because it would bar the government from obtaining information about media sources — even in the most urgent of circumstances affecting the public's health or safety or national security."

S. 1419/H.R. 3323

S. 1419/H.R. 3323 would establish a qualified privilege with respect to both the identity of a source and other information, but it would impose greater limitations on the ability to compel disclosure of the identity of a source than of other information. We will pose and answer questions about its salient features.

Where would the privilege apply? S. 1419/H.R. 3323 would apply in any "Federal entity," which the bill defines to include the executive branch, the judicial branch, and administrative agencies, but not the legislative branch. The bill would not apply in state courts or other state entities.

What would be protected from disclosure? S. 1419/H.R. 3323 would protect (subject to qualifications discussed below) any testimony and any documents. Its privilege would not apply to "any testimony or document that consists only of commercial or financial information that is not related to news gathering or the dissemination of news and information by the covered person."

Who could refuse to disclose? S. 1419/H.R. 3323 provides that a "covered person" — a person who may assert the privilege that the bill would create — is "an entity that disseminates information by print, broadcast, cable, satellite,

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[18] S. 1419 is a revision of Sen. Lugar's S. 340, 109th Cong., and H.R. 3323 is a revision of Rep. Pence's H.R. 581, 109th Cong. The two earlier bills are identical to each other. Another journalists' shield bill, S. 369, was introduced by Sen. Dodd, but Sen. Dodd later cosponsored S. 1419.

[19] Eunice Moscoso, "Proposed media shield law draws fire," *Atlanta Journal-Constitution* (July 21, 2005).

mechanical, photographic, electronic, or other means and that — (i) publishes a newspaper, book, magazine, or other periodical in print or electronic form; (ii) operates a radio or television broadcast station ... cable system, or satellite carrier, or ... (iii) operates a news agency or wire service." A "covered person" under the bill would also include "a parent, subsidiary, or affiliate of such an entity to the extent that such parent, subsidiary, or affiliate is engaged in news gathering or the dissemination of news and information; or ... an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity."

The bill's privilege would "apply to any testimony or document that a third party or a federal entity seeks from a communications service provider if such testimony or document consists of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person." A "communications service provider" would be defined as "any person that transmits information of the customer's choosing by electronic means; and ... includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in the sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230))." In other words, this provision would allow a covered person's telephone company or Internet service provider, for example, to assert a privilege not to disclose the covered person's phone or e-mail records.

The third party or federal entity seeking to compel testimony or a document from a communications service provider would have to give notice to the covered person who is a party to the business transaction with the communications service provider, and the covered person would be entitled to be heard by the court before the testimony or disclosure is compelled.

The bill's requirement as to what an entity must publish or operate to be a covered person would limit the bill's coverage so that it apparently would not protect bloggers or others who post on the Internet, except those who write for Webzines (unless a blog were considered a magazine). It would apparently also not protect a freelance reporter who gathered information while having no contract with an entity to do so. If he subsequently sold the information to an entity, however, he might be viewed as a "contractor" or as a "person who gathers ... news or information for such an entity"; this would depend upon how the quoted terms are construed.

S. 1419 apparently would also not protect people who gather news to disseminate solely on street corners, or who gather news that they attempt to publish solely in letters to the editor.

What exceptions would permit disclosure to be compelled? S. 1419/H.R. 3323's privilege would be qualified with respect both to the identity of a source and to other information, but it would impose additional limitations on compelling disclosure of the identity of a source. A federal entity would not be permitted to compel disclosure of any testimony or document — that would reveal sources or other information — unless a court determines by clear and convincing evidence that the entity "has unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably

be obtained other than a covered person." In addition, "in a criminal investigation or prosecution based on information obtained from a person other than the covered person," the court would have to find, for disclosure to be compelled, that "there are reasonable grounds to believe that a crime occurred" and that "the testimony or document sought is essential to the investigation, prosecution, or defense.... [I]n a matter other than a criminal investigation or prosecution, based on information obtained from a person other than a covered person, the testimony or document sought [would have to be] essential to a dispositive issue of substantial importance to the matter." To compel disclosure of the identity of a source or of information that could reasonably be expected to lead to the discovery of the identity of a source, the court would have to find, in addition to the above items, that disclosure is (1) "necessary to prevent imminent and actual harm to national security," (B) "would prevent such harm," and (C) "the harm sought to be redressed ... outweighs the public interest in protecting the free flow of information."

Update: On May 18, 2006, Senator Lugar introduced a new journalists' privilege bill — S. 2831, 109th Congress. The Senate Committee on the Judiciary held hearings on it on September 20, 2006.

Congressional Response in the 110th Congress

The 110th Congress has introduced legislation similar to the bills introduced in the 109th Congress. The bills in the 110th Congress appear to expand the definition of "covered persons." The privilege provided in the 110th Congress bills also appears to have a narrower scope than the privilege that the 109th Congress bills would have provided.

On May 2nd, 2007, companion bills, titled the "Free Flow of Information Act of 2007," were introduced in the Senate and the House (S. 1267 and H.R. 2102) by Senator Lugar and Representative Boucher, respectively. On August 1, 2007, after lengthy debate, the House Judiciary Committee approved H.R. 2102 with amendments added by voice vote, despite the reports of concern expressed by certain Members that the definition of "journalist" remained unclear in the final version of the bill.[20]

The companion bill, S. 1267, remains in committee and a new version of the Free Flow of Information Act of 2007, S. 2035, was introduced in the Senate on September 10, 2007, by Senator Arlen Specter.

S. 1267, S. 2035, and H.R. 2102 would establish a qualified privilege with respect to both the identity of a source and other information obtained by covered persons with the assurance of confidentiality.

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[20] Elaine S. Povich, *Journalist Shield Legislation Moves to the House Floor*, CongressDaily, Aug. 1, 2007, *available at* [http://nationaljournal.com/members/markups/2007/08/mr_20070801_7.htm].

S. 1267/H.R. 2102

Where would the privilege apply? S. 1267/H.R. 2102 would apply the privilege in any "Federal entity," which the bill defines to include the executive branch; the judicial branch; and any "administrative agency of the Federal Government with the power to issue a subpoena or other compulsory process," but not the legislative branch. The privilege provision in the bill would not apply in state courts or other state entities.

What would be protected from disclosure? S. 1267/H.R. 2102 would protect (subject to qualifications discussed below) any testimony and any documents, defined as "writings, recordings and photographs as defined by Federal Rule of Evidence 1001 (28 U.S.C. App.)."

Who could refuse to disclose? S. 1267/H.R. 2102 provides that a "covered person" means "a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person." Journalism is defined as "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."

The bill's privilege also would apply to compelled disclosure from communications service providers. The privilege would apply to any document, record, information or other communication that relates to a business transaction between a communications service provider and a covered person, if that document or testimony would fall under the privilege when sought from the covered person. A "communications service provider" would be defined as "any person that transmits information of the customer's choosing by electronic means; and ... includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in the sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230))." In other words, this provision would allow a covered person's telephone company or Internet service provider, for example, to assert a privilege not to disclose the covered person's phone or e-mail records.

The third party or federal entity seeking to compel testimony or a document from a communications service provider would have to give notice to the covered person who is a party to the business transaction with the communications service provider, and the covered person would be entitled to be heard by the court before the testimony or disclosure is compelled.

What exceptions would permit disclosure to be compelled? S. 1267/H.R. 2102's privilege would be qualified with respect both to the identity of a source and to other information. A federal entity would not be permitted to compel disclosure of any testimony or document — that would reveal sources or other information — unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to the covered person, that the entity "has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document."

In addition, "in a criminal investigation or prosecution based on information obtained from a person other than the covered person," the court would have to find, for disclosure to be compelled, that "there are reasonable grounds to believe that a crime has occurred" and that "the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution.... [I]n 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 [would have to be] essential to the successful completion of the matter."

To compel disclosure of the identity or of information that could reasonably be expected to lead to the discovery of the identity of a source, the court would have to find, in addition to the above items, that disclosure is (A) "necessary to prevent imminent and actual harm to national security"; (B) "is necessary to prevent imminent death or significant bodily harm"; or (C) "disclosure of a source is necessary to identify a person who has disclosed" a trade secret of significant value, individually identifiable health information, or nonpublic personal information.

The court must also 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."

Two amendments to H.R. 2102 were approved by the House Judiciary Committee. The first amendment relaxed the standard that would compel disclosure of the identity of a source or information that would lead to the discovery of the identity of a source from "imminent and actual harm to national security," to "significant harm to national security." The second amendment added a provision that would allow disclosure to be compelled to prevent acts of terrorism.

S. 2035

S. 2035 is substantially similar to both S. 1267 and H.R. 2102, but differs from those two in the exceptions it would create to the privilege. Under the exceptions, the federal entity would not be required to make the initial showing in order to compel testimony of a covered person. S. 2035 also seeks to more precisely define what types of information, sources, and work product would be protected by the privilege.

What circumstances are excepted from the privilege? S. 2035 would create three situations that would be excepted from the protections the bill would provide. First, the privilege would not apply to

> any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person, including any physical evidence or audio recording of the observed conduct, if a Federal court determines that the party seeking to compel disclosure has exhausted reasonable efforts to obtain the information from alternative sources.

However, when "the alleged criminal or tortious conduct is the act of communicating the documents or information at issue," this exception to the privilege would not apply.

S. 2035 would not apply the privilege to "any protected information that is reasonably necessary to stop, prevent or mitigate a specific case of death; kidnapping; or substantial bodily harm."

S. 2035 also would provide an exception for the prevention of terrorist activity or harm to national security. The privilege would not apply "to any protected information that a Federal court has found by a preponderance of the evidence would assist in preventing a specific case of terrorism against the United States; or significant harm to national security that would outweigh the public interest in newsgathering and maintaining the free flow of information to citizens."

What sources are considered confidential? S. 2035 would provide that only those sources who provide information, records, communication data, or documents with the promise of confidentiality would be covered by the privilege.

What is protected information? S. 2035 defines protected information as

> 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 any records, communications data, documents or information that a covered person obtained or created as part of engaging in journalism; and upon a promise or agreement that such records, communication data, documents, or information would be confidential.