

109TH CONGRESS
1ST SESSION

S. 1419

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

JULY 18, 2005

Mr. LUGAR (for himself, Mr. DODD, Mr. NELSON of Florida, Mr. JEFFORDS, and Mr. LAUTENBERG) 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 2005”.

6 **SEC. 2. CONDITIONS FOR COMPELLED DISCLOSURE.**

7 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.**—A
8 Federal entity may not compel a covered person to testify

1 or produce any document in any proceeding or in connec-
2 tion with any issue arising under Federal law unless a
3 court determines by clear and convincing evidence, after
4 providing notice and an opportunity to be heard to the
5 covered person—

6 (1) that the party seeking to compel production
7 of such testimony or document has unsuccessfully
8 attempted to obtain such testimony or document
9 from all persons from which such testimony or docu-
10 ment could reasonably be obtained other than a cov-
11 ered person;

12 (2) that—

13 (A) in a criminal investigation or prosecu-
14 tion, based on information obtained from a per-
15 son other than a covered person—

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

18 (ii) the testimony or document sought
19 is essential to the investigation, prosecu-
20 tion, or defense; or

21 (B) in a matter other than a criminal in-
22 vestigation or prosecution, based on information
23 obtained from a person other than a covered
24 person, the testimony or document sought is es-

1 sential to a dispositive issue of substantial im-
2 portance to that matter; and

3 (3) in any matter in which the testimony or
4 document sought could reveal the identity of a
5 source of information or include any information
6 that could reasonably be expected to lead to the dis-
7 covery of the identity of such a source, that—

8 (A) disclosure of the identity of such a
9 source is necessary to prevent imminent and ac-
10 tual harm to national security;

11 (B) compelled disclosure of the identity of
12 such a source would prevent such harm; and

13 (C) the harm sought to be redressed by re-
14 quiring disclosure clearly outweighs the public
15 interest in protecting the free flow of informa-
16 tion.

17 (b) LIMITATIONS ON CONTENT OF INFORMATION.—

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

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

24 (2) be narrowly tailored in subject matter and
25 period of time covered.

1 **SEC. 3. COMPELLED DISCLOSURE PERMITTED.**

2 Notwithstanding any provision of section 2, in any
3 proceeding or in connection with any issue arising under
4 Federal law, a Federal entity may compel a covered person
5 to produce any testimony or document that consists only
6 of commercial or financial information that is not related
7 to news gathering or the dissemination of news and infor-
8 mation by the covered person.

9 **SEC. 4. COMPELLED DISCLOSURE FROM THIRD PARTIES.**

10 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—

11 Section 2 shall apply to any testimony or document that
12 a third party or a Federal entity seeks from a communica-
13 tions service provider if such testimony or document con-
14 sists of any record, information, or other communication
15 that relates to a business transaction between a commu-
16 nications service provider and a covered person.

17 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-

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

23 (1) notice of the subpoena or other compulsory
24 request for such testimony or disclosure from the
25 communications service provider not later than the

1 time at which such subpoena or request is issued to
2 the communications service provider; and

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

6 (c) EXCEPTION TO NOTICE REQUIREMENT.—Notice
7 under subsection (b)(1) may be delayed only if the court
8 determines by clear and convincing evidence that such no-
9 tice would pose a substantial threat to the integrity of a
10 criminal investigation.

11 **SEC. 5. DEFINITIONS.**

12 In this Act:

13 (1) COMMUNICATIONS SERVICE PROVIDER.—

14 The term “communications service provider”—

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

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

24 (2) COVERED PERSON.—The term “covered
25 person” means—

1 (A) an entity that disseminates informa-
2 tion by print, broadcast, cable, satellite, me-
3 chanical, photographic, electronic, or other
4 means and that—

5 (i) publishes a newspaper, book, mag-
6 azine, or other periodical in print or elec-
7 tronic form;

8 (ii) operates a radio or television
9 broadcast station (or network of such sta-
10 tions), cable system, or satellite carrier, or
11 a channel or programming service for any
12 such station, network, system, or carrier;
13 or

14 (iii) operates a news agency or wire
15 service;

16 (B) a parent, subsidiary, or affiliate of
17 such an entity to the extent that such parent,
18 subsidiary, or affiliate is engaged in news gath-
19 ering or the dissemination of news and informa-
20 tion; or

21 (C) an employee, contractor, or other per-
22 son who gathers, edits, photographs, records,
23 prepares, or disseminates news or information
24 for such an entity.

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 provide other compulsory process.

10 (5) THIRD PARTY.—The term “third party”
11 means a person other than a covered person.

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