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September 27, 1986

Mr. DANTORTH. I thank the distinguished Senator for this clarification.

Mr. HATCH. Mr. President, I am pleased to join the amendment Senator Laxey and I have worked together to fashion a balanced protection for law enforcement records.

We have added protections for foreign intelligence Terrorism records. On this portion, we owe gratitude to Senator Denton who spoke for the Terrorism Subcommittee added this amendment.

The free waivers of this change also parallel the beneficial goal of media access to some records.

These and many other provisions will greatly strengthen the effectiveness of this national drug crisis. Another important provision involves the Freedom of Information Act. This section will protect a few narrow law enforcement files from mandatory disclosure. This section was nearly the same as part of S. 774 which unanimously passed the Senate last Congress.

Most important, this section would directly improve drug enforcement. In 1982, the DEA did a study on the impact of FOIA on DEA investigations. That study found, among other things:

35 percent of the DEA's agents considered the FOIA to be inhibiting their operations. An additional 28 percent of DEA investigations (involving the illegal use of confidential sources) involved the recruitment and use of confidential sources. Of this total:

(a) 47 percent of the enforcement investigations involved difficulty obtaining information from witnesses or defendants. Sixteen percent of these problems were directly attributed to the FOIA; and

(b) 26 percent of the enforcement investigations involved a reluctance or an unwillingness on the part of informants to cooperate with the agents. In these instances, the instances were directly attributed to the FOIA.

More than 60 percent of the FOIA requests were received by DEA originating from the present government. This study focused on only investigations that were actually initiated. No insight was gained as to the opportunities lost on investigations that were not developed because persons failed to cooperate with law enforcement for fear of FOIA exposures. In the final analysis, the loss of such investigative opportunities may far outweigh the adverse effects revealed in the study. That 1982 study concluded that many investigations are aborted, compromised, or reduced in scope because of FOIA exposure.

This is not the only study establishing the problem. In 1973, the Senate Judiciary Committee on Criminal Law concluded that:

"It can safely be said that none of the solicitors for FOIA foresees the host of difficulties that the legislation would create for the law enforcement community. They are beseeched to foresee the utilization that would be made of the act by organized crime and other elements or the danger it would pose to the personal security of individuals and zero...Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request."

In that same year the General Accounting Office released a study detailing 49 instances of potential informants refusing to cooperate with law enforcement after receiving a FOIA request. In 1979, FBI Director Webster supplied documentation of over 100 instances of FOIA interference with law enforcement investigations involving informants. He stated that his list was expanded to 204 instances in 1983, even more examples brought out by his testimony. In fact, no fewer than five different reports have concluded that the impact of FOIA has decreased the ability of law enforcement officers to enlist informants and carry out confidential investigations. Among these, Attorney General's 1981 Task Force, the FBI, and the DEA should be amended because it is used by lawbreakers "to evade criminal investigation or retaliate against informants."

The mainstay of drug enforcement today is the volunteered assistance and background information provided to Federal agencies by confidential sources, particularly for key criminal enterprises relating to narcotics, organized crime, and terrorism. However, because of the large volume of FOIA requests from known or suspected criminals, many sources and "street" informants also become reluctant to assist the FBI or DEA because of fear that Government cannot protect their identities. This is not merely a perceived problem. Indeed, confidential law enforcement information is disclosed through the legal process.

Perhaps I could explain these reservations more carefully. FOIA contains an exemption that is supposed to protect informants, but even a quick look at that language reveals that the protection is not sufficient. FOIA protects "investigative records compiled for law enforcement purposes but not only to the extent necessary for the proper functioning of a confidential source."

In 1973, our nation was in the middle of a drug crisis. Let us reexamine all of our laws that are in place to protect our people and our institutions from this scourge.

It is my understanding that if this amendment is reported in a conference and adopted in the Senate, it will be necessary to have the House also to report it in conference. If this is the case, I will move to instruct the conference committee to report it to the Senate, and then I will do the same.

I would like to ask the Senator from New York a question about his amendment. I understand that he has written a letter to Senator Laxey and myself saying that he would like to see us comment on his amendment. If he would like, I would certainly be happy to do so, but I think it would be better for him to make a statement before the Senate. I would like to ask the Ranking Democrat from the Judiciary Committee to comment on the amendment because he is the author of the legislation.
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but is not an investigatory record, it must be disclosed. If a record would disclose an informant's identity but was not compiled for law enforcement purposes, it must be disclosed. Thus, if an informant's identities and is not an investigatory record, then the Agency must provide a summary of recent successes in drug cases submitted to the Drug Policy Board, it must be disclosed. Is this the kind of protection that our informants deserve? After all, they have put their lives on the line to help us control the drug crisis.

Let us look further at the requirement that a record could only be disclosed if it "would disclose" the identity of an informant. This is a dangerous standard. If a record says that the informant, Joe Jones, drove away in a green sedan, the language of the statute allows the deletion of the informant's name, but that is not the only identifier. The requestor who may be the relator, in the Senate or over 80 percent of those requesting information from the DEA in 1985 were from the criminal element, knows that he only has one friend with a green sedan. Yet the DEA has no way of knowing if that information "would identify" the informant. The language of the statute does not clearly protect that information.

Let's look at another example. The DEA record would mention only that the transaction was a "sle." The statute does not necessarily preclude deletion of that term since it refers to half of humanity. It does not clearly identify informant, but what the DEA does not know is that the criminal requestor knows that he only told one female, his girlfriend, about his crime. He has found the informant. Without going into more details, I assure my colleagues that this last example is not hypothetical.

The problem with the narrow "would disclose" language is that there is no way for the DEA to know what the criminal requestor knows. The criminal may know that one of his friends always calls a party a "bash" or a soft drink a "pop." If one of those words appear in a requested record, he has identified the informant.

I could go on with other examples. For example, the statute says a record may be withheld only if disclosed "only by" that informant. This means that if the DEA also received the information from another informant, it cannot protect either of the two informants because neither are independent sources. Yet the criminal element always worries about such technicalities, it is going to take action when it identifies an informant.

In 1978, our colleague, Senator Nunn held a hearing on this subject. He interviewed an admitted murderer and convicted felon, Gary Bowdach. This is a verbatim rendering of that discussion:

Mr. Nunn. Turning to the Freedom of Information Act, what was your motivation in filing FOIA requests on your own behalf.

Mr. Bowdach. To try to identify the informants that revealed the information to the agencies.

Mr. Nunn. Why did you want to get their names.

Mr. Bowdach. To know who they were, to take care of business later on.

Mr. Nunn. To take care of business later on? You mean by that to murder them.

Mr. Bowdach. Yes sir.

What more needs to be said? This murderer states forthrightly that FOIA is used to take revenge on informants. To address this problem, this amendment recommends very modest changes. It does not gut the information act, but simply states that records may be withheld if it is reasonable to expect that the record could lead to disclosure of the informant's identity. This is reasonableness test that can be tested in the courts. With this background, it is easy to see why this language unanimously passed the Senate last Congress.

The current seventh exemption exempts investigatory records compiled for law enforcement purposes if those records also meet one of six further requirements (A to F). The six further criteria are intended to protect law enforcement proceedings and against disclosures to suspects, fair trials, personal privacy, identities of informants, investigative techniques, and the life and safety of law enforcement personnel.

The current threshold language of the exemption means that records may be eligible for protection if they are investigatory records compiled for law enforcement purposes. This could mean that a record which jeopardizes one of the six requirements, such as "endanger the life of a law enforcement person," could be disclosed simply because it does not satisfy the informalistic rest of being an investigatory record. This exalts form over substance.

The current language of (7)(A) requires an agency to show that disclosure of a record "interferes" with an enforcement proceeding. At the outset of an investigation, however, the agency often does not know which aspects of a record, if disclosed to the suspect, would interfere with the investigation. Thus the existing language could disclose to a suspect vital information about an ongoing investigation.

The current language of (7)(D) requires that a record conclusively "disclose the identity of an informant," before it qualifies for exemption. This ignores the commonsense principle that some information that does not in itself identify the informant can, in some circumstances known only to the suspect, result in such identification. This is particularly true in organized crime investigations because of the institutional memory of these organizations.

The threshold language about "investigatory" has meant that law enforcement manuals were not covered by the exemption for law enforcement techniques and procedures. The courts have also reached conflicting results about the protection to be afforded procedural guidelines and other law enforcement techniques and procedures.

Finally, the language in (7)(F) has an obvious and absurd limitation. Under this language, records are only exempt if they are records of a police officer, without giving similar protection to the life of any natural person.

Some kinds of investigations are particularly difficult to protect from abuse under FOIA. These are characteristically the kinds of investigations that involve organized crime, terrorism, and foreign counterintelligence. In these instances, the suspects often have the time, resources, and inclinations to use FOIA to get the identities of informants, the progress achieved by various investigations, and methods to avoid detection and prosecution. In short, these entities have in common a detached coordinating agent with the ability and motivation to circumvent the intent of the exemptions.

In hearings before the Constitution Subcommittee, FBI Director Webster submitted 20 recent examples of FOIA substantially jeopardizing law enforcement.

This amendment would exempt from disclosure any information that could reasonably be expected to disclose a confidential source, including a State or local government agency or a foreign government. This change would afford greater protection to information which should clearly be exempt from disclosure due to its serious implications for law enforcement investigations and the safety of confidential informants.

The present exemption that would disclose a confidential source—the rationale is to broaden the definition of confidential source to include State, local, and foreign governments. Some of the formalistic requirements of exemption 7, such as the threshold requirement that the record must be investigatory, are deleted to focus on protecting the harm to law enforcement functions.

With regard to organized crime, there is much evidence of the existence of sophisticated networks of FOIA requestors. Under the current FOIA there is no record that accompanies FOIA requests by organized criminal groups who have both the incentive and the resources to use the act systematically—to gather, analyze, and piece together segregated bits of information obtained from agency files. These sophisticated criminals can use the FOIA to determine whether an investigation is being conducted on him or his organization, whether
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There being no objection, the letter, as ordered to be printed in the Record, as follows:

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, D.C., September 27, 1986.

Majority Leader, U.S. Senate, Washington, D.C.,

DEAR SENO. Dole: The Omnibus Drug Enforcement, Education, and Control Act contains a provision vitally important to FBI efforts to strengthen drug and organized crime law enforcement programs. This provision would amend the provisions of Information Act to offer needed protection for confidential undercover informants and investigators.

The cooperation of confidential sources is a mainstay of nearly every successful drug enforcement effort. However, because of the large volume of FOIA requests from known or suspected criminals, many such sources have become reluctant to assist the FBI or the DEA. Moreover, FOIA disclosure on numerous occasions compromised investigations and jeopardized the safety of informants.

No fewer than five separate reports on the impact of the new, recently completed FOIA studies have been made by the General Accounting Office. These have revealed that the number of FOIA requests for public documents, whether operated for profit or not, should not qualify for a waiver under the standards of this bill. Congress never intended such a result and does not change its intention with language.

This amendment also adds the words “in the public interest because it” to bring the new language more into conformance with the standards and language of the law.

This change also strikes from the provisions of the bill allowing reduction of fees the words “a requester is indigent and can demonstrate a compelling need.” By striking this language, we intend to eliminate prisoners and other indigents from eligibility for reduced fees.

Finally, this provision limits significantly the present review standard found in H.R. 6414, which applies the words “reduction or” to specify that denovo review is to apply only to the waiver provisions of this section. Thus, denovo review applies to review of eligibility of federal, financial-representation, and commercial requesters for waivers. It does not apply to reductions of fees requested under the standards of (iii). These reduction or waiver issues will continue to be reviewed under the arbitrary and capricious standard.

The scope of denovo review is also limited to the administrative record. This denovo standard should not be construed to apply to any matters not raised or any evidence not presented in the administrative record.

It’s also important to note that this provision makes commercial requesters subject to the administrative record.

Anyone who has actually viewed programming from a satellite television station will find that many channels are indistinguishable from one another in terms of network, backhaul, or affiliate feeds. With dozens of sporting events, for exam