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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

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Free Flow of Information Act of 2007''.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony, or produce any document, relating to protected information, unless a Federal court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person—

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

(2) that—

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person—

(i) there are reasonable grounds to believe that a crime has occurred;

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; and

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

of properly classified information by a person with authorized access to such information, such unauthorized disclosure has caused significant, clear, and articulable harm to the national security; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the resolution of the matter; and

(3) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

(b) LIMITATIONS ON CONTENT OF INFORMATION.—The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible—

(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

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

duction of peripheral, nonessential, or speculative information.

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

(a) IN GENERAL.—Section 2 shall not apply to any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the covered person, including any physical evidence or visual or audio recording of the observed conduct, if a Federal court determines that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources.

(b) EXCEPTION.—This section shall not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.

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

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

(1) death;

(2) kidnapping; or

(3) substantial bodily harm.

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

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

(1) terrorism against the United States; or

(2) significant harm to national security that would outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.

SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) CONDITIONS FOR COMPELLED DISCLOSURE.—With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) NOTICE AND OPPORTUNITY PROVIDED TO COVERED PERSONS.—A Federal court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the cov-

ered person who is a party to the business transaction described in subsection (a)—

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

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

(c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under subsection (b)(1) may be delayed for not more than 45 days if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation. This period may be extended by the court for an additional period of not more than 45 days each time the court makes such a determination.

SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a covered person or communications service provider of—

(1) information identifying a source who provided information without a promise or agreement of confidentiality made by the covered person as part of engaging in journalism; or

(2) records, communication data, documents, or information obtained without a promise or agreement that such records, communication data, documents, or information would be confidential.

SEC. 8. DEFINITIONS.

In this Act:

(1) COMMUNICATIONS SERVICE PROVIDER.—The term ''communications service provider''—

(A) means any person that transmits information of the customer's choosing by electronic means; and

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

(2) COVERED PERSON.—The term ''covered person'' means a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.

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

(4) FEDERAL ENTITY.—The term ''Federal entity'' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM.—The term ''journalism'' means the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

(6) PROTECTED INFORMATION.—The term ''protected information'' means—

(A) information identifying a source who provided information under a promise or agreement of confidentiality made by a covered person as part of engaging in journalism; or

(B) any records, communications data, documents, or information that a covered person obtained or created—

(i) as part of engaging in journalism; and

(ii) upon a promise or agreement that such records, communication data, documents, or information would be confidential.

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