

109TH CONGRESS  
2D SESSION

**S.** \_\_\_\_\_

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

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IN THE SENATE OF THE UNITED STATES

Mr. LUGAR (for himself, Mr. SPECTER, Mr. DODD, Mr. SCHUMER, and Mr. GRAHAM) introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

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**A BILL**

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

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 2006”.

6       **SEC. 2. PURPOSE.**

7       The purpose of this Act is to guarantee the free flow  
8       of information to the public through a free and active

1 press as the most effective check upon Government abuse,  
2 while protecting the right of the public to effective law  
3 enforcement and the fair administration of justice.

4 **SEC. 3. DEFINITIONS.**

5 In this Act—

6 (1) the term “attorney for the United States”  
7 means the Attorney General, any United States At-  
8 torney, Department of Justice prosecutor, special  
9 prosecutor, or other officer or employee of the  
10 United States in the executive branch of Govern-  
11 ment or any independent regulatory agency with the  
12 authority to obtain a subpoena or other compulsory  
13 process;

14 (2) the term “communication service pro-  
15 vider”—

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

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

1           (3) the term “journalist” means a person who,  
2           for financial gain or livelihood, is engaged in gath-  
3           ering, preparing, collecting, photographing, record-  
4           ing, writing, editing, reporting, or publishing news  
5           or information as a salaried employee of or inde-  
6           pendent contractor for a newspaper, news journal,  
7           news agency, book publisher, press association, wire  
8           service, radio or television station, network, maga-  
9           zine, Internet news service, or other professional me-  
10          dium or agency which has as 1 of its regular func-  
11          tions the processing and researching of news or in-  
12          formation intended for dissemination to the public.

13 **SEC. 4. COMPELLED DISCLOSURE AT THE REQUEST OF AT-**  
14 **TORNEYS FOR THE UNITED STATES IN CRIMI-**  
15 **NAL PROCEEDINGS.**

16           (a) IN GENERAL.—Except as provided in subsection  
17 (b), in any criminal investigation or prosecution, a Federal  
18 court may not, upon the request of an attorney for the  
19 United States, compel a journalist, any person who em-  
20 ploys or has an independent contract with a journalist,  
21 or a communication service provider to disclose—

22           (1) information identifying a source who pro-  
23           vided information under a promise or agreement of  
24           confidentiality made by the journalist while acting in  
25           a professional newsgathering capacity; or

1           (2) any records, communication data, docu-  
2           ments, or information that the journalist obtained or  
3           created while acting in a professional newsgathering  
4           capacity and upon a promise or agreement that such  
5           records, communication data, documents, or infor-  
6           mation would be confidential.

7           (b) DISCLOSURE.—Compelled disclosures otherwise  
8           prohibited under subsection (a) may be ordered only if a  
9           court, after providing the journalist, or any person who  
10          employs or has an independent contract with a journalist,  
11          notice and an opportunity to be heard, determines by clear  
12          and convincing evidence that—

13                 (1) the attorney for the United States has ex-  
14                 hausted alternative sources of the information;

15                 (2) to the extent possible, the subpoena—

16                         (A) avoids requiring production of a large  
17                         volume of unpublished material; and

18                         (B) is limited to—

19                                 (i) the verification of published infor-  
20                                 mation; and

21                                 (ii) surrounding circumstances relat-  
22                                 ing to the accuracy of the published infor-  
23                                 mation;

1           (3) the attorney for the United States has given  
2           reasonable and timely notice of a demand for docu-  
3           ments;

4           (4) nondisclosure of the information would be  
5           contrary to the public interest, taking into account  
6           both the public interest in compelling disclosure and  
7           the public interest in newsgathering and maintaining  
8           a free flow of information to citizens;

9           (5) there are reasonable grounds, based on an  
10          alternative, independent source, to believe that a  
11          crime has occurred, and that the information sought  
12          is critical to the investigation or prosecution, par-  
13          ticularly with respect to directly establishing guilt or  
14          innocence; and

15          (6) the subpoena is not being used to obtain pe-  
16          ripheral, nonessential, or speculative information.

17 **SEC. 5. COMPELLED DISCLOSURE AT THE REQUEST OF**  
18 **CRIMINAL DEFENDANTS.**

19          (a) IN GENERAL.—Except as provided in subsection  
20 (b), a Federal court may not, upon the request of a crimi-  
21 nal defendant, compel a journalist, any person who em-  
22 ploys or has an independent contract with a journalist,  
23 or a communication service provider to disclose—

24           (1) information identifying a source who pro-  
25           vided information under a promise or agreement of

1 confidentiality made by the journalist while acting in  
2 a professional newsgathering capacity; or

3 (2) any records, communication data, docu-  
4 ments, or information that the journalist obtained or  
5 created while acting in a professional newsgathering  
6 capacity and under a promise or agreement that  
7 such records, communication data, documents, or in-  
8 formation would be confidential.

9 (b) DISCLOSURE.—Compelled disclosures otherwise  
10 prohibited under subsection (a) may be ordered only if a  
11 court, after providing the journalist, or any person who  
12 employs or has an independent contract with a journalist,  
13 notice and an opportunity to be heard, determines by clear  
14 and convincing evidence that—

15 (1) the criminal defendant has exhausted alter-  
16 native sources of the information;

17 (2) there are reasonable grounds, based on an  
18 alternative source, to believe that the information  
19 sought is directly relevant to the question of guilt or  
20 innocence or to a fact that is critical to enhancement  
21 or mitigation of a sentence;

22 (3) the subpoena is not being used to obtain pe-  
23 ripheral, nonessential, or speculative information;  
24 and

1           (4) nondisclosure of the information would be  
2           contrary to the public interest, taking into account  
3           the public interest in compelling disclosure, the de-  
4           fendant's interest in a fair trial, and the public in-  
5           terest in newsgathering and in maintaining the free  
6           flow of information.

7 **SEC. 6. CIVIL LITIGATION .**

8           (a) IN GENERAL.—Except as provided in subsection  
9 (b), in any civil action, a Federal court may not compel  
10 a journalist, any person who employs or has an inde-  
11 pendent contract with a journalist, or a communication  
12 service provider to disclose—

13           (1) information identifying a source who pro-  
14           vided information under a promise or agreement of  
15           confidentiality made by the journalist while acting in  
16           a professional newsgathering capacity; or

17           (2) any records, communication data, docu-  
18           ments, or information that the journalist obtained or  
19           created while acting in a professional newsgathering  
20           capacity and upon a promise or agreement that such  
21           records, communication data, documents, or infor-  
22           mation would be confidential.

23           (b) DISCLOSURE.—Compelled disclosures otherwise  
24 prohibited under (a) may be ordered only if a court, after  
25 providing the journalist, or any person who employs or has

1 an independent contract with a journalist, notice and an  
2 opportunity to be heard, determines by clear and con-  
3 vincing evidence that—

4 (1) the party seeking the information has ex-  
5 hausted alternative sources of the information;

6 (2) the information sought is critical to the suc-  
7 cessful completion of the civil action;

8 (3) nondisclosure of the information would be  
9 contrary to the public interest, taking into account  
10 both the public interest in compelling disclosure and  
11 the public interest in newsgathering and in main-  
12 taining the free flow of information to the widest  
13 possible degree about all matters that enter the pub-  
14 lic sphere;

15 (4) the subpoena is not being used to obtain pe-  
16 ripheral, nonessential, or speculative information;

17 (5) to the extent possible, the subpoena—

18 (A) avoids requiring production of a large  
19 volume of unpublished material; and

20 (B) is limited to—

21 (i) the verification of published infor-  
22 mation; and

23 (ii) surrounding circumstances relat-  
24 ing to the accuracy of the published infor-  
25 mation; and

1           (6) the party seeking the information has given  
2           reasonable and timely notice of the demand for doc-  
3           uments.

4 **SEC. 7. EXCEPTION FOR JOURNALIST'S EYEWITNESS OB-**  
5                           **SERVATIONS OR PARTICIPATION IN CRIMI-**  
6                           **NAL OR TORTIOUS CONDUCT.**

7           Notwithstanding sections 1 through 6, a journalist,  
8           any person who employs or has an independent contract  
9           with a journalist, or a communication service provider has  
10          no privilege against disclosure of any information, record,  
11          document, or item obtained as the result of the eyewitness  
12          observations of criminal conduct or commitment of crimi-  
13          nal or tortious conduct by the journalist, including any  
14          physical evidence or visual or audio recording of the ob-  
15          served conduct, if a court determines by clear and con-  
16          vincing evidence that the party seeking to compel disclo-  
17          sure under this section has exhausted reasonable efforts  
18          to obtain the information from alternative sources. This  
19          section does not apply if the alleged criminal or tortious  
20          conduct is the act of communicating the documents or in-  
21          formation at issue.

22 **SEC. 8. EXCEPTION TO PREVENT DEATH OR SUBSTANTIAL**  
23                           **BODILY INJURY.**

24          Notwithstanding sections 1 through 6, a journalist,  
25          any person who employs or has an independent contract

1 with a journalist, or communication service provider has  
2 no privilege against disclosure of any information to the  
3 extent such information is reasonably necessary to stop  
4 or prevent reasonably certain—

5 (1) death; or

6 (2) substantial bodily harm.

7 **SEC. 9. EXCEPTION FOR NATIONAL SECURITY INTEREST.**

8 (a) IN GENERAL.—Notwithstanding sections 1  
9 through 6, a journalist, any person who employs or has  
10 an independent contract with a journalist, or communica-  
11 tion service provider has no privilege against disclosure of  
12 any records, communication data, documents, information,  
13 or items described in sections 4(a), 5(a), or 6(a) sought  
14 by an attorney for the United States by subpoena, court  
15 order, or other compulsory process, if a court has provided  
16 the journalist, or any person who employs or has an inde-  
17 pendent contract with a journalist, notice and an oppor-  
18 tunity to be heard, and determined by clear and convincing  
19 evidence, that—

20 (1) disclosure of information identifying the  
21 source is necessary to prevent an act of terrorism or  
22 to prevent significant and actual harm to the na-  
23 tional security, and the value of the information that  
24 would be disclosed clearly outweighs the harm to the

1 public interest and the free flow of information that  
2 would be caused by compelling the disclosure; or

3 (2) in a criminal investigation or prosecution of  
4 an unauthorized disclosure of properly classified  
5 Government information by an employee of the  
6 United States, such unauthorized disclosure has se-  
7 riously damaged the national security, alternative  
8 sources of the information identifying the source  
9 have been exhausted, and the harm caused by the  
10 unauthorized disclosure of properly classified Gov-  
11 ernment information clearly outweighs the value to  
12 the public of the disclosed information.

13 (b) RULE OF CONSTRUCTION.—Nothing in this Act  
14 shall be construed to limit any authority of the Govern-  
15 ment under the Foreign Intelligence Surveillance Act (50  
16 U.S.C. 1801 et seq.).

17 **SEC. 10. JOURNALISTS' SOURCES AND WORK PRODUCT**

18 **PRODUCED WITHOUT PROMISE OR AGREE-**

19 **MENT OF CONFIDENTIALITY.**

20 Nothing in this Act shall supersede, dilute, or pre-  
21 clude any law or court decision compelling or not compel-  
22 ling disclosure by a journalist, any person who employs  
23 or has an independent contract with a journalist, or a  
24 communications service provider of—

1           (1) information identifying a source who pro-  
2           vided information without a promise or agreement of  
3           confidentiality made by the journalist while acting in  
4           a professional newsgathering capacity; or

5           (2) records, communication data, documents, or  
6           information obtained without a promise or agree-  
7           ment that such records, communication data, docu-  
8           ments, or information would be confidential.