

S 1419 IS

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

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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 2005'.

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

(a) Conditions for Compelled Disclosure- A Federal entity may not compel a covered person to testify or produce any document in any proceeding or in connection with any issue arising under Federal law unless a court determines by clear and convincing evidence, after providing notice and an opportunity to be heard to the covered person--

(1) that the party seeking to compel production of such testimony or document has unsuccessfully attempted to obtain such testimony or document from all persons from which such testimony or document could reasonably be obtained other than a covered person;

(2) that--

- (A) in a criminal investigation or prosecution, based on information obtained from a person other than a covered person--
    - (i) there are reasonable grounds to believe that a crime has occurred; and
    - (ii) the testimony or document sought is essential to the investigation, prosecution, or defense; or
  - (B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than a covered person, the testimony or document sought is essential to a dispositive issue of substantial importance to that matter; and
  - (3) in any matter in which the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that--
    - (A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security;
    - (B) compelled disclosure of the identity of such a source would prevent such harm; and
    - (C) the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting 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.

### **SEC. 3. COMPELLED DISCLOSURE PERMITTED.**

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

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

- (a) Conditions for Compelled Disclosure- Section 2 shall apply to any testimony or document that a third party or a Federal entity seeks from a communications service provider if such testimony or document consists of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person.
- (b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party

seeking such a document provides the covered 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 the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

## **SEC. 5. 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 the sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) COVERED PERSON- The term `covered person' means--

(A) an entity that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means and that--

(i) publishes a newspaper, book, magazine, or other periodical in print or electronic form;

(ii) operates a radio or television broadcast station (or network of such stations), cable system, or satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or

(iii) operates a news agency or wire service;

(B) a parent, subsidiary, or affiliate of such an entity to the extent that such parent, subsidiary, or affiliate is engaged in news gathering or the dissemination of news and information; or

(C) an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.

(3) DOCUMENT- The term `document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (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 provide other compulsory process.

(5) THIRD PARTY- The term `third party' means a person other than a covered person.

*END*