



CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

January 21, 2010

S. 448

Free Flow of Information Act of 2009

As ordered reported by the Senate Committee on the Judiciary on December 10, 2009

CBO estimates that implementing S. 448 would cost about \$500,000 annually over the 2011-2013 period from appropriated funds. The bill would not affect direct spending or revenues. S. 448 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

S. 448 would exempt journalists from being compelled to disclose protected information (confidential sources or related records, communications, or documents) unless a court finds that one of the following exceptions apply:

- The party seeking protected information has exhausted all reasonable alternative sources;
- In criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred, the Attorney General has certified that the decision to request compelled disclosure is consistent with federal regulations, if applicable, the sources or records sought are essential to the investigation, prosecution, or defense, and the journalist has not sufficiently shown that disclosure would be contrary to the public interest;
- In all other matters, the protected information sought is essential to the resolution of the matter and the public interest in compelling disclosure of the document or information involved outweighs the public interest in gathering or disseminating news information;
- The protected information was obtained during the alleged criminal conduct of the reporter;

- The information sought is necessary to prevent certain actions, including death and kidnapping, among others; and
- The information sought would materially assist the government in preventing or mitigating an act of terrorism or other act that could harm national security.

Under the bill, communication service providers (that is, telecommunications carriers and Internet service providers) could not be compelled to provide testimony or documents relating to a reporter's phone, email, and computer use, unless one of the above exceptions applies. S. 448 also would require the Department of Justice (DOJ) Inspector General to conduct an audit of the effects of the bill's provisions during the period between enactment and December 31, 2012, and to submit a report to the Congress by June 30, 2013.

Under current law, requests to subpoena journalists on matters related to federal cases typically originate within DOJ. Federal prosecutors can request a subpoena of a journalist from a court after an internal review by DOJ. Information from DOJ indicates that very few subpoena requests seeking confidential source information are approved each year (there were a total of 19 over the 1991-2007 period) and that it is unlikely that the bill would substantially increase such requests. Thus, CBO assumes that there would be very few instances each year when such a subpoena could be challenged in court.

Journalists already challenge some subpoenas under current law, and S. 448 would clarify the instances when a journalist would be compelled to produce information or testify. The bill might increase federal attorneys' litigation duties if more subpoenas would be challenged than under current law, but given the small number of potential cases, CBO estimates that any increase in federal spending would be insignificant. In addition, based on information from the Administrative Office of the United States Courts, CBO expects that the bill would not appreciably increase the courts' workload.

Based on information from DOJ, we expect that the department would need to hire about three people to carry out the audits required by S. 448. CBO estimates that it would cost about \$500,000 annually over the 2011-2013 period for DOJ to complete the audits and report required by the bill. Such spending would be subject to the availability of appropriated funds.

On March 27, 2009, CBO transmitted a cost estimate for H.R. 985, the Free Flow of Information Act of 2009, as ordered reported by the House Committee on the Judiciary on March 25, 2009. H.R. 985 would not require DOJ audits, and CBO estimated that implementing that bill would have no significant effect on the federal budget.

The CBO staff contact for this estimate is Mark Grabowicz. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.