

112TH CONGRESS
2D SESSION

S. 2197

To require the attorney for the Government to disclose favorable information to the defendant in criminal prosecutions brought by the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 15, 2012

Ms. MURKOWSKI (for herself, Mr. INOUE, Mrs. HUTCHISON, Mr. BEGICH, and Mr. AKAKA) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To require the attorney for the Government to disclose favorable information to the defendant in criminal prosecutions brought by the United States, and for other purposes.

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 “Fairness in Disclosure
5 of Evidence Act of 2012”.

6 **SEC. 2. DUTY TO DISCLOSE FAVORABLE INFORMATION.**

7 Chapter 201 of title 18, United States Code, is
8 amended by adding at the end the following:

1 **“§ 3014. Duty to disclose favorable information**

2 “(a) DEFINITIONS.—In this section—

3 “(1) the term ‘covered information’ means in-
4 formation, data, documents, evidence, or objects that
5 may reasonably appear to be favorable to the de-
6 fendant in a criminal prosecution brought by the
7 United States with respect to—

8 “(A) the determination of guilt;

9 “(B) any preliminary matter before the
10 court before which the criminal prosecution is
11 pending; or

12 “(C) the sentence to be imposed; and

13 “(2) the term ‘prosecution team’ includes, with
14 respect to a criminal prosecution brought by the
15 United States—

16 “(A) the Executive agency, as defined in
17 section 105 of title 5, that brings the criminal
18 prosecution on behalf of the United States; and

19 “(B) any entity or individual, including a
20 law enforcement agency or official, that—

21 “(i) acts on behalf of the United
22 States with respect to the criminal pros-
23 ecution;

24 “(ii) acts under the control of the
25 United States with respect to the criminal
26 prosecution; or

1 “(iii) participates, jointly with the Ex-
2 ecutive agency described in subparagraph
3 (A), in any investigation with respect to
4 the criminal prosecution.

5 “(b) DUTY TO DISCLOSE FAVORABLE INFORMA-
6 TION.—In a criminal prosecution brought by the United
7 States, the attorney for the Government shall provide to
8 the defendant any covered information—

9 “(1) that is within the possession, custody, or
10 control of the prosecution team; or

11 “(2) the existence of which is known, or by the
12 exercise of due diligence would become known, to the
13 attorney for the Government.

14 “(c) TIMING.—Except as provided in subsections (e)
15 and (f), the attorney for the Government shall provide to
16 the defendant any covered information—

17 “(1) without delay after arraignment and before
18 the entry of any guilty plea; and

19 “(2) if the existence of the covered information
20 is not known on the date of the initial disclosure
21 under this subsection, as soon as is reasonably prac-
22 ticable upon the existence of the covered information
23 becoming known, without regard to whether the de-
24 fendant has entered or agreed to enter a guilty plea.

25 “(d) RELATIONSHIP TO OTHER LAWS.—

1 “(1) IN GENERAL.—Except as provided in para-
 2 graph (2), the requirements under subsections (b)
 3 and (c) shall apply notwithstanding section 3500(a)
 4 or any other provision of law (including any rule or
 5 statute).

6 “(2) CLASSIFIED INFORMATION.—Classified in-
 7 formation (as defined in section 1 of the Classified
 8 Information Procedures Act (18 U.S.C. App.)) shall
 9 be treated in accordance with the Classified Infor-
 10 mation Procedures Act.

11 “(e) PROTECTIVE ORDERS.—

12 “(1) IN GENERAL.—Upon motion of the United
 13 States, the court may issue an order to protect
 14 against the immediate disclosure to a defendant of
 15 covered information otherwise required to be dis-
 16 closed under subsection (b) if—

17 “(A) the covered information is favorable
 18 to the defendant solely because the covered in-
 19 formation would provide a basis to impeach the
 20 credibility of a potential witness; and

21 “(B) the United States establishes a rea-
 22 sonable basis to believe that—

23 “(i) the identity of the potential wit-
 24 ness is not already known to any defend-
 25 ant; and

1 “(ii) disclosure of the covered infor-
2 mation to a defendant would present a
3 threat to the safety of the potential witness
4 or of any other person.

5 “(2) TIME LIMIT.—The court may delay disclo-
6 sure of covered information under this subsection
7 until the earlier of—

8 “(A) the date that the court determines
9 provides a reasonable amount of time before the
10 date set for trial (which shall be not less than
11 30 days before the date set for trial, absent a
12 showing by the United States of compelling cir-
13 cumstances); and

14 “(B) the date on which any requirement
15 under paragraph (1) ceases to exist.

16 “(3) MOTIONS UNDER SEAL.—The court may
17 permit the United States to file all or a portion of
18 a motion under this subsection under seal to the ex-
19 tent necessary to protect the identity of a potential
20 witness, but the United States—

21 “(A) may not file a motion under this sub-
22 section ex parte; and

23 “(B) shall summarize any undisclosed por-
24 tion of a motion filed under this subsection for
25 the defendant in sufficient detail to permit the

1 defendant a meaningful opportunity to be heard
 2 on the motion, including the need for a protec-
 3 tive order or the scope of the requested protec-
 4 tive order.

5 “(f) WAIVER.—

6 “(1) IN GENERAL.—A defendant may not waive
 7 a provision of this section except in open court.

8 “(2) REQUIREMENTS.—The court may not ac-
 9 cept the waiver of a provision of this section by a
 10 defendant unless the court determines that—

11 “(A) the proposed waiver is knowingly, in-
 12 telligently, and voluntarily offered; and

13 “(B) the interests of justice require the
 14 proposed waiver.

15 “(g) NONCOMPLIANCE.—

16 “(1) IN GENERAL.—Before entry of judgment,
 17 upon motion of a defendant or by the court sua
 18 sponte, if there is reason to believe the attorney for
 19 the Government has failed to comply with subsection
 20 (b) or subsection (c), the court shall order the
 21 United States to show cause why the court should
 22 not find the United States is not in compliance with
 23 subsection (b) or subsection (c), respectively.

24 “(2) FINDINGS.—If the court determines under
 25 paragraph (1) that the United States is not in com-

1 pliance with subsection (b) or subsection (c), the
2 court shall—

3 “(A) determine the extent of and reason
4 for the noncompliance; and

5 “(B) enter into the record the findings of
6 the court under subparagraph (A).

7 “(h) REMEDIES.—

8 “(1) REMEDIES REQUIRED.—

9 “(A) IN GENERAL.—If the court deter-
10 mines that the United States has violated the
11 requirement to disclose covered information
12 under subsection (b) or the requirement to dis-
13 close covered information in a timely manner
14 under subsection (c), the court shall order an
15 appropriate remedy.

16 “(B) TYPES OF REMEDIES.—A remedy
17 under this subsection may include—

18 “(i) postponement or adjournment of
19 the proceedings;

20 “(ii) exclusion or limitation of testi-
21 mony or evidence;

22 “(iii) ordering a new trial;

23 “(iv) dismissal with or without preju-
24 dice; or

1 “(v) any other remedy determined ap-
 2 propriate by the court.

3 “(C) FACTORS.—In fashioning a remedy
 4 under this subsection, the court shall consider
 5 the totality of the circumstances, including—

6 “(i) the seriousness of the violation;

7 “(ii) the impact of the violation on the
 8 proceeding;

9 “(iii) whether the violation resulted
 10 from innocent error, negligence, reckless-
 11 ness, or knowing conduct; and

12 “(iv) the effectiveness of alternative
 13 remedies to protect the interest of the de-
 14 fendant and of the public in assuring fair
 15 prosecutions and proceedings.

16 “(2) DEFENDANT’S COSTS.—

17 “(A) IN GENERAL.—If the court grants re-
 18 lief under paragraph (1) on a finding that the
 19 violation of subsection (b) or subsection (c) was
 20 due to negligence, recklessness, or knowing con-
 21 duct by the United States, the court may order
 22 that the defendant, the attorney for the defend-
 23 ant, or, subject to paragraph (D), a qualifying
 24 entity recover from the United States the costs
 25 and expenses incurred by the defendant, the at-

1 torney for the defendant, or the qualifying enti-
2 ty as a result of the violation, including reason-
3 able attorney’s fees (without regard to the
4 terms of any fee agreement between the defend-
5 ant and the attorney for the defendant).

6 “(B) QUALIFYING ENTITIES.—In this
7 paragraph, the term ‘qualifying entity’ means—

8 “(i) a Federal Public Defender Orga-
9 nization;

10 “(ii) a Community Defender Organi-
11 zation; and

12 “(iii) a fund established to furnish
13 representation to persons financially un-
14 able to obtain adequate representation in
15 accordance with section 3006A.

16 “(C) SOURCE OF PAYMENTS FOR COSTS
17 AND EXPENSES.—Costs and expenses ordered
18 by a court under subparagraph (A)—

19 “(i) shall be paid by the Executive
20 agency, as defined in section 105 of title 5,
21 that brings the criminal prosecution on be-
22 half of the United States, from funds ap-
23 propriated to that Executive agency; and

24 “(ii) may not be paid from the appro-
25 priation under section 1304 of title 31.

1 “(D) PAYMENTS TO QUALIFYING ENTI-
 2 TIES.—Costs and expenses ordered by the court
 3 under subparagraph (A) to a qualifying entity
 4 shall be paid—

5 “(i) to the Community Defender Or-
 6 ganization that provided the appointed at-
 7 torney; or

8 “(ii) in the case of a Federal Public
 9 Defender Organization or an attorney ap-
 10 pointed under section 3006A, to the court
 11 for deposit in the applicable appropriations
 12 accounts of the Judiciary as a reimburse-
 13 ment to the funds appropriated to carry
 14 out section 3006A, to remain available
 15 until expended.

16 “(i) STANDARD OF REVIEW.—In any appellate pro-
 17 ceeding initiated by a criminal defendant presenting an
 18 issue of fact or law under this section, the reviewing court
 19 may not find an error arising from conduct not in compli-
 20 ance with this section to be harmless unless the United
 21 States demonstrates beyond a reasonable doubt that the
 22 error did not contribute to the verdict obtained.”.

1 **SEC. 3. TECHNICAL AND CONFORMING AMENDMENTS.**

2 (a) TABLE OF SECTIONS.—The table of sections for
3 chapter 201 of title 18, United States Code, is amended
4 by adding at the end the following:

“3014. Duty to disclose favorable information.”.

5 (b) DEMANDS FOR PRODUCTION OF STATEMENTS
6 AND REPORTS OF WITNESSES.—Section 3500(a) of title
7 18, United States Code, is amended by striking “In” and
8 inserting “Except as provided in section 3014, in”.

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