

Issue-by-Issue Comparison of 2007 Lugar-Dodd (S. 1267) with 2007 Specter-Schumer

<i>Issue</i>	<i>2007 Lugar-Dodd</i>	<i>2007 Specter-Schumer</i>
Materials and information protected	<p><i>Any testimony of a person engaged in journalism as part of engaging in journalism, whether or not subject to a promise of confidentiality from a source</i></p> <p>The bill covers both confidential and non-confidential information.</p> <ul style="list-style-type: none"> ▪ The bill applies to testimony or documents “related to information possessed by [a] covered person as part of engaging in journalism.” Thus, the bill covers information not subject to a promise of confidentiality from a source, in addition to confidential source information. Sec. 2(a). ▪ As discussed below, it imposes a more stringent test for compelled disclosure of confidential source information than for non-confidential-source information and journalists’ work product. 	<p><i>Only confidential source information or documents containing such information.</i></p> <p>Unlike Lugar-Dodd, Specter-Schumer applies only to confidential information.</p> <ul style="list-style-type: none"> ▪ The bill applies to testimony or documents “relating to protected information.” Sec. 2(a). “Protected information” is “(1) 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 (2) 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.” Sec. 8(6). ▪ Although non-confidential-source information and journalists’ work product is not covered, the bill does not intend to displace court decisions providing protection for such information and materials: Nothing in the bill “shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure” of such material.” Sec. 7.
Entities covered	<p><i>Persons “engaged in journalism” – as defined by a functional test. Need not be professionals.</i></p> <p>The bill applies to “covered person[s].” Sec. 2(a).</p> <ul style="list-style-type: none"> ▪ A “covered person” is a person “engaged in journalism.” ▪ Journalism, in turn, is “the 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.” Sec. 4(5). 	<p><i>Persons “engaged in journalism” – as defined by a functional test. Need not be professionals, but journalistic activity must be “regular.”</i></p> <p>As in Lugar-Dodd, the bill applies to “covered person[s].” Sec. 2(a). Specter-Schumer defines “covered person” and “journalism” identically to Dodd-Lugar – with one exception.</p> <ul style="list-style-type: none"> ▪ A “covered person” is “a person who is engaged in journalism.” Sec. 8(2). ▪ In Specter-Schumer, the journalistic activities must be “regular”: “Journalism” is “the <i>regular</i> 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.” Sec. 8(5) (emphasis added).

<i>Issue</i>	<i>2007 Lugar-Dodd</i>	<i>2007 Specter-Schumer</i>
<p>Level of privilege</p>	<p><i>Two levels of qualified privilege, for non-confidential-source information and for confidential sources</i></p> <p>The bill provides greater protection for information about confidential-sources than for information that is non-confidential.</p> <ul style="list-style-type: none"> ▪ For information that would not reveal a confidential source, the privilege is subject to the balancing tests provided for criminal and civil proceedings. ▪ For information that would reveal a confidential source, a court can compel disclosure only (A) to prevent imminent and actual harm to national security, (B) to prevent imminent death or significant bodily harm; or (C) to identify a person who has disclosed (i) a trade secret of significant value in violation of State or Federal law, (ii) personal health information in violation of Federal law, or (iii) personal financial information in violation of Federal law. Sec. 2(a)(3). 	<p><i>Qualified privilege for confidential sources only</i></p> <p>Qualified privilege for confidential-source information. No protection for non-confidential source information.</p> <p>The privilege “shall not apply” in certain additional circumstances:</p> <ul style="list-style-type: none"> ▪ (a) the information was obtained through eyewitness observations of criminal or tortious conduct, Sec. 3; ▪ (b) the information is necessary to stop, prevent, or mitigate a specific case of death, kidnapping, or bodily harm, Sec. 4; or ▪ (c) the information would assist in preventing a specific case of act of terrorism or significant harm to national security, Sec. 5. <p>These exceptions are detailed below.</p>
<p>Burden of proof</p>	<p><i>Preponderance of the evidence</i></p> <p>Compelled disclosure may be ordered only after a court determines “by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person,” that the test for disclosure has been satisfied. Sec. 2(a).</p>	<p><i>Preponderance of the evidence</i></p> <p>Also uses the preponderance standard: Compelled disclosure may be ordered if “a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person,” that the test for disclosure has been satisfied. Sec. 2(a).</p> <p>The relevant sections of the bill, however, do not uniformly and expressly incorporate the evidentiary standard, the requirements of notice and opportunity to be heard, and the explicit requirement that the court decide whether the statutory standards have been met.</p> <ul style="list-style-type: none"> ▪ The exception for criminal or tortious conduct requires that the determination be made by the court, but neither identifies the standard of proof nor provides for notice or an opportunity to be heard. Sec. 3. ▪ The exception for death, kidnapping, or substantial bodily harm does not specifically require that the determination be made by a court, does not specify the standard of proof, and does not provide for notice or an opportunity to be heard. Sec. 4. ▪ The exception for terrorism or harm to national security requires that a court make the finding “by a preponderance of the evidence,” but does not provide for notice or

<i>Issue</i>	<i>2007 Lugar-Dodd</i>	<i>2007 Specter-Schumer</i>
		an opportunity to be heard. Sec. 5.
Exhaustion of non-media sources	<p><i>Exhaustion of alternative sources is required</i></p> <p>In both civil and criminal cases, the court must determine that the seeking party “has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document.” Sec. 2(a)(1).</p>	<p><i>Exhaustion of alternative sources is required – but not when information subpoenaed pursuant to exceptions in Sections 3 -5.</i></p> <p>Though Specter-Schumer contains the same limitation as does Lugar-Dodd, the limitation does not apply to every situation in which disclosure is required.</p> <ul style="list-style-type: none"> ▪ The limitation does not apply to information subpoenaed under the exceptions for criminal or tortious conduct (Sec. 3); death, kidnapping, or bodily harm (Sec. 4); or terrorist activity or harm to national security (Sec. 5). ▪ Otherwise, in both civil and criminal cases, the court must determine that the seeking party “has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document.” Sec. 2(a)(1).
Standard for compelled disclosure in criminal cases	<p><i>Crime has occurred and information is “essential,” plus a balancing test</i></p> <p>In a criminal case, non-confidential information can be disclosed in the following circumstances:</p> <ul style="list-style-type: none"> ▪ Whether sought by prosecution or defense, the information must be “essential to the investigation or prosecution or to the defense against the prosecution.” Sec. 2(a)(2)(A)(ii). ▪ The court must also find 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.” Sec. 2(a)(4). 	<p><i>Crime has occurred and information is “essential,” plus a balancing test</i></p> <p>Specter-Schumer applies the same standard as Lugar-Dodd, but applies this standard to confidential information (non-confidential information is not protected). Specter-Schumer also has an additional, separate provision addressing cases where the crime is the leak itself.</p> <ul style="list-style-type: none"> ▪ Whether sought by the prosecution or by the defense, the information must be “essential to the investigation or prosecution or to the defense against the prosecution.” Sec. 2(a)(2)(A)(ii). ▪ There is a heightened standard when the crime at issue is the leak of information itself: “[I]n 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.” Sec. 2(a)(2)(A)(iii). ▪ In either situation, the court must find 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.” Sec. 2(a)(3).

<i>Issue</i>	<i>2007 Lugar-Dodd</i>	<i>2007 Specter-Schumer</i>
Standard for compelled disclosure in civil cases	<p><i>“Essential to the successful completion of the matter” – plus balancing test</i></p> <p>In a “matter other than a criminal investigation or prosecution,” non-confidential information can be disclosed in the following circumstances:</p> <ul style="list-style-type: none"> ▪ The court must determine that “the testimony or document sought is essential to the successful completion of the matter.” Sec. 2(a)(2)(B). ▪ The court must also determine 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.” Sec. 2(a)(4). 	<p><i>“Essential to the resolution of the matter” – plus balancing test</i></p> <p>Specter-Schumer also uses the “essential” standard and also applies the balancing test, but applies this standard to confidential information (non-confidential information is not protected).</p> <ul style="list-style-type: none"> ▪ In a “matter other than a criminal investigation or prosecution,” the court must determine that “the testimony or document sought is essential to the resolution of the matter.” Sec. 2(a)(2)(B). ▪ The court must also determine 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.” Sec. 2(a)(3).
Standard for compelled disclosure before agencies	<p><i>“Essential to the successful completion of the matter,” plus balancing test</i></p> <p>Same test as civil litigation (above).</p>	<p><i>“Essential to the successful completion of the matter,” plus balancing test</i></p> <p>Same test as civil litigation (above).</p>
Information held by third parties	<p><i>Covers phone and email records – notice required, but can be delayed for criminal investigations, in certain circumstances.</i></p> <p>The bill has a separate section specifically addressing communications service providers.</p> <ul style="list-style-type: none"> ▪ If a party seeks “any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person,” the privilege applies “in the same manner” as it applies to a covered person. Sec. 3(a). ▪ The party must also provide the covered person with notice and an opportunity to be heard. Sec. 3(b). Notice can be delayed “only 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.” Sec. 3(c). 	<p><i>Covers phone and email records – notice required, but can be delayed for criminal investigations, in certain circumstances. Notice provision more specific than in Dodd-Lugar.</i></p> <p>Like Lugar-Dodd, Specter-Schumer has a separate section specifically addressing communications service providers. Specter-Schumer also provides for delayed notice to the covered person, in certain circumstances, but is more specific about the amount of time that notice can be delayed.</p> <ul style="list-style-type: none"> ▪ If a party seeks “any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person,” the privilege applies “in the same manner” as it applies to a covered person. Sec. 6(a). ▪ The party must also provide the covered person with notice and an opportunity to be heard by the court. Sec. 6(b). Notice can be delayed for up to 45 days each time the court determines, by clear and convincing evidence, that “such notice would pose a substantial threat to the integrity of a criminal investigation.” Sec. 6(c).

<p>Terrorism & National Security</p>	<p><i>Mandatory disclosure to prevent “imminent and actual harm to national security,” plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for national security.</p> <ul style="list-style-type: none"> ▪ The court must find that “disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm.” Sec. 2(a)(3)(A). ▪ The court must also apply the balancing test: “[N]ondisclosure 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.” Sec. 2(a)(4). 	<p><i>Mandatory disclosure to “assist” in preventing a specific case of “terrorism against the United States” or “significant harm to national security” – with balancing test for the “national security” exception.</i></p> <p>Specter-Schumer has a lower standard for triggering the exception (“would assist” as opposed to “is necessary”), and it eliminates the balancing test in the terrorism part of the exception.</p> <ul style="list-style-type: none"> ▪ Confidential source information can be compelled if a court finds, by a preponderance of the evidence, that “the evidence would assist in preventing a specific case of—(1) terrorism against the United States; or (2) significant harm to national security.” Sec. 5. ▪ Under the exception for “national security,” the national security harm must “outweigh the public interest in newsgathering and maintaining a free flow of information to citizens.” Sec. 5(2).
<p>Classified document investigations</p>	<p><i>No specific provision</i></p> <p>No specific provision, but general provisions would apply.</p>	<p><i>Qualified privilege, with balancing test and additional requirement</i></p> <p>Unlike Lugar-Dodd, Specter-Schumer incorporates a special leak provision into the bill’s provisions governing criminal prosecutions.</p> <ul style="list-style-type: none"> ▪ In addition to the requirements set forth for the disclosure of information in criminal prosecutions or investigations, if the investigation or prosecution concerns the “unauthorized disclosure of properly classified information by a person with authorized access to such information,” the disclosure must have caused “significant, clear, and articulable harm to the national security.” Sec. 2(a)(2)(A)(iii). ▪ As with all other criminal investigations and prosecutions, the court must also determine that nondisclosure “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.” Sec. 2(a)(3).
<p>Death or injury</p>	<p><i>Compelled disclosure where “necessary to prevent imminent death or significant bodily harm,” plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for death or bodily</p>	<p><i>No privilege where “reasonably necessary to stop, prevent, or mitigate” a “specific case” of “death, kidnapping, or substantial bodily harm” – no balancing test.</i></p> <p>Specter-Schumer has a somewhat broader exception, and adds kidnapping to the excepted</p>

	<p>harm.</p> <ul style="list-style-type: none"> ▪ The court must find that “disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm.” Sec. 2(a)(3)(B). ▪ The court must also apply balancing test: “[N]ondisclosure 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.” 2(a)(4). 	<p>circumstances.</p> <ul style="list-style-type: none"> ▪ The privilege does not apply to information that is “reasonably necessary to stop, prevent, or mitigate a specific case of—(a) death; (b) kidnapping; or (c) substantial bodily harm.” Sec. 4. ▪ No additional balancing test.
<p>Eyewitness testimony</p>	<p><i>No specific provision</i></p> <p>No specific provision, but general provisions would apply.</p>	<p><i>No privilege for eyewitness testimony or tort or crime</i></p> <p>Unlike in Lugar-Dodd, in Specter-Schumer the privilege does not apply when the covered person obtained the information by witnessing a crime or participating in a tort or crime.</p> <ul style="list-style-type: none"> ▪ The privilege does 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,” if reasonable efforts are made to exhaust other sources. Sec. 3(a). ▪ The section does not apply, however, “if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.” Sec. 3(b).
<p>Trade secrets, personal medical information, and personal financial information.</p>	<p><i>Compelled disclosure where necessary to identify a person who has disclosed trade secrets, personal medical information, or personal financial information – plus balancing test</i></p> <p>Confidential source information can be compelled under an exception for trade secrets, medical information, or personal financial information.</p> <ul style="list-style-type: none"> ▪ The court must find finds that “disclosure of the identity of such a source is necessary to identify a person who has disclosed— <ul style="list-style-type: none"> (i) a trade secret of significant value in violation of a State or Federal law; (ii) individually identifiable health information . . ., in violation of Federal law; or (iii) nonpublic personal information . . . of any consumer in violation of Federal 	<p><i>No specific provision</i></p> <p>No specific provision, but general provisions would apply.</p>

	<p>law.” Sec. 2(a)(3)(C).</p> <ul style="list-style-type: none"> ▪ In each situation, the court must also apply balancing test: “[N]ondisclosure 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.” Sec. 2(a)(4). 	
<p>General limitations on the use of subpoenas</p>	<p><i>Minimization and tailoring to exclude nonessential information required to the extent possible in all cases</i></p> <p>Information subpoenaed “shall, to the extent possible –</p> <ul style="list-style-type: none"> (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 production of peripheral, nonessential, or speculative information.” Sec. 2(b). 	<p><i>Minimization and tailoring to exclude nonessential information required to the extent possible – but not when information subpoenaed pursuant to exceptions in Sections 3 -5.</i></p> <p>Though Specter-Schumer contains the same limitation as does Lugar-Dodd, the limitation does not apply to every situation in which disclosure is required.</p> <ul style="list-style-type: none"> ▪ The limitation does not apply to information subpoenaed under the exceptions for criminal or tortious conduct (Sec. 3); death, kidnapping, or bodily harm (Sec. 4); or terrorist activity or harm to national security (Sec. 5). ▪ Otherwise, in criminal and civil proceedings, the disclosure “shall, to the extent possible— <ul style="list-style-type: none"> (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 production of peripheral, nonessential, or speculative information.” Sec. 2(b).