slip through our hands during the closing days of this Congress. Moreover, the health of our citizens and the security of our institutions demand that we take legislative action to help contain this plague on all mankind. Accordingly, I urge my colleagues to fully support this rule.

Mr. PEPPER. Mr. Speaker, for purposes of debate only, I yield 2 minutes to the able gentleman from Oklahoma [Mr. ENGLISH].

Mr. ENGLISH. Mr. Speaker, there are several sections in the bill we are now considering that amend the Freedom of Information Act. I was somewhat surprised several days ago when I learned that the Senate had chosen this method of amending the FOIA. We have tried for some time to develop an acceptable set of FOIA amendments and have been unable to reach any agreement.

I would not have chosen this time or this bill for these amendments, but I am pleased to say that, viewed together, the changes proposed by the Senate represent an overall improvement in the FOIA.

There are two major sets of changes in the Senate bill. The first set relates to law enforcement. The changes to the seventh exemption relating to law enforcement records are based on proposals in S. 774 from the 98th Congress. The three so-called Glomar provisions are taken from a bill negotiated by my subcommittee staff with the Justice Department.

Together, these law enforcement amendments make only modest changes to the FOIA. For the most part, the changes to the seventh exemption only codify existing law. Except for a slight expansion of exemptions (7)(E) and (7)(F), no information that is subject to disclosure today will be withholdable under the revised seventh exemption.

The three so-called Glomar exclusions will expand the amount of information that is subject to withholding. However, the expansion is slight, precisely defined, and fully justified. For records regarding ongoing investigations, informants, foreign intelligence, counterintelligence, and international terrorism, the FBI will be able to withhold information on the existence of such records in cases where disclosure of the existence of the records will reveal information that should be protected. No substantive records that are disclosable today will be subject to withholding under these exclusions.

I am pleased to learn that these very modest provisions will solve the problems confronting law enforcement agencies. The small scope of the reforms confirms my previously stated views that the broad complaints from the law enforcement community about the negative effects of the FOIA were greatly exaggerated. Had the Justice Department limited its legislative proposals to these minor changes, we could have reached agreement on FOIA reform years ago.

The second set of changes involves the fee and fee waiver structure of the FOIA. The language is taken from a bill—H.R. 6414—that I introduced during the 98th Congress along with TOM KINDNESS, ranking minority member on the Government Information, Justice, and Agriculture Subcommittee.

While I am not in complete agreement with the Senate changes to this proposal, I am pleased with several important features. First, fees for requests by the news media are minimal. Second, the concept of news media is very expansive and includes a broad range of those in the business of publishing or disseminating Government information. Third, the standard for fee waivers is broader than current law and will require the granting of more fee waivers. Finally, although public interest groups do not fall within the most favorable fee category, all public interest groups—regardless of their status or identity or function—will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers.

We have made several technical and minor changes to the FOIA provisions as passed by the Senate. We have also included a transition provision to clarify the bill's effect on pending requests. Other changes were considered, but any substantive questions that may have surrounded the Senate language have been resolved by the statement made by Senator LEAHY in the CONGRESSIONAL RECORD of September 30, 1986. I fully concur in that statement. I consider that Senator LEAHY's statement—and the statement made here today by Mr. KINDNESS and myself—reflect the intent of the Congress in making these changes to the FOIA. It is unnecessary, therefore, to amend the text of the bill since the intent has been so clearly stated.

In order to clarify the intent and purpose of t e amendments for the benefit of our colleagues in the House, TOM KINDNESS—ranking minority member of the Government Information, Justice, and Agriculture Subcommittee—and I have jointly put together written explanatory materials that would have been included in a committee report. My statement includes an explanation of the fee waiver provisions.

SUMMARY OF HOUSE CHANGES TO THE FREEDOM OF INFORMATION ACT AMENDMENTS IN THE ANTI DRUG ABUSE ACT OF 1986

(1) The two Freedom of Information Act sections have been reorganized into four sections (§§1801-1804), including a short title. Wording, cross references, and typographical errors have been corrected.

(2) An effective date provision has been added as section 1804. The law enforcement provisions become effective upon enactment and are fully applicable to all requests in process or in litigation. The fee and fee waiver provisions become effective 90 days after enactment. Once effective, these fee provisions are fully applicable to all requests in process or in litigation, except that no review costs can be charged to any requests made before an agency adopts regulations on or after the effective date.

(3) The exclusion for foreign intelligence, counterintelligence and international terrorism contains two bracketed references defining these terms. These references are unnecessary or inappropriate and have been deleted. This is a technical change, and the definitions referenced in the Senate version are intended to remain applicable.

(4) In the revision to exemption (7)(C) relating to withholding or records on privacy grounds, the words "could reasonably be expected to" are deleted and the word "would" is included. This change makes the privacy standard in the law enforcement exemption consistent with the existing standard in exemption 6.

(5) A limitation on "review costs" has been added to clarify that only direct costs incurred during initial examination can be charged but that review costs may not include any costs in resolving issues of law or policy

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ANALYSIS OF THE FEES AND FEE WAIVERS AMENDMENTS TO THE FREEDOM OF INFORMATION ACT INCLUDED IN THE ANTI-DRUG ABUSE ACT OF 1986 (H.R. 5484)

H.R. 5484 includes several provisions amending the Freedom of Information Act. The new language changes the rules governing fees and fee waivers for requests made under the FOIA.

Each agency is required to promulgate regulations specifying the schedule of fees and establishing procedures and guidelines for determining when such fees should be waived or reduced. Agency fee schedules must conform to guidelines promulgated by OMB.

There are three categories of requests for purposes of assessing fees. First, when records are requested for commercial use, fees shall be limited to reasonable standard charges for document search, duplication, and review. This provision allows the charging of review costs for the first time under the FOIA, but review costs may only be charged to commercial users. A commercial user is one who seeks information solely for a private, profit making purpose. Higher fees for commercial users will recover more of the costs of processing requests when one business uses the FOIA to seek information about another under circumstances in which there are no public interest aspects to the disclosure.

Except for requests that fall within the second category, requests from a for-profit corporation or its representative may be presumed to be for commercial use unless the requester can demonstrate that the request qualifies for a more favorable fee schedule. A request from a public interest group, nonprofit organization, labor union, library, or similar organization, or a request from an individual may not be presumed to be for commercial use unless the nature of the request suggests that the information is being sought solely for a private, profit making purpose. The public redissemination of documents or information obtained from the government is specifically intended not to be treated as a commercial use regardless of the identity or status of the requester.

Agency regulations must include procedures whereby a requester can determine its status for purposes of fee categories and can supply adequate justification at the time the request is made. Agency procedures and requirements must be simple, reasonable, and limited. Sworn or notarized statements may not be routinely required. An agency may not conduct an extensive proceeding to determine the status of a requester. Doubts should be resolved in favor of the requester. If there are multiple requesters, the status of the most favorable requester is controlling. Whenever possible, processing of a request should continue while the proper fee category is being determined.

The House amendment adds a provision limiting review costs to the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed. Also, the House version provides that review costs may not include any costs incurred in resolving issues of law and policy that may be raised in the course of processing a request. Once a document has been reviewed in response to a request—whether from a commercial requester or otherwise—no charge may be imposed on any subsequent requester for reviewing that document.

A similar limitation on review costs was included in H.R. 6414 (98th Congress), in the bill (S. 774) that passed the Senate in the 98th Congress, and in a draft bill that was the subject of negotiations with the Justice Department earlier this year. See the discussion of review costs in Senate Report 98-221. The omission of the review cost limitation in the Senate bill was probably inadvertent.

Second, when records are not sought for commercial use and are requested by (a) an educational or noncommercial scientific institution whose purpose is scholarly or scientific research, or (b) a representative of the news media, fees shall be limited to reasonable standard charges for document duplication. A request made by a professor or other member of the professional staff of an educational or scientific institution should be presumed to have been made by the institution. A request by a reporter or other person affiliated with a newspaper, magazine, television or radio station, or other entity that is in the business of publishing or otherwise disseminating information to the public qualifies under this provision.

When a requester who is a representative of the news media has provided basic identification of his or her status (such as a request filed on news media letterhead; display of press credentials; or reasonable assurance that the information is being sought for public dissemination), the request must be treated under the second fee category. Free lance writers and book authors who can demonstrate that their work is likely to be published also qualify under the second fee category.

No definition of "news media" has been included in the bill. It is difficult to write a comprehensive definition. "News media" obviously includes traditional newspapers such as the Washington Post, New York Times, Daily Oklahoman, and Journal of Commerce. Similarly, magazines, newsletters; television, radio, and other broadcasters; and book publishers also automatically qualify as traditional news media. Reporters, columnists, and writers whose work is published in any of these outlets also qualify.

The purpose of low fees for the news media is to further the availability of nonexempt information in government files to the public. Therefore, other vendors of information from agency files to public users also qualify as news media, even though the means of dissemination may not include standard newspaper or magazine formats. For example, a computerized information service that provides subscribers with access to information obtained from the government qualifies as news media under the FOIA because the services furthers the availability of government information to the public in the same way that a traditional newspaper does. Requests from these other information vendors whose dissemination functions are similar to that of newspapers and broadcasters must be treated in the same fashion.

The bill provides that most favorable fee provision for those in the information dissemination business because the use of the FOIA for public dissemination of information in government files is in the public interest. Wide dissemination of government information supports public knowledge and oversight of government activities. The fact that a newspaper, publisher, information vendor, or author seeks to make a profit through publication does not affect the public interest nature of the disclosure.

The republication or dissemination of government information by a private concern is in the public interest just as much as the original distribution by the agency that prepared the information. The public benefits directly from broader availability of the information. In addition, the private dissemination actually saves the government effort and money that would otherwise be expended in providing the information to the public. In short, therefore, disseminating information to the public is not intended to be a commercial use under the bill.

This broad understanding of "news media" will allow information to be readily disclosed by an agency whenever a newspaper or other news media has determined that there is an interest in the information. The FOIA is intended to foster the free market in ideas and information. Nonexempt government information compiled at taxpayers expense should be widely available so that the benefits of the information can be shared. Easy and inexpensive access to government information by news media will prevent agencies from monopolizing information distribution and from controlling public debate in any way. This is also the policy behind the provision of the Copyright Act that prevents the federal government from copyrighting information. See also the discussion of copyright issues in House Report 99-560.

It is not the role of government agencies to determine whether information is newsworthy. That is the responsibility of the news media. In the long run, it will be better and more efficient if agencies provide disclosable information to the news media without the costly, unnecessary battles over fees that have been a familiar feature in FOIA history. See the discussion of the first twenty years of the FOIA in House Report 99-832.

If a qualifying requester seeks information both for public dissemination and for a commercial or other use, the requester retains full entitlement to the favorable rates for dissemination. For example, a request from a public interest group falls under the third fee category. However, a request from reporter or writer for a general circulation magazine published by the public interest group would qualify under the second fee category for news media. A request for information that is sought for possible publication is still a request from the news media even though the public interest group might also want the information for other purposes. This will keep fees from becoming an unnecessary barrier to disclosure and will keep agencies from inquiring unnecessarily into all intended uses of the information that is being sought.

Third, for all other requesters, fees are limited to reasonable standard charges for document search and duplication. This is current law. Most requests from individuals will fall under this category. However, a request from an individual for Privacy Act files pertaining to himself or herself will continue to be governed by the limited fees permitted under that Act.

All of the fees chargeable to any requester may be waived or reduced if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. This change is specifically intended to remove from further debate or consideration the erroneous standards included in the January 1983 Justice Department fee waiver guidelines. Those guidelines have been heavily criticized by both House and Senate Committees as being inconsistent with the letter and the spirit of the FOIA. See the discussion of fee waivers in Senate Report 98-221 and in House Report 99-832. While legislative action to overturn the fee waiver guidelines is probably unnecessary, the opportunity to clarify the law is welcome.

House action today on fee waivers is consistent with the view expressed in House Report 99-832 that current practices with respect to fee waivers are too restrictive and that legitimate requests for fee waivers are being improperly denied because of the 1983 Justice Department guidelines.

The new fee waiver standard provides that waivers must be granted when a requester is seeking information on a subject relating to the manner in which a government agency is carrying out its operations or the manner in which an agency program affects the public. A requester is likely to contribute significantly to public understanding if the information disclosed is new; supports public oversight of agency operations, including the quality of agency activities and the effect of agency policy or regulations on public health or safety; or otherwise confirms or clarifies data on past or present operations of the government.

Any requester, regardless of its identity or status under other provisions of the FOIA can qualify for a fee waiver. Even a commercial requester can qualify for a fee waiver if the standard is met, but a commercial requester seeking information about a competitor will not normally be able to meet the standard.

As with the fee waiver standard that is superseded, the new fee waiver standard should be liberally construed in order to encourage full and complete disclosure of information in the possession of the government that does not require withholding for a public or private interest. The new standard is specifically intended to make it easier for more requesters, especially noncommercial requesters, to qualify for fee waivers. Anyone who qualifies under the existing standard will also qualify under the new language.

The requirement that the information will "contribute significantly" to public understanding should be objectively evaluated. For example, in *Better Government Association v. Department of State*, 780 F.2d 86 (D.C. Cir. 1986), a public interest organization sought access to information about the money spent by U.S. embassies entertaining visiting dignitaries. The State Department refused to grant a fee waiver, but this is precisely the sort of information that would qualify for a fee waiver under both the existing and the new standard.

The phrase "operations and activities of the government" should be broadly construed. It can encompass requests for historical documents and for information relating to foreign policy and national defense. Also, agencies deal with private entities on a wide range of regulatory, enforcement, procurement, and other activities. Records which illuminate that relationship indicate how the agency is carrying out its mission. It may be impossible to understand an agency's activities or operations unless records submitted by those being regulated or otherwise affected by agency policies are available. Thus, records submitted to an agency can qualify for a fee waiver when disclosure of the information reflects on agency operations and activities.

The deletion of the current language requiring fee waivers only when "furnishing the information can be considered as primarily benefiting the general public" is intended to emphasize that a request can qualify for a fee wavier even if the issue is not of interest to the public-at-large. Public understanding is enhanced when information is disclosed to the subset of the public most interested, concerned, or affected by a particular action or matter.

The bill includes several general limitations on the imposition of fees by agencies. The purpose of these limitations is to prevent agencies from using procedural ploys over fees to discourage requesters or delay the disclosure of information.

First, fee schedules can only provide for the recovery of direct costs of search, duplication, or review. This is the current limitation extended to include the newly permitted charges for review costs.

Second, no fee may be charged if the routine costs of collecting and processing of the fee allowable under the FOIA are likely to equal or exceed the amount of the fee. For example, a request for a 110 page document would not be charged a fee because no charges are applicable to the first 100 pages and the charges for the remaining ten pages would normally be waived under this provision.

Third, except for requests for commercial use that are subject to review charges, an agency may not charge any requester for the first two hours of search time or for the first one hundred pages of duplication. A requester may not file multiple requests at the same time each seeking portions of a large document solely in order to avoid payment of all fees. However, if requests are made more than thirty calendar days apart, each request must be treated separately. Multiple requests filed at the same time on unrelated matters cannot be treated as a single request for purposes of this provision.

Fourth, an agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion or unless the agency has determined that the fee will exceed $250. This is to prevent agencies from imposing an advance payment requirement in order to harass or discourage requesters.

The fee schedules in the FOIA do not supersede fees chargeable under a statute that specifically provides for setting of a level of fees for particular types of records. This provision does not change current law. The new language simply clarifies that statutes setting specific alternative bases for recovering dissemination costs can supersede FOIA fees. An example of a qualifying statute is 44 U.S.C. § 1708 (1982) which allows the Public Printer to set charges at cost plus a fifty percent surcharge to recover indirect costs. However, the User Fee Statute, 31 U.S.C. § 9701 does not qualify under new subparagraph (4)(A)(vi) of the FOIA because it is does not establish a specific level of fees. Similarly, the statute governing the National Library of Medicine, 42 U.S.C. § 275 et seq. (1982), is too general to qualify under the new FOIA subparagraph. A more extensive discussion of fees for government information, can be found in House Report 99-560 which is incorporated here in its entirety by reference.

In any action brought by a requester regarding the waiver of fees, the court shall determine the matter de novo, except that the court's review of the matter shall be limited to the record before the agency. The purpose of this provision is to allow the courts to exercise independent judgment on the issue of whether a requester is entitled to a fee waiver.

Finally, it is apparent that the effect of the changes in fee and fee waiver policies will be to increase use of the FOIA by the press and by public interest and other nonprofit organizations as well. An increase in government oversight by these groups with less interference in the disclosure process by the political or bureaucratic processes of government is fully intended. It also seems likely that the use of the FOIA by businesses for purely commercial purposes may decrease as a result of higher fees. If this happens, it will be an unintended side effect of higher charges.

Mr. KINDNESS. Mr. Speaker, I was naturally suspicious—but not surprised—when I learned that the other body had included amendments to the Freedom of Information Act in its version of the antidrug legislation. Nevertheless, I believe that those amendments—as perfected in the version of the bill before us today—maintain an appropriate balance between disclosure and confidentiality necessary for the proper fulfillment of Government functions.

I have served since 1979 as ranking minority member of the Government Operations Subcommittee on Government Information, which has legislative jurisdiction over the Freedom of Information Act. During that time, the subcommittee has reviewed several particular concerns about the operation of the act, including the handling of requests for information held by Federal law enforcement agencies and for information submitted by private businesses to Federal agencies, as well as the assessment and waiver of fees upon disclosure of Government information.

Because those concerns reflected the tension between disclosure and confidentiality inherent in the act, I have believed that successful legislative revision of the act would require a comprehensive measure that addressed each of these several concerns. I had hoped that the Government Operations Committee would be able to present such legislation to the House this year. The chairman and I authorized negotiations involving our staff with representatives of the Department of Justice, the press, and public interest groups. A draft bill was developed from these negotiations which contained provisions similar to those before us today in the Anti-Drug Abuse Act. But, the Justice Department encountered opposition from other executive branch agencies to the bill and the subcommittee decided not to proceed with a comprehensive reform bill. Instead, it recommended and the Government Operations Committee reported to the House a bill revising the process by which agencies handle requests for confidential business information. That bill, H.R. 4862, was passed by the House under suspension of the rules on September 22, 1986, and, I remain hopeful that the other body will pass it before the end of this session.

The Freedom of Information Act amendments contained in the Anti-Drug Abuse Act before the House today are addressed to the handling of requests for law enforcement information and to the assessment and waiver of fees on any FOIA request. These amendments have been derived from House and Senate proposals developed over the past 5 years. In brief summary, the provisions contained in the bill before us, and their legislative sources, are as follows:

Section 1801 states that these amendments may be cited as the "Freedom of Information Reform Act of 1986."

Section 1802 contains two subsections: Subsection (a) revises the law enforcement records exemption of the act—the seventh exemption—to bring its terms more into conformity with original congressional intent and accurate judicial interpretations of its terms. Subsection (a) was passed by the other body in the 98th Congress as section 10 of S. 774 and, a slightly modified version was included in the draft bill developed earlier this year by the Government Information Subcommittee.

Subsection (b) adds a new provision to the act, authorizing law enforcement agencies to treat certain law enforcement records as not subject to the act under certain limited circumstances in order to prevent the mere response to a FOIA request from serving as a tipoff to the subject of an investigation or from identifying an informant. This provision was included in the draft bill developed earlier this year by the Government Information Subcommittee, and a version of subsection (b)(2) was included in section 10 of S. 774.

Section 1803 rewrites existing law on the assessment and waiver of fees. Current law permits agencies to charge fees for the search for and duplication of records responsive to a FOIA request and, it requires a waiver of those fees when disclosure of the information can be considered as primarily benefiting the general public. Section 1803 specifies in greater detail than current law the types of fees that can be charged to particular requesters and, it contains a more specific test for waiver of fees. Through these provisions, it is hoped that longstanding controversies over the assessment of fees and the grant of fee waivers may be resolved. The source of section 1803 is the fee and waiver provision of H.R. 6414, a bill I cosponsored with subcommittee Chairman English which

was introduced at the end of the 98th Congress.

Section 1804 provides two effective dates: Section 1802 will take effect upon enactment and will apply to all pending requests and litigation. Section 1803 will take effect 90 days after enactment except that the authority to issue regulations will be effective upon enactment and all such regulations must be promulgated within 90 days of enactment; in addition, section 1803 will apply to all requests and litigation pending 90 days after enactment, except that review charges may not be applied before the effective date or before the agency has finally issued its regulations.

The chairman of the Subcommittee on Government Information, the gentleman from Oklahoma [Mr. ENGLISH], has already provided to the House a detailed explanation of section 1803, the new fee and fee waiver provisions. Before continuing with a detailed explanation of the law enforcement record provisions contained in section 1802, I would like to commend and congratulate him for his good work on the Anti-Drug Abuse Act generally. For the past 4 years, he has, in addition to overseeing the operation of the Freedom of Information Act, conducted regular oversight of the executive branch's efforts to interdict drug smugglers. Like the Freedom of Information Act, the effort to interdict drug smugglers raises a number of controversial issues. At times we have disagreed on how best to address and resolve those controversies; but his ultimate goals have been worthy of support. So, I congratulate him and I hope that the Congress will enact this legislation.

ANALYSIS OF THE LAW ENFORCEMENT RECORDS AMENDMENTS TO THE FREEDOM OF INFORMATION ACT INCLUDED IN THE ANTI-DRUG ABUSE ACT OF 1986 (H.R. 5484)

Much of the impetus for adjustment of the provisions of the Freedom of Information Act which affect the handling of requests for information maintained by law enforcement agencies comes from the concerns expressed by Federal Bureau of Investigation Director William Webster in congressional testimony that the act is exploited by organized crime figures attempting to learn whether they are targets of investigative law enforcement activities, as well as the identities of informants.

While some have disputed the extent of such activity, it is clear that strict compliance with the terms of the act can, in certain limited circumstances, create problems for law enforcement agencies in terms of their ability to conduct investigations and protect the identity of informants. The amendments to the Freedom of Information Act contained in the Anti-Drug Abuse Act are designed to deal with these particularized law enforcement problems.

Section 1802(a) of H.R. 5484 amends subsection (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain judicial interpretations, and clarify congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

The language of those amendments is identical with one exception explained below to that proposed in section 10 of S. 774, proposed FOIA reform legislation which passed the Senate, but was not acted upon in the House, during the 98th Congress. The meaning and intended effect of the amendments was carefully explained in the report of the Senate Judiciary Committee on S. 774 (S. Rept. 98-221), the relevant portion of which is set out below:

SECTION 10: LAW ENFORCEMENT RECORDS

Section 10 of S. 774 would amend paragraph (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain explanatory caselaw, and clarify Congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

Under current law, an agency may invoke the (b)(7) exemption to withhold "investigatory records compiled for law enforcement purposes" to the extent that disclosure of such records would interfere with enforcement proceedings; deprive a person of a right to a fair trial or an impartial adjudication; constitute an unwarranted invasion of personal privacy; disclose the identity of a confidential source or, in certain cases, information provided only by a confidential source; disclose investigative techniques and procedures; or, endanger the life or physical safety of law enforcement personnel.

The Committee finds, based upon testimony of the FBI and other federal law enforcement agencies, that this exemption in practice, has created problems with respect to the disclosure of sensitive non-investigative law enforcement materials, premature disclosure of investigative activities, and the protection of confidential sources. Although Exemption 7 currently attempts to protect confidential informants and investigations, this protection can be compromised when small pieces of information, insignificant by themselves, are released and then pieced together with other previously released information and the requester's own personal knowledge to complete a whole and accurate picture of information that should be confidential and protected, such as an information's identity.

S. 774 would make the following changes in Exemption (b)(7) to address these problems:

Substitute "records or information" for "investigatory records" as the threshold qualification for the exemption: This amendment would broaden the scope of the exemption to include "records or information compiled for law enforcement purposes," regardless of whether they may be investigatory or noninvestigatory. It is intended to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which the record is maintained. Cf. FBI v. Abramson, 456 U.S. 615 (1982). It should also resolve any doubt that law enforcement manuals and other non-investigatory materials can be withheld under (b)(7) if they were compiled for law enforcement purposes and their disclosure would result in one of the six recognized harms to law enforcement interests set forth in the subparagraphs of the exemption. See contra, *Sladek* v. *Bensinger*, 605 F.2d 899 (5th Cir. 1979) (Exemption 7 is not applicable to DEA agents Manual because manual "was not compiled in the course of a specific investigation"), *Cox* v. *Department of Justice*, 576 F.2d 1302 (8th Cir. 1978) (Exemption 7 does not apply to DEA manual that "contains no information compiled in the course of an investigation.") The Committee amendment, however, does not affect the threshold question of whether "records or information" withheld under (b)(7) were "compiled for law enforcement purposes." This standard would still have to be satisfied in order to claim the protection of the (b)(7) exemption. See, e.g., *FBI* v. *Abramson*, supra.

Substitute "could reasonably be expected to" for "would" as a standard for the risk of harm with respect to (b)(7)(A) interference with enforcement proceedings, (b)(7)(C) unwarranted invasions of personal privacy, (b)(7)(D) disclosure of the identity of a confidential source, and (b)(7)(F) endanger the life or physical safety of any natural person: This amendment is intended to clarify the degree of risk of harm from disclosure which must be shown to justify withholding records under any of these subparagraphs. The FBI and other law enforcement agencies have testified that the current "would" language in the exemption places undue strictures on agency attempts to protect against the harms specified in Exemption 7's subparts.

This burden of proof is troubling to some agencies in the context of showing that a particular disclosure "would" interfere with an enforcement proceeding. Moreover, as the FBI has testified, it is particularly vexing with respect to whether production of requested records "would" disclose the identity of a confidential source, substantially contributing to the asserted "perception" problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA. The "could reasonably be expected to" standard has been effectively used in the protection of national security sources under provisions of the National Security Act of 1947, 50 U.S.C. § 403(d)(3). It recognizes the lack of certainty in attempting to predict harm, but requires a standard of reasonableness in that process, based on an objective test.

Including State, local and foreign agencies or authorities and private institutions within the meaning of "confidential source": This amendment is intended to codify the caselaw in which the weight of judicial interpretation has held that "confidential source" protection under (b)(7)(D) is applicable to entities, as well as natural persons, that furnished information to an agency on a confidential basis. See, e.g., *Lesar* v. *Dept. of Justice*, 636 F.2d 472 (D.C. Cir. 1980), *Church of Scientology* v. *Dept. of Justice*, 612 F.2d 417 (9th Cir. 1979), *Nix* v. *U.S.*, 572 F.2d 998 (4th Cir. 1978); *Keeney* v. *FBI*, 630 F.2d 114 (2d Cir. 1980).

Delete "only" from the second clause of (b)(7)(D): Courts interpreting the second clause of (b)(7)(D) have occasionally stumbled over the meaning of the word "only" in the context of deciding whether confidential information furnished by a confidential source in a criminal investigation or a lawful national security intelligence investigation may be withheld. Compare, e.g., *Radowich* v. *U.S. Attorney, District of Maryland*, 501 F. Supp. 284 (D. Md. 1980), rev'd 658 F.2d 957 (4th Cir. 1981) (Winter, C.J. Dissenting) with *Nix* v. *United States*, 572 F.2d 998 (4th Cir. 1978). A literal reading of the provision would appear to indicate that confidential information is exempt only if it has been "furnished" to the agency "only by the confidential source," which is to say, apparently, that the confidential information would not be exempt if it has also been furnished to the agency by some other source or means.

By deleting the word "only", the Committee intends to make clear that, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal

investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished by a confidential source is exempt, regardless of whether it might also have been obtained from another source.

Delete "investigative" and add "guidelines" to (b)(7)(E): This amendment, like the deletion of "investigatory" from the exemption's threshold language, is intended to facilitate the protection of non-investigatory materials under the exemption. In this case, it is intended to make clear that "techniques and procedures for law enforcement investigations and prosecutions" can be protected, regardless of whether they are "investigative" or non-investigative. The Committee, however, reemphasizes the intention of the conferees on the 1974 amendments which first created (b)(7)(E) that the subparagraph does not authorize withholding of routine techniques and procedures already well known to the public, such as ballistics tests, fingerprinting, and other scientific tests or commonly-known techniques and procedures. See H.R. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974). The amendment also expands (b)(7)(E) to permit withholding of "guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." This is intended to address some confusion created by the D.C. Circuit's en banc holding in *Jordan* v. *U.S. Dept. of Justice*, 591 F.2d 753 (D.C. Cir. 1978), denying protection for prosecutorial discretion guidelines under the (b)(2) exemption. The Committee intends that agencies and courts will consider the danger of creating "secret law" together with the potential for aiding lawbreakers to avoid detection or prosecution. In so doing, the Committee was guided by the "circumvention of the law" standard that the D.C. Circuit established in its en banc decision in *Crooker* v. *BATF*, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) (interpreting Exemption 2).

The Congressional Research Service of the Library of Congress recently analyzed the proposed amendments regarding the substitution of "could reasonably be expected to" for "would" in several of the subparagraphs in (b)(7), as well as the change in language to include State, local, and foreign agencies and private institutions within the meaning of "confidential source" under subparagraph (b)(7)(D). Its conclusions, as indicated in the two memoranda set out at the conclusion of Senator LEAHY's statement of September 30, 1986 (CONGRESSIONAL RECORD, page S 14299), were that in both instances the proposed changes in statutory language substantially reflect current judicial interpretations and would not appreciably alter the meaning of the affected provisions in their practical application.

The House bill includes a minor amendment to exemption (7)(C) relating to withholding of records on privacy grounds. The words "could reasonably be expected to" are replaced with the word "would." This change maintains the current language and retains the consistency with the privacy standard in exemption 6.

Because exemption (7)(C) and exemption 6 are nearly identical, it would be inappropriate to make any changes that increase the difference between these two privacy standards. It is already easier to withhold law enforcement information on privacy grounds under exemption (7)(C) than it is to withhold other information under exemption 6. An additional adjustment, however slight, is unnecessary.

The Senate bill also amends existing exemption (7)(E) to permit the withholding of guidelines for investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law. This is a reasonable standard, but it has to be interpreted with some care.

Where prosecutorial guidelines are widely known among prosecutor's staffs, it will be difficult to make the case that disclosure will risk circumvention of the law. Any assistant U.S. attorney who establishes a private practice will know the guidelines and will be able to use the otherwise nonpublic guidelines to further that practice. Since this use by former prosecutors cannot be effectively prevented, a broad interpretation of the new exemption (7)(E) will only enhance the practice of former prosecutors rather than protect any important law enforcement interest.

Where prosecutorial guidelines are changed temporarily or there are other circumstances where there is no risk of public disclosure from other sources, then exemption (7)(E) may be used to withhold provided that disclosure can reasonably be expected to risk circumvention of the law.

Section 1802(b) of H.R. 5484 amends the FOIA so that criminal law enforcement agencies, in certain circumstances, are not required to acknowledge the existence of: First, records concerning an ongoing and undisclosed criminal investigation; second, informant records maintained under an informant's name or personal identifier; or third, classified records of the FBI pertaining to foreign intelligence, counterintelligence, or international terrorism investigations, in response to a FOIA request.

This provision provides criminal law enforcement authorities the ability to avoid confirmation of the investigatory status of specific individuals or incidents in responding to FOIA requests. It is a narrow and specific statutory authority for criminal law enforcement agencies to act on the principle that "an agency may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under an FOIA exemption." *Gardels* v. *CIA*, 689 F.2d 1100, 1103 (D.C. Cir. 1982), citing *Phillippi* v. *CIA*, 546 F.2d 1009, 1012 (D.C. Cir. 1976), the so-called Glomar case.

Although Federal courts have generally recognized that the FOIA exemption scheme permits an agency to withhold the fact of the existence or nonexistence of specific records when disclosure of that fact itself cause the harm that a specific exemption is intended to avoid, the Director of the FBI requested specific statutory authority to exercise this right so that there would be no ambiguity regarding its propriety. (See, e.g., Hearings on the Freedom of Information Reform Act Before a Subcommittee of the House Committee on Government Operations, 98th Cong., 2d Sess. 906-910 (1984) (responses of William H. Webster)).

Subsection (b) of section 1802 sets forth the criteria for three specific circumstances in which criminal law enforcement agencies would not be required to acknowledge the existence of agency records in response to an FOIA request.

The first circumstance, provided under paragraph (1) of subsection (b), permits agencies to refuse to acknowledge the existence of records when their disclosure would interfere with a criminal law enforcement proceeding under exemption (b)(7)(A), and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency. While the agency is thus able to prevent a "tipoff" of investigatory activity to someone using the FOIA to find out if such activity is underway, its authority to do so is narrowly drawn and closely circumscribed. It cannot, for example, refuse to acknowledge requested records under this authority unless the records concern a criminal, rather than civil, law enforcement proceeding and would already be exempt from disclosure by virtue of exemption (b)(7)(A).

Moreover, its authority to refuse to acknowledge such records under this provision exists only so long as there is reason to believe that the subject of the proceeding is not aware of its existence. Thus the provision gives agencies no new substantive withholding authority, since it does not apply to records that are not already exempt from disclosure, and it would not be available to an agency when there is reason to believe that the subject of an investigation or proceeding is aware of its pendency.

The law enforcement agencies carry the burden of demonstrating the subject's unawareness of proceedings, inasmuch as requesters will lack access to sufficient information to carry that burden, as a rule. However, certain publicly demonstrable facts will carry a heavy presumption of the subject's awareness which the agencies must rebut with clear and convincing evidence if records are to remain outside the scope of the act. Among those facts are: public statements by law enforcement officials relating to an ongoing or contemplated investigation; returns of subpoenas and search warrants against subjects or other persons from whom the subject could reasonably be expected to learn of the subpoenas or search warrants; public statements by subjects or persons associated with subjects; arrests of subjects or persons associated with subjects; grand jury investigations of which subjects and/or the general public are aware and any other incident or statement that brings the existence of an investigation to public attention.

The second circumstance where an agency is not required to acknowledge the existence of specific requested documents concerns FOIA requests for informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier. The authority provided under subsection 1802(a)(2), however, is limited to those instances in which the request for such informant records is from a third party who specifically requests them by the informant's name or personal identifier. Moreover, an agency must acknowledge the existence or nonexistence of such records when the informant's status as an informant has been "officially confirmed."

In referring to a similar provision in S. 774, the Senate Judiciary Committee noted the obvious limitations of the exclusion authority thus permitted: "Where the requester is the informant himself, or a third party who describes the responsive records without reference to the informant's name or personal identifier, the records are subject to ordinary consideration under the provisions of the FOIA." (S. Rept. 98-221 at 25.)

The third so-called Glomar provision under section 1802 applies to classified FBI records pertaining to foreign intelligence or counterintelligence—as defined in Executive Order 12333—or international terrorism—as defined in the Foreign Intelligence Surveillance Act—but only to the extent that the fact of the existence of such records itself remains properly classified information. Like the first part of this section, subparagraph (a)(3) permits nonconfirmation of the investigatory status of specific individuals or incidents in the context of activities regarding foreign intelligence, counterintelligence or international terrorism. But it gives no new substantive withholding authority since it applies only to FBI records that are properly classified as national security information and, therefore, already exempt from disclosure pursuant to exemption (b)(1) of the FOIA.

Agency actions pursuant to these provisions, like agency determinations to withhold acknowledged records pursuant to subsection (b) of the FOIA, are subject to de novo judicial review. The manner in which the Federal courts will review agency refusals to acknowledge or deny the existence of records under these provisions has already been well-established in the leading "glomarization" case involving the CIA. *Gardels* v. *CIA*, 689 F. 2d 1100 (D.C. Cir. 1982) and *Phillippi* v. *CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

In effect, to paraphrase the D.C. Circuit, the situation is as if the requester had requested and been refused permission to see a document which says either "Yes, we have records related to the subject of the request" or "No, we do not have any such records." 546 F. 2d at 1012.

When the agency's position is that it can neither confirm nor deny the existence of the requested records, there are no relevant documents for the court to examine other than the affidavits which explain the agency's refusal. Therefore, to fulfill its congressionally imposed obligation to make a de novo determination of the propriety of a refusal to provide information in response to an FOIA request, the district court may have to examine classified affidavits in camera and without participation by plaintiff's counsel.

Before adopting such a procedure, however, the district court should attempt to create as complete a public record as is possible. This would require the agency to provide a public affidavit explaining in as much detail as is possible the basis for its claim that it can be required neither to confirm nor to deny the existence of the requested records. The agency's arguments should then be subject to testing by the requester, who should be allowed to seek appropriate discovery when necessary to clarify the agency's position or to identify the procedures by which that position was established. Only after the issues have been identified by this process should the district court, if necessary, consider arguments or information which the agency is unable to make public. Id. at 1013.

If the district court should decide that the agency's refusal to confirm or deny the existence of the requested records is unjustified, the standard Vaughn procedures, including preparation of a detailed index to the requested records, if any, would then apply. (Id. at 1013-1014, n.7)

Of course, the extent to which the agency can neither confirm nor deny the existence of particular records is limited by otherwise available "official confirmation" of the facts which this response is intended to avoid revealing. See Id. at 1014 text and notes 9-12, where the Government was forced to retreat from its original refusal to confirm or deny any involvement with the *Glomar Explorer* by its disclosures in a tax case.

The requester's discovery can focus on the relationship between confirmation or denial of the existence of records and the disclosure which the agency seeks to prevent, as well as the process by which the agency seeks to prevent, as well as the process by which it was determined that confirming or denying the existence of the requested records would cause that disclosure. (Id. at 1014, n. 12.)

Agencies are required to maintain records in such a manner as to ensure that in processing FOIA requests, such publicly demonstrable facts are a part of the administrative deliberation over the status of records. Requesters who present such publicly demonstrable facts to an agency are to receive due consideration or reconsideration of their requests within the administrative process. A showing by a requester that an agency had in its possession such publicly demonstrable facts, but withheld records from normal search and review processes without justification will raise a strong inference of an arbitrary and capricious withholding under 5 U.S.C. 552(a)(4)(F).

It is important to note that the provisions in section 1802 regarding law enforcement records were derived from a draft bill which was the subject of negotiations between the Department of Justice, and the House Government Operations Subcommittee on Government Information, Justice, and Agriculture earlier this year. During the course of these negotiations, the Department agreed that their implementation, as now provided by section 1802, would require that a notice of the authority to refuse to confirm the existence of requested records be included in every FOIA response by agencies permitted to exercise such authority. The other body adopted this provision with the explicit understanding of the amendment's sponsors that such notice would be required.

The intention of the sponsors was that the notice to be included as a standard paragraph in responses to all FOIA requests to such agencies would be similar, if not identical to, the following language negotiated between the Department of Justice and the House subcommittee:

Requesters should be aware that in certain circumstances, pursuant to 5 U.S.C. 552(c), criminal law enforcement agencies are not required to acknowledge the existence of (1) records concerning an ongoing and undisclosed criminal investigation; (2) informant records maintained under an informant's name or personal identifier; or, (3) classified records of the FBI pertaining to foreign intelligence, counterintelligence or international terrorism investigations, in response to a FOIA request. Actions pursuant to 5 U.S.C. 552(c), like agency determinations to withhold acknowledged records pursuant to 5 U.S.C. 552(b), are subject to de novo judicial review.

Mr. QUILLEN. Mr. Speaker, I yield 2 minutes to the gentleman from New York [Mr. SCHEUER], and I am happy to go across the aisle to do that.

Mr. SCHEUER. Mr. Speaker, I thank the gentleman very much for yielding this time.

I want to congratulate the majority leadership, the Speaker, the majority leader, the gentleman from Texas [Mr. WRIGHT], especially the gentleman from New York [Mr. RANGEL], the chairman of this committee who has done such a superb job.

I especially want to thank my colleague, the gentleman from New York, [Mr. BEN GILMAN], who has served on this committee with me for the last 15 years or so and has rendered an absolutely outstanding level of able, dedicated, conscientious and informed service on that committee.

This is a truly nonpartisan effort, a brilliant example of how well this two-party House can work when it sets its mind to it. I congratulate all concerned on both sides of the aisle.

I am particularly pleased that this bill represents more than an effort at enhanced law enforcement, because we have seen that can never be the whole answer. We know that eradication is helpful. We must keep up our efforts to stamp out the crops in the fields. We know that interdiction at the borders is essential. We know that control in our cities is an effort that we must continue; but the fact is that it has not solved the problem.

We know now and we have been informed by tough law enforcement officials at the Federal, State, and local levels, that if we want to turn off this awful curse that has blighted our land, we have got to change behavior among the youth of America through a comprehensive drug education program.

□ 1230

Mr. PEPPER. Mr. Speaker, for purposes of debate only, I yield 1 minute to the able gentleman from California [Mr. PANETTA].

Mr. PANETTA. Mr. Speaker, I rise to support the rule on the bill before us. I particularly want to discuss a provision which will provide needed nutrition assistance to the homeless. Many of those whom this provision would assist are victims of drug abuse. In 1984, the Department of Health and Human Services estimated that from one-half to two-thirds of the homeless population suffered from a combina-