

110TH CONGRESS
1ST SESSION

S. 2035

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 10, 2007

Mr. SPECTER (for himself, Mr. LUGAR, and Mr. SCHUMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Free Flow of Informa-
5 tion Act of 2007”.

1 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
2 **SONS.**

3 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—In
4 any proceeding or in connection with any issue arising
5 under Federal law, a Federal entity may not compel a cov-
6 ered person to provide testimony, or produce any docu-
7 ment, relating to protected information, unless a Federal
8 court determines by a preponderance of the evidence, after
9 providing notice and an opportunity to be heard to such
10 covered person—

11 (1) that the party seeking to compel production
12 of such testimony or document has exhausted all
13 reasonable alternative sources (other than a covered
14 person) of the testimony or document;

15 (2) that—

16 (A) in a criminal investigation or prosecu-
17 tion, based on information obtained from a per-
18 son other than the covered person—

19 (i) there are reasonable grounds to be-
20 lieve that a crime has occurred;

21 (ii) the testimony or document sought
22 is essential to the investigation or prosecu-
23 tion or to the defense against the prosecu-
24 tion; and

25 (iii) in a criminal investigation or
26 prosecution of an unauthorized disclosure

1 of properly classified information by a per-
2 son with authorized access to such infor-
3 mation, such unauthorized disclosure has
4 caused significant, clear, and articulable
5 harm to the national security; or

6 (B) in a matter other than a criminal in-
7 vestigation or prosecution, based on information
8 obtained from a person other than the covered
9 person, the testimony or document sought is es-
10 sential to the resolution of the matter; and

11 (3) that nondisclosure of the information would
12 be contrary to the public interest, taking into ac-
13 count both the public interest in compelling disclo-
14 sure and the public interest in gathering news and
15 maintaining the free flow of information.

16 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

17 The content of any testimony or document that is com-
18 pelled under subsection (a) shall, to the extent possible—

19 (1) be limited to the purpose of verifying pub-
20 lished information or describing any surrounding cir-
21 cumstances relevant to the accuracy of such pub-
22 lished information; and

23 (2) be narrowly tailored in subject matter and
24 period of time covered so as to avoid compelling pro-

1 duction of peripheral, nonessential, or speculative in-
2 formation.

3 **SEC. 3. EXCEPTION RELATING TO CRIMINAL OR TORTIOUS**
4 **CONDUCT.**

5 (a) IN GENERAL.—Section 2 shall not apply to any
6 information, record, document, or item obtained as the re-
7 sult of the eyewitness observations of criminal conduct or
8 commitment of criminal or tortious conduct by the covered
9 person, including any physical evidence or visual or audio
10 recording of the observed conduct, if a Federal court de-
11 termines that the party seeking to compel disclosure under
12 this section has exhausted reasonable efforts to obtain the
13 information from alternative sources.

14 (b) EXCEPTION.—This section shall not apply if the
15 alleged criminal or tortious conduct is the act of commu-
16 nicating the documents or information at issue.

17 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR**
18 **SUBSTANTIAL BODILY INJURY.**

19 Section 2 shall not apply to any protected information
20 that is reasonably necessary to stop, prevent, or mitigate
21 a specific case of—

- 22 (1) death;
- 23 (2) kidnapping; or
- 24 (3) substantial bodily harm.

1 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
2 **HARM TO THE NATIONAL SECURITY.**

3 Section 2 shall not apply to any protected information
4 that a Federal court has found by a preponderance of the
5 evidence would assist in preventing a specific case of—

6 (1) terrorism against the United States; or

7 (2) significant harm to national security that
8 would outweigh the public interest in newsgathering
9 and maintaining a free flow of information to citi-
10 zens.

11 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
12 **SERVICE PROVIDERS.**

13 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.—**

14 With respect to testimony or any document consisting of
15 any record, information, or other communication that re-
16 lates to a business transaction between a communications
17 service provider and a covered person, section 2 shall apply
18 to such testimony or document if sought from the commu-
19 nications service provider in the same manner that such
20 section applies to any testimony or document sought from
21 a covered person.

22 (b) **NOTICE AND OPPORTUNITY PROVIDED TO COV-**
23 **ERED PERSONS.—**A Federal court may compel the testi-
24 mony or disclosure of a document under this section only
25 after the party seeking such a document provides the cov-

1 ered person who is a party to the business transaction de-
 2 scribed in subsection (a)—

3 (1) notice of the subpoena or other compulsory
 4 request for such testimony or disclosure from the
 5 communications service provider not later than the
 6 time at which such subpoena or request is issued to
 7 the communications service provider; and

8 (2) an opportunity to be heard before the court
 9 before compelling testimony or the disclosure of a
 10 document.

11 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
 12 under subsection (b)(1) may be delayed for not more than
 13 45 days if the court involved determines by clear and con-
 14 vincing evidence that such notice would pose a substantial
 15 threat to the integrity of a criminal investigation. This pe-
 16 riod may be extended by the court for an additional period
 17 of not more than 45 days each time the court makes such
 18 a determination.

19 **SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITH-**
 20 **OUT PROMISE OR AGREEMENT OF CON-**
 21 **FIDENTIALITY.**

22 Nothing in this Act shall supersede, dilute, or pre-
 23 clude any law or court decision compelling or not compel-
 24 ling disclosure by a covered person or communications
 25 service provider of—

1 (1) information identifying a source who pro-
2 vided information without a promise or agreement of
3 confidentiality made by the covered person as part
4 of engaging in journalism; or

5 (2) records, communication data, documents, or
6 information obtained without a promise or agree-
7 ment that such records, communication data, docu-
8 ments, or information would be confidential.

9 **SEC. 8. DEFINITIONS.**

10 In this Act:

11 (1) COMMUNICATIONS SERVICE PROVIDER.—

12 The term “communications service provider”—

13 (A) means any person that transmits infor-
14 mation of the customer’s choosing by electronic
15 means; and

16 (B) includes a telecommunications carrier,
17 an information service provider, an interactive
18 computer service provider, and an information
19 content provider (as such terms are defined in
20 sections 3 or 230 of the Communications Act of
21 1934 (47 U.S.C. 153 and 230).

22 (2) COVERED PERSON.—The term “covered
23 person” means a person who is engaged in jour-
24 nalism and includes a supervisor, employer, parent,
25 subsidiary, or affiliate of such person.

1 (3) DOCUMENT.—The term “document” means
2 writings, recordings, and photographs, as those
3 terms are defined by rule 1001 of the Federal Rules
4 of Evidence (28 U.S.C. App.).

5 (4) FEDERAL ENTITY.—The term “Federal en-
6 tity” means an entity or employee of the judicial or
7 executive branch or an administrative agency of the
8 Federal Government with the power to issue a sub-
9 poena or issue other compulsory process.

10 (5) JOURNALISM.—The term “journalism”
11 means the regular gathering, preparing, collecting,
12 photographing, recording, writing, editing, reporting,
13 or publishing of news or information that concerns
14 local, national, or international events or other mat-
15 ters of public interest for dissemination to the pub-
16 lic.

17 (6) PROTECTED INFORMATION.—The term
18 “protected information” means—

19 (A) information identifying a source who
20 provided information under a promise or agree-
21 ment of confidentiality made by a covered per-
22 son as part of engaging in journalism; or

23 (B) any records, communications data,
24 documents, or information that a covered per-
25 son obtained or created—

- 1 (i) as part of engaging in journalism;
2 and
3 (ii) upon a promise or agreement that
4 such records, communication data, docu-
5 ments, or information would be confiden-
6 tial.

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