

110TH CONGRESS  
1ST SESSION

# S. 1267

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.

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## IN THE SENATE OF THE UNITED STATES

MAY 2, 2007

Mr. LUGAR (for himself, Mr. DODD, Mr. GRAHAM, Mr. DOMENICI, and Ms. LANDRIEU) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## 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 document  
7 related to information possessed by such covered person  
8 as part of engaging in journalism, unless a court deter-  
9 mines by a preponderance of the evidence, after providing  
10 notice and an opportunity to be heard to such covered per-  
11 son—

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

16 (2) that—

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

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

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

1 (B) in a matter other than a criminal in-  
2 vestigation or prosecution, based on information  
3 obtained from a person other than the covered  
4 person, the testimony or document sought is es-  
5 sential to the successful completion of the mat-  
6 ter;

7 (3) in the case that the testimony or document  
8 sought could reveal the identity of a source of infor-  
9 mation or include any information that could reason-  
10 ably be expected to lead to the discovery of the iden-  
11 tity of such a source, that—

12 (A) disclosure of the identity of such a  
13 source is necessary to prevent imminent and ac-  
14 tual harm to national security with the objective  
15 to prevent such harm;

16 (B) disclosure of the identity of such a  
17 source is necessary to prevent imminent death  
18 or significant bodily harm with the objective to  
19 prevent such death or harm, respectively; or

20 (C) disclosure of the identity of such a  
21 source is necessary to identify a person who has  
22 disclosed—

23 (i) a trade secret of significant value  
24 in violation of a State or Federal law;

1 (ii) individually identifiable health in-  
2 formation, as such term is defined in sec-  
3 tion 1171(6) of the Social Security Act (42  
4 U.S.C. 1320d(6)), in violation of Federal  
5 law; or

6 (iii) nonpublic personal information,  
7 as such term is defined in section 509(4)  
8 of the Gramm-Leach-Bliley Act (15 U.S.C.  
9 6809(4)), of any consumer in violation of  
10 Federal law; and

11 (4) 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. COMPELLED DISCLOSURE FROM COMMUNICATIONS**  
4                                   **SERVICE PROVIDERS.**

5       (a) CONDITIONS FOR COMPELLED DISCLOSURE.—

6       With respect to testimony or any document consisting of  
7       any record, information, or other communication that re-  
8       lates to a business transaction between a communications  
9       service provider and a covered person, section 2 shall apply  
10      to such testimony or document if sought from the commu-  
11      nications service provider in the same manner that such  
12      section applies to any testimony or document sought from  
13      a covered person.

14      (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-

15      ERED PERSONS.—A court may compel the testimony or  
16      disclosure of a document under this section only after the  
17      party seeking such a document provides the covered per-  
18      son who is a party to the business transaction described  
19      in subsection (a)—

20                   (1) notice of the subpoena or other compulsory  
21      request for such testimony or disclosure from the  
22      communications service provider not later than the  
23      time at which such subpoena or request is issued to  
24      the communications service provider; and

1           (2) an opportunity to be heard before the court  
2           before the time at which the testimony or disclosure  
3           is compelled.

4           (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice  
5           under subsection (b)(1) may be delayed only if the court  
6           involved determines by clear and convincing evidence that  
7           such notice would pose a substantial threat to the integrity  
8           of a criminal investigation.

9   **SEC. 4. 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 and 230 of the Communications Act  
21           of 1934 (47 U.S.C. 153, 230)).

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

1           (3) DOCUMENT.—The term “document” means  
2 writings, recordings, and photographs, as those  
3 terms are defined by Federal Rule of Evidence 1001  
4 (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 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.

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